

Moise v City of New York

2023 NY Slip Op 31399(U)

April 27, 2023

Supreme Court, New York County

Docket Number: Index No. 160384/2019

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM **PART** **05RCP**

Justice

-----X

CHANELLE MOISE,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE CHAPIN SCHOOL,

Defendants.

INDEX NO. 160384/2019

MOTION DATE 11/21/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to VACATE/STRIKE - NOTE OF ISSUE

On October 24, 2019, plaintiff commenced this action against defendant the City of New York (the "City"), alleging that on March 11, 2019 she sustained injuries when the monkey bars in the playground located at East 84th Street and East End Avenue, New York, New York collapsed on her (NYSCEF Doc. No. 66 [Compl. at ¶6]). On March 2, 2022, plaintiff commenced a separate action against defendant the Chapin School ("Chapin") in New York State Supreme Court, New York County, under Index No. 151841/2021, asserting claims arising out of the same incident (NYSCEF Doc. No. 67 [Chapin Compl. at ¶16]). Pursuant to a stipulation dated May 3, 2022, these actions were consolidated in this action (NYSCEF Doc. No. 70 [May 3, 2022 Stipulation]).

On or about January 22, 2020, plaintiff served the City with a Bill of Particulars alleging, in pertinent part, that

[a]s a result of the defendant's negligence, plaintiff was caused to suffer serious and permanent personal injuries including but not limited to:

cervical and lumbar injuries, L4-5 herniated disc with bilateral radiculopathy; S1 herniated disc causing root compression, spinal muscle spasms, bilateral upper and lower extremity radiculopathy, numbness and tingling; concussion; headaches; cognitive decline; loss of memory; ringing in the ears; shoulder and back pain; unable to perform activities of daily living, studying, attending school, and playing sports and hobbies like prior to the accident; difficulty studying; difficulty carrying back pack for school and walking around campus for classes for any extended length of time; difficulty pushing, pulling, carrying, lifting, squatting, walking, sitting, standing as before the accident, and claimant has been otherwise damaged, all of which damages are permanent in nature and continuing into the future.

(NYSCEF Doc. No. 71 [Bill of Particulars at ¶¶3-4] [emphasis added]).

On October 25, 2022, the parties stipulated that discovery was complete and that plaintiff was to file a note of issue by October 31, 2022 (NYSCEF Doc. No. 73 [October 25, 2022 Stipulation]). On October 27, 2022, plaintiff served Chapin with a Supplemental Bill of Particulars alleging that

[a]s a result of defendant's negligence, plaintiff has suffered and continues to suffer bilateral cervical radiculopathy with numbness, tingling, weakness and loss of range of motion, headaches, lumbar radiculopathy, numbness, tingling, weakness and loss of range of motion, plaintiff has suffered nerve damage, difficulty in prolonged standing, sitting, walking, carrying, pushing, pulling, squatting, bending, and lifting, requires constant and chronic physical therapy, massages, injections, medications including pain medications and gabapentin, constantly hiccups [sic], plaintiff has difficulty with pursuing her chosen profession and difficulty performing her laboratory work, difficulty using her hands and holding objects steady in her hands, difficulty wearing high heels, attending extracurricular activities, will have difficulty carrying a baby, working full time, required to use handicap services to avoid prolonged walking or carrying her back pack, radiological and medical examination costing plaintiff in excess of \$50,000 and it is anticipated that plaintiff's future medical care will exceed \$8,000,000 over the course of her life, and it is further anticipated that plaintiff's condition will continue to deteriorate causing her to suffer arthritis, osteo arthritis, degeneration of her cervical and lumbar spine, spasms, neurological injury, plaintiff's entire life has been changed by this accident.

(NYSCEF Doc. No. 64 [Supplemental Bill of Particulars] [emphasis added]).

Four days later, on October 31, 2022, plaintiff filed the note of issue certifying that discovery was complete and that this action was ready for trial (NYSCEF Doc. 74 [Note of Issue]). On that same day, the City served plaintiff with a Notice for Discovery and Inspection setting forth twenty-nine demands seeking documents related to the Supplemental Bill of Particulars, generally falling within three categories: (1) the names and contact information, and HIPAA-complaint authorizations, for plaintiff's medical providers and pharmacists; (2) an itemized accounting of her past and future medical expenses; and (3) authorizations directing the release of plaintiff's student file for each school, college, or university attended by Plaintiff from the date of her accident to the present (NYSCEF Doc. Nos. 75 [Notice for Discovery and Inspection]). The City also sought a further deposition of plaintiff based on the "additional items/claims alleged in Plaintiff's supplemental Verified Bill of Particulars" (NYSCEF Doc. No. 76 [Notice of Further Deposition]).

Over a year later, the City mailed plaintiff a letter, dated November 10, 2022, demanding "duly-executed HIPAA compliant authorizations, and courtesy copies of [plaintiff's] client's medical records" for forty-one doctors, medical practices, medical labs, and pharmacies (NYSCEF Doc. No. 79). The City noted in this letter that, of the items demanded in its Notice for Discovery and Inspection, plaintiff had failed to provide:

an authorization to obtain the complete file related to the accident claim made to Philadelphia Insurance Companies; copies of any and all permits for handicap or related services issued to plaintiff from the date of accident to present; copies of any and all applications for handicap services, permits, or related services submitted or prepared by plaintiff or on plaintiff's behalf from the date of incident to present; an itemized accounting of anticipated future medical costs for plaintiff's future medical expenses; the name, address, and telephone number of each school, college, or university plaintiff has attended from the date of incident to present; [and] duly executed, original HIPAA- and FERPA-complaint authorizations directing the release of plaintiff's student file for each school, college, or university attended by plaintiff from the date of incident to present.

(Id.).

The City now moves for an order, pursuant to NYCRR §202.21(e), vacating the Note of Issue on the grounds that plaintiff's certificate of readiness incorrectly states that discovery is complete. The City argues, specifically, that plaintiff's Supplemental Bill of Particulars sets forth new injuries and damages, including: bilateral cervical radiculopathy; nerve damage; loss of range of motion; difficulty pursuing her chosen profession; constant hiccups; difficulty wearing high heels; and future difficulty carrying a baby, such that the City is entitled to vacatur of the note of issue and additional discovery related to these newly-asserted injuries and damages. The City also moves for an order, pursuant to CPLR §§3124 and 3126, compelling plaintiff to respond to its October 31, 2022 Notice for Discovery and Inspection and Good Faith Letter of November 10, 2022 or, alternatively, precluding plaintiff from offering evidence at trial in support of the injuries and damages newly alleged in her Supplemental Bill of Particulars.

Plaintiff opposes the City's motion, arguing that "the injuries and treatment described in the January 2020 bill of particular and the October 2022 are virtually identical except that plaintiff's previously alleged nerve injury (alleged in the 2020 Bill of Particular and testified to ad nauseum by plaintiff) was identified as a phrenic nerve injury which worsened causing her to chronically burp" (NYSCEF Doc. No. 93 [Ayers Affirm. in Opp. at ¶22]). Plaintiff adds that "although plaintiff makes a claim in the October 2022 bill of particular of past medical expenses, the correct amount is \$5,000, not \$50,000 which was made in error and in any event, the future medical expenses were estimated by counsel, and life care plan with detailed expenses will be provided the City with its life care plan at least 30 days before trial but most likely much sooner" (Id. at ¶¶25-27).

DISCUSSION

As a general matter, “[a] note of issue should be vacated where it is based upon a certificate of readiness that incorrectly states that all discovery has been completed” (Matos v City of New York, 154 AD3d 532, 533 [1st Dept 2017] [internal citations and quotations omitted]). In this case, many of the injuries set forth in the Supplemental Bill of Particulars are either sequelae of “essentially the self-same permanent injuries recited in the earlier bill” (Tate v Colabello, 58 NY2d 84, 87 [1983]; see also Olivo v Nazario, 154 AD3d 624 [1st Dept 2017] [internal citations omitted]) or highlight injuries and disabilities that may develop as plaintiff ages (See Villalona v Bronx-Lebanon Hosp. Ctr., 261 AD2d 185, 185 [1st Dept 1999]). Moreover, plaintiff has testified about a number these injuries and treatments at two separate examinations before trial, including, inter alia: nerve damage, difficulty carrying objects, her use of handicap services at Cornell University, difficulty in performing laboratory work, as well as physical therapy, medications, injections, and massage treatments (See NYSCEF Doc. Nos. 95 [June 7, 2021 EBT] and 96 [August 9, 2022 EBT]). In light of the foregoing, the Court concludes that the Supplemental Bill of Particulars complies with the requirements of CPLR §3043(b) and denies that branch of the City’s motion which seeks to strike the note of issue (See Linares v City of New York, 198 AD3d 417, 418 [1st Dept 2021]; see also DeLuca v Federated Dept. Stores, Inc., 259 AD2d 421, 422 [1st Dept 1999]).

However, the Court agrees with the City that in light of the additional details offered in the Supplemental Bill of Particulars regarding plaintiff’s injuries and treatment—i.e., plaintiff’s constant hiccupping, difficulty pursuing her chosen profession, difficulty carrying a baby, spasms, anticipated arthritis, osteoarthritis, and degeneration of plaintiff’s cervical and lumbar spine, as well as her use of gabapentin—the City is entitled to post-note of issue discovery limited to these issues (See e.g., Linares v City of New York, 198 AD3d 417 [1st Dept 2021]). Accordingly, the

City's motion to compel is granted and plaintiff is directed to: (1) respond to City's October 31, 2022 Notice for Discovery and Inspection demand numbers 1-25 and 27-29¹ (to the extent it has not already done so) within fifteen days from the date of this decision and order; and (2) appear for a deposition related to plaintiff's use of gabapentin, constant hiccupping, difficulty pursuing her chosen profession, difficulty carrying a baby, spasms, and anticipated arthritis, osteoarthritis, and degeneration of her cervical and lumbar spine within ninety days after the plaintiff's service of her responses the Notice for Discovery and Inspection.

In light of the foregoing, it is

ORDERED that the branch of the City of New York's motion to vacate the Note of Issue is denied; and it is further

ORDERED that the branch of the City of New York's motion to compel is granted as set forth above; and it is further

ORDERED that counsel for the City of New York is directed to serve a copy of this decision and order, with notice of entry, upon plaintiff within fifteen days of the date of this decision and order; and it is further

ORDERED that counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within fifteen days of the date of this decision and order; and it is further

ORDERED that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk

¹ Plaintiff asserts that she presently has no material responsive to demand number 26, seeking an itemized accounting of anticipated future medical treatment, but will produce a life care plan to defendants once it is prepared (NYSCEF Doc. No. 93 [Ayers Affirm. in Opp. at ¶26]).

Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

4/27/2023
DATE


HON. JUDY H. KIM, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: