

**Shevack v O'Malley**

2024 NY Slip Op 33001(U)

August 22, 2024

Supreme Court, New York County

Docket Number: Index No. 805295/2020

Judge: Kathy J. King

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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. KATHY J. KING PART 06**

*Justice*

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KATE SHEVACK AND BRETT SHEVACK,

Plaintiff,

- v -

MARTIN J. O'MALLEY, FOOT & ANKLE ORTHOPAEDIC  
SURGERY, P.C., JAMES DAVIES, HOSPITAL FOR  
SPECIAL SURGERY

Defendant.

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**INDEX NO.** 805295/2020

**MOTION DATE** 10/05/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for STRIKE PLEADINGS.

The Defendants, Martin J. O'Malley, M.D. and Foot & Ankle Orthopaedic Surgery, P.C., move for an order, pursuant to CPLR § 3043, striking Plaintiffs' Amended Verified Bill of Particulars dated August 4, 2023, or in the alternative, for an order compelling plaintiffs Kate Shevack and Brett Shevack to appear for a further deposition regarding additional claims and injuries made in the Amended Verified Bill of Particulars, pursuant to CPLR §§ 3124 and 3126; or precluding the Plaintiffs from offering evidence at trial in support of allegations and injuries contained in plaintiffs' Amended Verified Bill of Particulars; and compelling Plaintiffs to produce a copy of any and all documents pertaining to the application for, and receipt of, disability benefits with Northwestern Mutual, and any and all documents relating to their Paycheck Protection Program ("PPP") loan application(s) and any documentation submitted therewith and permitting a further deposition of the Plaintiffs in relation to the materials disclosed therein.

The Plaintiffs oppose the motion and cross-move seeking an order, pursuant to 22 NYCRR § 130-1.1(a), for the imposition of sanctions against the Defendants for frivolous motion practice. The Defendants oppose the motion.

This action sounds in medical malpractice and arises from a tibial nerve injury allegedly sustained by Plaintiff Kate Shevack, as a result of improper surgical care and treatment rendered by the Defendants during surgery to lengthen her Achilles tendon.

Pursuant to CPLR § 3043(b), a Plaintiff may serve a supplemental bill of particulars containing “continuing special damages and disabilities,” without leave of the court, if it alleges “no new cause of action ... or new injury” (*Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717 [2d Dept 2012]; *see also Khosrova v Hampton Bays Union Free School Dist.*, 151 AD3d 953 92d Dept 2017).

A careful review of the original Bill of Particulars and the Amended Bill of Particulars at issue here, indicates that the Plaintiffs seek to allege continuing consequences of the injuries suffered and described in the previous Bill of Particulars, rather than new and unrelated injuries. Therefore, the contested Amended Bill of Particulars is deemed to be a Supplemental Bill of Particulars which, pursuant to CPLR § 3043(b), does not require leave of Court prior to service upon the Defendants. As such, the prong of the Defendants’ motion seeking to strike Plaintiffs’ Amended Bill of Particulars; or compelling the Plaintiffs to appear for a further deposition; or precluding the Plaintiffs from offering evidence at trial in support of the allegations and injuries contained in the Amended Verified Bill of Particulars is denied.

Turning to that branch of Defendants’ motion seeking any records in the Plaintiffs’ possession relating to Ms. Shevack’s disability claim with Northwestern Mutual, the Court finds

that said records must be disclosed to the Defendants. Plaintiffs have previously provided the Defendants with an authorization for the release of the records, however according to the Defendants, the authorization was rejected. Likewise, Defendants assert that they have subpoenaed the documents, and have not received them. Under the circumstances, the Plaintiffs are directed to provide the Defendants with all of the records in Plaintiffs' possession concerning Ms. Shevack's disability claim with Northwestern Mutual.

Likewise, the Defendants' demand for all documents relating to Plaintiffs' PPP loan application and any documentation submitted therewith, is granted. According to the Plaintiffs' Amended Bill of Particulars, Ms. Shevack is making a claim for lost past and future earnings, commencing in February 2019 through Ms. Shevack's work life, of an average of \$178,860.00 per year, increasing each year at 4% growth rate. The Court finds that the PPP records, seeking compensation for lost business during the Covid pandemic, which occurred subsequent to the alleged malpractice, are sufficiently material and necessary to that claim to warrant disclosure. Therefore, the Plaintiffs are directed to provide the Plaintiff with all records relating to their PPP loan application, including any documentation submitted with said application.

Lastly, the Plaintiffs' cross-motion seeking the imposition of sanctions against the Defendants is denied. 22 NYCRR 130-1.1[c] states in pertinent part:

Conduct is frivolous if...(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

The Plaintiffs have failed to demonstrate that the conduct of the Defendants in making the instant motion was frivolous as that term is defined in the statute, or that the motion was brought in bad

faith (*see Kantrowitz, Goldhammer & Graifman, P.C. v Ayrovainen*, 204 AD3d 652 [2d Dept 2022]).

Accordingly, it is hereby

**ORDERED**, that the branch of Defendants' motion seeking disclosure of records in Plaintiffs' possession relating to Plaintiff Kate Shevack's disability claim from Northwestern Mutual, is granted; and it is further

**ORDERED**, that the branch of Defendants' motion seeking disclosure of all PPP loan application records, and documents submitted therewith, in Plaintiffs' possession is granted; and it is further

**ORDERED**, that the Plaintiffs are directed to provide the Defendants with the aforementioned documents within 30 days of entry of this order; and it is further

**ORDERED**, that the remainder of the Defendants' motion is denied; and it is further

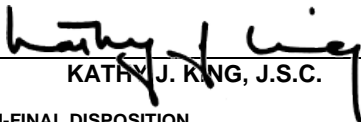
**ORDERED**, that the Plaintiffs' motion seeking costs and sanctions, pursuant to 22 NYCRR § 130-1.1(a), is denied; and it is further

**ORDERED**, that a status discovery conference will be held on October 10, 2024, at 10:00 a.m., in Room 351 at 60 Centre Street, New York; and it is further

**ORDERED**, that the determination whether Defendants are entitled to a further deposition of the Plaintiffs regarding the Northwestern Mutual and PPP loan records is held in abeyance pending the status conference of October 10, 2024.

This constitutes the Decision and Order of the Court.

8/22/2024  
DATE

  
KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE