

Merlo v LCOR 55 Bank St. LLC
2022 NY Slip Op 30345(U)
February 7, 2022
Supreme Court, New York County
Docket Number: Index No. 152443/2017
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANK NERVO PART 04

Justice

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DANIEL MERLO,

Plaintiff,

- v -

LCOR 55 BANK STREET LLC,LCOR INCORPORATED,
WP NORTH TOWER, LLC,LRC CONSTRUCTION
LLC,ECKER WINDOW CORP, PARKVIEW PLUMBING &
HEATING, INC.,BAKER CONCRETE CONSTRUCTION,
INC.,PRECISION CARPENTRY OF WESTCHESTER, INC,

Defendant.

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INDEX NO. 152443/2017
MOTION DATE 07/23/2021
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 226, 227, 228, 229,
230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250,
251, 252, 267, 270, 278, 279, 280, 281, 282, 283, 290, 291, 292

were read on this motion to/for DISCOVERY

This matter was transferred to Part IV.

Defendants LCOR 55 Bank Street, LCOR Inc., WP North Tower, and
LRC Construction (hereinafter "movants" or "defendants") seek an order
compelling plaintiff to appear for further independent medical examination.
Plaintiff opposes contending, as in motion sequence 004, that the injuries were
disclosed during plaintiff's deposition in 2019, and defendants could have
examined plaintiff for these injuries at the time of plaintiff's physical exam
(IME) before Dr. Gelsamer in August 2020.

It is beyond cavil that a defendant is entitled to further discovery, including an additional deposition and physical examination of plaintiff, where a plaintiff adds new claims of injury in an amended bill of particulars (*Torre v. Cifarelli*, 157 AD2d 713, 714 [2d Dept 1990]; *Brown v. Brink El. Corp.*, 125 AD3d 421 [1st Dept 2015]; see also CPLR § 3043[b]).

The Court notes that plaintiff's argument that defendants' expert, Dr. Gelsamer, who performed the prior physical examination, could have examined other injuries disclosed during plaintiff's deposition has been expressly denied by the Appellate Division (*Marashaj v. Rubin*, 132 AD3d 641 [2d Dept 2015]). It is undisputed that at the time of Dr. Grelsamer's examination, plaintiff had not asserted claims of injury to his back, shoulder or hip (see May 11, 2020 email from plaintiff's counsel "not sure if we will"), and Dr. Grelsamer was retained by defendants solely to perform an examination of the injuries claimed by plaintiff at that time. It is further undisputed that at the time of Dr. Grelsamer's examination, plaintiff presented with his shoulder/arm in a sling and an examination of same would be a practical impossibility. To the extent that plaintiff contends he must be examined for these newly claimed injuries by the same physician, Dr. Grelsamer, in the absence of bias or prejudice, requiring the same physician perform a subsequent physical examination is an abuse of

discretion that this Court will not endorse (*Brown v. Brink El. Corp.*, 125 AD3d at 422).

Were the Court to accept plaintiff's argument that his 2019 deposition placed the parties on notice of further claims of injury, the Court notes that defendant AMX Mechanical group was impleaded as a second third-party defendant after plaintiff's deposition and the physical examination by Dr. Grelsamer; consequently, under plaintiff's own reasoning, AMX would nevertheless be entitled to conduct a physical examination of plaintiff.

Finally, plaintiff's request that this Court "note defendants waive the right to any subsequent examination after completion of the surgery," is preposterous and directly conflicts with the CPLR and Appellate Authority regarding amended bills of particular discussed *supra*. It warrants no further discussion.

Accordingly, it is

ORDERED that the motion is granted; and it is further

ORDERED that plaintiff shall appear for further physical examination (IME) of his knee and hip before Dr. Gelsamer on or before March 14, 2022; and it is further

ORDERED that plaintiff shall appear for further physical examination (IME) of his shoulder and back before Dr. Roth on or before March 21, 2022; and it is further

ORDERED that plaintiff's complaint is stricken, and the matter dismissed with prejudice without further order or application, unless plaintiff timely appears for further examination with Dr. Gelsamer and Dr. Roth, as above; and it is further

ORDERED that defendants shall serve a copy of the physical examination (IME) reports within 30 days of completion of exam; and it is further

ORDERED that should defendants fail to timely serve a copy of the physical examination (IME) reports, such failure shall result in sanctions, including but not limited to the striking of pleadings and preclusion of evidence

at time of trial, in the Court's discretion upon further application; and it is further

ORDERED that the dates set forth herein may not be adjourned, extended, or otherwise modified absent further written order of the Court. Any adjournment, extension, or modification without order of the Court shall be a nullity; and it is further

ORDERED that all parties shall serve courtesy copies of any outstanding discovery demands within 14 days; all parties shall respond thereto within 20 days of receipt; and it is further

ORDERED that the failure to timely serve a courtesy copy of outstanding discovery demands, as above, may constitute waiver of same, in the Court's discretion and upon further application; and it is further

ORDERED that the failure to timely serve responses to a timely courtesy copy, as above, shall result in sanctions, including but not limited to the striking of pleadings in the Court's discretion upon further order; and it is further

ORDERED that all counsel are reminded of the Part Rules, available on the Court’s website, including those requiring extension of the note of issue deadline by motion returnable prior to the deadline date; and it is further

ORDERED that the argument on the Court’s own sanction motion, pursuant to NYSCEF Doc. No. 204, scheduled for March 3, 2022 is adjourned *sine die*; and it is further

ORDERED that the note of issue deadline is extended to July 1, 2022.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

2/7/2022
DATE


FRANK NERVO, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE