Melendez v Pro Sports & Entertainment, Inc.
2024 NY Slip Op 33357(U)
September 23, 2024
Supreme Court, New York County
Docket Number: Index No. 114296/2005
Judge: Emily Morales-Minerva
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EMILY MORALES-MINERVA PART 42M

Justice

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CARLOS MELENDEZ,

Plaintiff,

- v -

PRO SPORTS & ENTERTAINMENT, INC.,THE ROUSE COMPANY OF NEW YORK, LLC,SOUTH STREET SEAPORT LIMITED PARTNERSHIP, APPLE INDUSTRIAL DEVELOPMENT CORP., NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, THE CITY OF NEW YORK

Defendants.

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INDEX NO. 114296/2005

MOTION DATE 04/12/2024

MOTION SEQ. NO. 013

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 013) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93

were read on this motion to/for VACATE STAY.

APPEARANCES:

Hach & Rose LLP, New York, NY (Adam Roth, Esq. and Evan Bane, Esq., of counsel) for Plaintiff.

Wilson Elser Miskowitz Edelman & Dicker, White Plains, NY(Mathew Ross, Esq., of counsel) for Defendants.

HON. EMILY MORALES-MINERVA:

This labor law action has been pending for almost twenty years, since October 12, 2005. There have been twelve motions between the parties, including an unsuccessful motion for summary judgment that reached the Appellate Division, First Department (see Melendez v Brown United, Inc., 209 AD3d 437 [1st Dept 2022]). Further, Note of Issue, with a jury demand, was initially filed on October 20, 2010, but was subsequently

vacated by motion.[1] The matter was certified as trial ready in 2015, but proceeded to mediation, which failed after numerous sessions. On June 5, 2019, counsel stipulated to discovery being complete, and Note of Issue, with a jury demand, was re-filed on August 30, 2019.[2] The case was then again certified as trial ready on March 26, 2021, and jury selection was scheduled for May 6, 2024.[3]

On April 12, 2024 -- less than three weeks before jury selection was scheduled to commence - defendants filed the instant order to show cause (motion seq. no. 13). Defendants move for an order (1) granting them leave to amend their answer, pursuant to CPLR § 3025(b); (2) vacating the Note of Issue and re-opening discovery, pursuant to the Uniform Rules of the New York State Trial Courts (NYCRR) § 202.12; and (3) staying the instant action pending the conclusion of Roosevelt Road Re, Ltd. et al. v Hajjaf et al. (Index No. 24-CV-01549-NG-LB), which is currently pending before the Eastern District of New York.

Plaintiff timely filed opposition, on April 27, 2024, and the clerk marked the matter submitted.

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[1] The undersigned conducted a review of the appearances held in this matter, to the extent possible, via the Unified Court Managing System ("UCMS").
[2] On February 23, 2021, this case was converted to an electronic file via the New York State electronic filing system. Given the Note of Issue date predates the conversion, a copy of the note of issue does not appear on NYSCEF.
[3] This court is unable to ascertain the reasoning behind the large gap between these two dates.

However, on September 05, 2024, this action -- including the subject order to show cause (motion seq. no. 13) -- was transferred to the undersigned for disposition.

Upon consideration of the papers submitted on this motion, the Court denies the motion in its entirety.

ANALYSIS

In the instant order to show cause (motion seq. no. 13), defendants seek to amend their answer to add an eighth affirmative defense, which contains four paragraphs, as follows:

> "15. Plaintiff's alleged accident and his subsequent medical treatment are and were fraudulent and said occurrence and treatment were a product of a fraudulent scheme including, but not limited to, fraudulent medical treatment in an effort to seek recovery in excess of the real value of any claims. These representations were fraudulently made to both Defendant and the Court.
>
> 16. Plaintiff's physicians likewise provided excess and fraudulent medical treatment and services in an effort to bolster Plaintiff's lawsuit and enrich themselves from said improper and medically unnecessary procedures and appointments. These statements included the false and fraudulent statements that: (1) plaintiff's alleged injuries were related to the accident alleged in the complaint and no other contributing factors; (2) the surgeries performed were medically necessary due to the alleged accident; (3) he had no prior related injuries or conditions; and (4) he did not undergo relevant prior testing.
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> 17. That, by reason of the foregoing, the claims made by Plaintiff are in violation of CPLR § 8303-a, which provides in pertinent part that '[i]f in an action to recover damages for personal injury . . . such action or claim is commenced or continued by a plaintiff . . . and is found, at any time during the proceedings or upon judgment, to be

> frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars,' and Uniform Trial Court Rule 130-1.1
>
> 18. By reason of the foregoing, Defendants are entitled to their costs, expenses, and legal fees in defending the within action."

(see New York State Cts Electronic Filing [NYSCEF] Doc No. 77, Proposed Amended Answer, at ¶ 15 - 18).

It is well settled that leave to amend a pleading should be freely granted absent evidence of substantial prejudice or surprise, or unless the proposed amendment is palpably insufficient or patently devoid of merit (see CPLR § 3025 [b]; JP Morgan Chase Bank, N.A. v Low Cost Bearings N.Y., Inc., 107 AD3d 643 [1st Dept 2013]; MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499 [1st Dept 2010]; Cherebin v Empress Ambulance Serv., Inc., 43 AD3d 364 [1st Dept 2007]; Nyahsa Servs., Inc., Self-Ins. Tr. v People Care Inc., 156 AD3d 99 [3d Dept 2017]). A motion for leave to amend is reserved to the broad discretion of the court (see Ravnikar v Skyline Credit-Ride, Inc., 79 AD3d 1118, 1119 [2d Dept 2010]).

However, "where . . . the case has been certified as ready for trial, a trial court's discretion to grant a motion to amend should be exercised with caution" (Harris v Jim's Proclean Service, Inc., 34 AD3d 1009, 1010 [3d Dept 2006]; see Bailey v Village of Saranac Lake, Inc., 100 AD3d 1089 [3d Dept 2012]);

see also Panasia Estate, Inc. v Broche, 89 AD3d 498 [1st Dept 2011]). "In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, [and] whether a reasonable excuse for the delay was offered" (Cohen v Ho, 38 AD3d 705, 706 [2007]; see also American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co., 68 AD3d 792, 794 [2009]).

Here, defendants seek to amend their answer by adding two new affirmative defenses eighteen years from the filing of plaintiff's complaint, five years from discovery having been completed, three years from being marked as trial ready, and three weeks prior to the commencement of jury selection. To allow defendants to amend its answer at such a late date would significantly prejudice plaintiff (see Holliday v Hudson Armored Car & Courier Service, Inc., 301 AD2d 392 [1st Dept 2003][holding: defendant would be seriously prejudiced by plaintiff's motion to amend complaint which was filed ten years after the action was commenced, subsequent to the completion of discovery, and on the eve of trial]; see also Lattanzio v v Lattanzio, 55 AD3d 431 [1st Dept 2008]; Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs., 257 AD2d 423 [1st Dept 1999]). In light of the foregoing, as well as the impending trial and the clear prejudice to plaintiff from the additional

discovery burden presented by the proposed amendments, the court denies defendants' order to show cause to amend their answer.

Further, while the court recognizes that defendants only became aware of the facts upon which their motion is predicated on or around March 1, 2024 -- the date the Racketeer Influenced and Corrupt Organizations ("RICO") Act complaint was filed in the Eastern District of New York -- this does not outweigh the substantial prejudice to plaintiff. Defendants' proposed amendments are based on unproven accusations against two of plaintiff's treating physicians in an unrelated federal action, which is in its infancy. The RICO complaint, which is merely a vehicle for allegations, does not warrant defendants' request to amend its answer.

Notwithstanding the prejudice to plaintiff, the court finds that the proposed affirmative defenses are palpably insufficient so as to survive a motion to dismiss. When asserting a cause of action for fraud, a party is required to allege "misrepresentation of a material fact, scienter, justifiable reliance, and injury" (Barrett v Grenda, 154 AD3d 1275, 1277 [4th Dept 2017]; Browning Ave. Realty Corp v Rubin, 207 AD2d 263, 266 [1st Dept 1994]). Pursuant to CPLR § 3016 (b), "where a cause of action or defense is based upon . . . fraud, the circumstances constituting the wrong shall be stated in detail."

