

<b>Bent-Anderson v Singh</b>
2021 NY Slip Op 33697(U)
November 1, 2021
Supreme Court, Westchester County
Docket Number: Index No. 58229/2016
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
MAXINE BENT-ANDERSON and HEATHER  
BENT-TAMIR,

Plaintiffs,

-against-

**DECISION and ORDER**  
**Index No. 58229/2016**  
**Seq. No. 13**

GURMEET SINGH, NISHAN SINGH, LINDA M. CORONATO, ESQ., AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF BERNARD MORCHELES, and JOHN DOES 1-5, (hereinafter "JOHN DOE") a fictitious name for the individuals or entities which hired, employed or otherwise contracted with Defendant(s) at the time of the subject incident and is responsible by way of vicarious liability, respondeat superior or otherwise for the acts and omissions alleged herein and/or negligently repaired, managed, maintained, controlled, entrusted, and/or owned the subject vehicles described below and involved in the subject incident and whose identity is presently known only to the Defendant(s),

Defendants.

-----X  
FIDUCIARY INSURANCE COMPANY OF AMERICA A/S/O  
MAXINE BENT-ANDERSON,

Plaintiff,

-against-

LINDA M. CORONATO, ESQ., AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF BERNARD MORCHELES,

Defendant.

-----X  
LEFKOWITZ, J.

The following papers were read on the motion of defendant The Estate of Bernard Morcheles (“defendant”)<sup>1</sup> for an order pursuant to CPLR § 3101(a), CPLR 3043(b), CPLR 3124, and 22 NYCRR 202.21 (d), granting the following relief: (a) directing and compelling plaintiffs to appear for further depositions and further defense physical examinations based upon the claims set forth in plaintiffs’ supplemental bills of particulars and plaintiffs’ expert witness disclosures served after the note of issue was filed, (b) directing and compelling plaintiffs to provide all of the documentation demanded in the notice to produce dated July 22, 2020, (c) awarding costs and disbursements on this motion, and (d) granting such other and further relief as this Court deems just and proper:

Notice of Motion – Affirmation in Support with Exhibits A-P – Affirmation of Good Faith with Exhibits A-B  
Affirmation in Opposition with Exhibits A-C  
Affirmation in Reply with Exhibit 1  
NYSCEF File

Upon the foregoing papers, this motion is determined as follows:

Relevant facts and procedural history:

Plaintiffs commenced this action on May 7, 2015 to recover damages for personal injuries allegedly sustained as the result of a December 8, 2013 automobile accident. Plaintiff Maxine Bent-Anderson (“Bent-Anderson”) was deposed on March 15, 2017 (Transcript, Exhibit B). Plaintiff Heather Bent-Tamir (“Bent-Tamir”) was deposed on March 24, 2017 (Transcript, Ex. C). By Decision and Order (Walker, J.) entered on December 17, 2019, the Court granted plaintiffs’ motion for summary judgment on the issue of liability as to defendant (NYSCEF Doc. 548). Defense examinations of plaintiffs were conducted in May 2018 by neurologist Dr. Rene Elkin and orthopedic surgeon Dr. Richard Weinstein, and of Bent-Anderson by vocational rehabilitation expert Dr. Getreu (Examination reports, Exhibits D and E). The note of issue was filed on March 28, 2019 (Exhibit F).

On January 14, 2020 the Court issued a Trial Date Scheduling Notice setting March 25, 2020 as the trial date (Exhibit H). On January 15, 2020, plaintiffs served the expert exchange and report of Dr. Edmond Provder (“Provder”), vocational expert, certified life care planner, and certified rehabilitation counselor (Exhibit I). Plaintiffs served a supplemental verified bill of particulars dated February 6, 2020 (Exhibit J). On February 12, 2020 plaintiffs served expert witness information and a report for economic experts Kirstin K. Kucsma (“Kucsma”) and Kenneth T. Betz (“Betz”) (collectively “economic experts”) (Exhibit K). Plaintiffs served a supplemental verified bill of particulars as to Bent-Tamir dated February 13, 2020 (Exhibit L) and a supplemental verified bill of particulars as to Bent-Anderson dated February 17, 2020 (Exhibit M). On February 23, 2020 plaintiffs served the expert exchange and report of

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<sup>1</sup> By Decision and Order (Walker, J.) entered December 17, 2019 the complaint was dismissed against defendants Gurmeet and Nishan Singh (NYSCEF Doc. 545).

psychologist Dr. Howard M. Rombom (“Rombom”) (Exhibit N). On March 3, 2020 plaintiffs served an addendum to the previously exchanged report of Dr. Howard I. Baum (“Baum”) with respect to Bent-Anderson (Exhibit O). The trial date was suspended due to the COVID-19 pandemic.

On July 22, 2020, defendant served a notice to produce seeking documents relied upon by plaintiffs’ economic experts concerning their February 7, 2020 “Appraisal of Economic Loss from Injury” concerning Bent-Anderson (Exhibit P).

On September 16, 2020 the parties appeared for a pre-motion conference. Following that conference the court issued a briefing schedule for the present motion with a return date of October 26, 2020 (Exhibit A). This motion was filed on October 5, 2020. Upon notification by defense counsel on or about October 6, 2020 that defendant Bernard Morcheles had died on February 16, 2020, this matter was stayed. The Decision and Order of this Court (Walker, J.) entered July 12, 2021 lifted the stay, appointed a temporary administrator, and restored this action to the trial calendar (NYSCEF Doc. 631).

A so-ordered stipulation filed to NYSCEF (NYSCEF Doc. 662) on September 16, 2021, provided that due to the death of Dr. Getreu, defendant’s previously designated vocational rehabilitation expert, plaintiff Maxine Bent-Anderson consented to the designation of a new vocational rehabilitation expert and a new virtual vocational interview.

The parties’ contentions:

On this motion defendant contends that service of the supplemental bills of particulars and expert witness disclosures constitute unusual and unanticipated circumstances that justify vacating the note of issue. Defendant also contends that service of plaintiffs’ supplemental bills of particulars entitles defendant to additional discovery pursuant to CPLR 3043(b). Defendant argues that the continuing consequences of injuries alleged in the supplemental bills of particular require additional discovery including additional depositions and further physical examinations of both plaintiffs by Dr. Elkin and Dr. Richard Weinstein (“Weinstein”) and production of documentation relied upon by plaintiffs’ economic experts as sought by the July 22, 2020 notice to produce.

Defendant also asserts that the economic expert disclosure stated for the first time that plaintiffs intended to call economic experts to testify concerning Bent-Anderson’s economic losses. Defendant contends that this position was contrary to representations made by plaintiffs’ counsel prior to the filing of the note of issue. Defendant contends this discovery is necessary in order to properly prepare for trial. Specifically, defendant seeks a questionnaire completed by Bent-Anderson for plaintiffs’ economic experts and that was relied upon by plaintiffs’ economic experts in forming their opinions. Defendant contends that the completed questionnaire and the remainder of the documentation relied upon by plaintiffs’ economic experts is necessary to defend against plaintiffs’ claims of economic loss.

Defendant states that the supplemental bill and expert exchanges concerning future lost wages entitles defendant to additional discovery, including a further deposition and physical examination. Defendant also states that there are discrepancies between plaintiffs' experts as to the amount of Bent-Anderson's future economic losses.

Defendant states that the expert disclosure of Dr. Rombom served on February 23, 2020 disclosed for the first time that plaintiffs intended to call Dr. Rombom to testify concerning the continuing treatment, disabilities, and special damages alleged by Bent-Anderson in the initial bill of particulars (Ex. N). Defendant states that although Dr. Baum examined Bent-Anderson on May 14, 2018, the report from that examination was first served on March 3, 2020. Defendant states that plaintiffs were required to serve this report within 45 days after the examination pursuant to 22 NYCRR 202.17 (c).

In opposition, plaintiffs deny that they represented they would not retain economic experts. Plaintiffs assert that service of the supplemental bills was proper in that they claim continuing special damages and no new cause of action or injury. Plaintiffs contend that while CPLR 3043 may allow for additional discovery, it does not guarantee the right to further discovery. Plaintiffs argue that service of the supplemental bills and expert exchanges post-note of issue do not constitute unusual and unanticipated circumstances. They contend that in order for defendant to prevail it must be demonstrated that unusual or unanticipated circumstances arose after the filing of the note of issue and the existence of substantial prejudice without the additional discovery. Plaintiffs argue that defendant has not demonstrated either prong of this requirement. Moreover, plaintiffs argue that they will be severely prejudiced should defendant's motion be granted. Plaintiffs note vacating the note of issue would remove this case that was originally filed in 2015 from the trial calendar. Plaintiffs state that Bent-Anderson who resides in South Carolina would endure hardship and additional expense if forced to appear for subsequent in-person physical examinations and/or deposition. Plaintiffs state that directing further examinations and/or further deposition would cause Bent-Tamir to miss additional time from work causing her to lose income. Plaintiffs also aver that Bent-Anderson's initial claims for past and future lost wages of \$1,155,000, were actually higher than those projected by the economic experts' report.

Plaintiffs state that most of the documents sought by the notice to produce were produced prior to service of the demand. Plaintiffs state that this was raised at the September 16, 2020 compliance conference at which time defense counsel represented that she would search for those documents and advise plaintiffs' counsel if any of the documents sought were not in defense counsel's possession. Plaintiffs' counsel states that he did not hear anything further from defense counsel concerning these demands until the present motion. Additionally, plaintiffs state although the notice to produce seeks plaintiffs' tax returns, defendant has demonstrated these documents have been already been provided as they have been included as an exhibit to defendant's moving papers herein. Plaintiffs argue that defendant is not entitled to the information relied upon by plaintiffs' economic experts because that information is privileged and shielded from discovery. Plaintiffs also argue the notice to produce was a nullity as it was served after Morcheles died, but prior to the appointment of the temporary administrator.

In reply defendant reiterates the argument that pursuant to CPLR 3043 and 22 NYCRR 202.21(d) defendant is entitled to exercise any and all rights of discovery with respect to plaintiffs' continuing disabilities. Defendant also raises for the first time that the supplemental bill concerning Bent-Tamir (Ex. J) includes allegations of treatment to body parts not previously claimed in the initial bill of particulars. Defendant raises, also for the first time in the reply papers, the need to obtain letters/paystubs from the University of Virgin Islands ("UVI") relied upon by plaintiffs' experts in determining Bent-Anderson's starting base salary.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]).

CPLR 3043(b) provides:

"Supplemental bill of particulars without leave. A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged, or new injury claimed and that the other party shall upon seven days' notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities."

Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21[d],[e]. If a party seeks to vacate the note of issue within twenty days of its service, that party need show only that a material fact in the certificate of readiness is incorrect or that it fails to comply with the requirements of that section in a material respect. However, if more than twenty days have elapsed since service of the note of issue, the moving party must demonstrate the existence of unusual or unanticipated circumstances which developed subsequent to the filing of the note of issue and certificate of readiness in order for them to be vacated (22 NYCRR 202.21[d]).

While CPLR 3043(b) allows for discovery after the filing of the note of issue that discovery is limited to the supplemental matter (*Brown v Brink Elevator Corp.*, 125 AD3d 421 [1<sup>st</sup> Dept 2015]). Additionally, any requests for additional discovery must comport with the general principles of relevance and materiality. With respect to the supplemental bills, defendant has not identified anything in those bills that necessitates further discovery. Although defendant contends that Dr. Baum's report was not timely served, defendant has failed to identify what in that report requires additional discovery. Moreover, it is noted that although defendant was aware of Dr. Baum's affidavit dated June 10, 2019 wherein, he details his findings and resulting medical opinion from the May 8, 2014 examination of Bent-Anderson which was included as an exhibit to plaintiffs' motion for summary judgment filed June 13, 2019 (NYSCEF Doc. 459), defendant did not previously raise an objection.

Nor does the court find that defendant has established the existence of unusual or unanticipated circumstances that arose after the filing of the note of issue to warrant its vacatur to allow further discovery. The Court does not credit defendant's contention that plaintiffs' retention of economic experts was a surprise. That Bent-Anderson was seeking economic losses was clearly alleged in the initial bill and it should have been anticipated that plaintiffs would rely on experts in this area to substantiate those claims. Additionally, the questionnaire as completed by Bent-Anderson is not discoverable as it constitutes materials prepared in anticipation of litigation (*see Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729 [2d Dept 2011]) and attorney-client communications (*see Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747 [2d Dept 2008]; *Daniels v Armstrong*, 42 AD3d 558 [2d Dept 2007]).

While there is no limit to the number of physical examinations of a party, an additional examination is permissible only where the necessity for it has been demonstrated, and in cases where it is sought after the filing of the note of issue, the party seeking an additional examination must also demonstrate that unusual and unanticipated circumstances developed subsequent to such filing to justify an additional examination (*Futersak v Brinen*, 265 AD2d 452 [2d Dept 1999]). Defendant has failed to demonstrate any basis warranting additional physical examinations of plaintiffs.

Additionally, defendant's contentions regarding a further physical examination of Bent-Tamir based upon new injuries allegedly claimed in the supplemental bill and the materials relied upon by plaintiffs' economic experts concerning Bent-Anderson's salary were impermissibly raised for the first time in the reply papers. The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (*Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). Moreover, the transcript from Bent-Anderson's deposition reflects that she provided testimony concerning her employment by UVI at the time of the accident (which was also included in the initial bill of particulars), that she had filed a long-term disability claim with UVI's disability carrier, and her salary from UVI. Accordingly, defendant had the opportunity to question Bent-Anderson on this issue and request any relevant discovery at that time.

Concerning the issue of Bent-Andersons' past and future lost wages, the initial bill of particulars claimed past and future lost wages at an amount not less than \$1,155,000. According to the economist experts' report (Ex. K) Bent-Anderson's past and future earnings, are projected at \$270,342 and \$385,493, respectively, an amount less than that alleged in the initial bill. This is distinguishable from the case relied upon by defendant where the amount alleged in the supplemental bill was three times the amount originally alleged (*Sing v 244 W. 39<sup>th</sup> St. Realty, Inc.*, 65 AD3d 1325 [2d Dept 2009]). Accordingly, defendant has failed to demonstrate a basis for further discovery.

Lastly, any discrepancies between plaintiffs' experts concerning economic damages are issues to be resolved at trial, not through post-note of issue discovery.

All other arguments raised, and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is hereby:

ORDERED that the motion is denied in its entirety; and it is further,

ORDERED that any applications not decided are herewith denied; and it is further,

ORDERED that movant shall serve a copy of this Decision and Order, with notice of entry, upon all parties within five days of entry.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York

October 2021

Nov 1

  
HON. JOAN B. LEFKOWITZ, J.S.C.

To:

All Counsel Via NYSCEF

cc: Compliance Part Clerk