Paragraph fifteen of the proposed amended answer alleges, "Plaintiff's alleged accident and his subsequent medical treatment are and were fraudulent and said occurrence and treatment were a product of a fraudulent scheme including, but not limited to, fraudulent medical treatment in an effort to seek recovery in excess of the real value of any claims. These representations were fraudulently made to both Defendant and the Court" (NYSCEF Doc. No. 80, Proposed Amended Answer). Wholly absent are any facts sufficiently specific as to the substance of any misrepresentation plaintiff allegedly made, or any fraud plaintiff allegedly perpetrated (see Brown v Wolf Grp. Integrated Commc'ns, Ltd., 23 AD3d 239 [1st Dept 2005][finding: allegation that defendant "deliberately misrepresented the fact that an agreement had been reached" was insufficient to satisfy CPLR § 3106; failed to specify words or actions used]). Simply repeating the word "fraud" multiple times in an allegation does not satisfy the particularity requirement of CPLR § 3106.

Further these conclusory, general allegations as to the alleged fraudulent medical treatment and fraudulent scheme contain no information as to when and by whom plaintiff received this alleged fraudulent medical treatment, or as to whom partook in this alleged fraudulent scheme (see Gregor v Rossi, 120 AD3d 447 [1st Dept 2014][holding: "fraud . . . [is] not pled with the requisite particularly under CPLR § 3016(b) because the words

used by defendants and the date of the alleged false representations are not set forth]; see also Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp., 127 AD3d 479 [1st Dept 2015]).

Paragraph 16 of the proposed amended answer alleges, "Plaintiff's physicians likewise provided excess and fraudulent medical treatment and services in an effort to bolster Plaintiff's lawsuit and enrich themselves from said improper and medically unnecessary procedures and appointments. These statements included the false and fraudulent statements that: (1) plaintiff's alleged injuries were related to the accident alleged in the complaint and no other contributing factors; (2) the surgeries performed were medically necessary due to the alleged accident; (3) he had no prior related injuries or conditions; and (4) he did not undergo relevant prior testing" (NYSCEF Doc. No. 80, Proposed Amended Answer). These allegations are also general and conclusory, and are not pled with the requisite particularly required under CPLR § 3016(b) (see Gregor, 120 AD3d at 447). Further, this affirmative defense pertains to non-parties to this action and their alleged perpetration of fraud -- this is not a proper affirmative defense pursuant to CPLR § 3018.

Paragraph 17 of the proposed amended answer -- for sanctions pursuant to CPLR § 8303-a and 22 NYCRR § 130-1.1 - is

not an affirmative defense, but a counterclaim. Aside from the fact that this counterclaim contains general, conclusory allegations that do not "set forth any facts sufficient to show intent by plaintiff to harass or maliciously injure defendants through commencement of this lawsuit," plaintiff has instituted a sufficiently plausible lawsuit that cannot be construed as frivolous (Shulz v Washington Cnty., 157 AD2d 948, 950 [3d Dept 1990]; see Korean United Methodist Church & Inst., Inc. v Sone, 2 AD3d 118 [1st Dept 2003]).

Based on the denial of defendants' request to amend their answer, defendants' request to vacate Note of Issue and re-open discovery in connection with the proposed affirmative defenses is likewise denied. Defendants' request for a stay of the trial pending resolution of the federal action -- which is essentially indefinite in nature given the federal action is in its infancy -- is also denied. The instant matter does not overlap whatsoever with the federal action, and a stay will sufficiently prejudice plaintiff (see Lauria v Kriss, 147 AD3d 575 [1st Dept 2017] [holding: while "judicial efficiency may warrant a stay where there is substantial overlap of claims and parties . . . plaintiff's description of the [proceedings] . . . do not sufficiently overlap or show the likelihood of estoppel such that denial of a stay was an abuse of discretion]).

Accordingly it is,

ORDERED, that defendants' motion, by order to show cause (seq. no. 013), is denied in its entirety, it is further

ORDERED, that parties outstanding motions in limine are scheduled for oral argument before Justice Emily Morales-Minerva in Part 42 at 111 Centre Street New York, NY 10013, in Courtroom 574 on October 17 2024 at 10:00 A.m. .

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

9/23/2024
DATE

EMILY MORALES-MINERVA, 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