

**Noble v Deco Towers Assoc. LLC**

2025 NY Slip Op 33814(U)

September 30, 2025

Supreme Court, New York County

Docket Number: Index No. 157141/2019

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH PART 12M

Justice

-----X

INDEX NO. 157141/2019

MACK NOBLE,

MOTION DATE 06/17/2025

Plaintiff,

MOTION SEQ. NO. 004

- v -

DECO TOWERS ASSOCIATES LLC, GROUP HEALTH INCORPORATED,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR

In this personal injury action arising out of an alleged slip-and-fall, Deco Towers Associates LLC (defendant) moves for an order (1) vacating plaintiff Mack Noble's note of issue and certificate of readiness; (2) striking this case from the court's trial calendar; (3) compelling plaintiff to submit to a further deposition and medical examination; (4) setting new deadlines for completion of all outstanding discovery; or, in the alternative, (5) precluding plaintiff from offering evidence of proximate cause and damages at trial based on plaintiff's alleged failure to comply with defendant's attempt to conduct further discovery. Plaintiff opposes.

For the reasons set forth below, the motion is denied in part and granted in part.

Background Facts

On July 22, 2019, plaintiff commenced the instant action for damages arising out of an alleged slip-and-fall accident by filing a summons and verified complaint (NY St Cts Elec Filing [NYSCEF] Doc No. 104). Defendant interposed a verified answer on September 17, 2019 (NYSCEF Doc No. 105).

The verified complaint alleges that on August 12, 2018, while working on a cargo bay located at 330 West 42nd Street, New York, New York (subject premises), plaintiff slipped and fell due to a dangerous and defective condition (NYSCEF Doc No. 104 at 7-8). Defendant allegedly owned, managed, and operated the subject premises, including the cargo bay at issue (NYSCEF Doc No. 104 at 3-4). Plaintiff also alleged that defendant failed to maintain the cargo bay in a reasonably safe condition, causing his injury (NYSCEF Doc No. 104 at 3-4 & 8-9).

By a verified bill of particulars dated August 12, 2020 (NYSCEF Doc No. 106), plaintiff notified defendant of an injury to his left ankle that required plaintiff to undergo open reduction and internal fixation (*id.* at ¶ 15). Thereafter, plaintiff submitted to a deposition on August 18, 2022 (NYSCEF Doc No. 107). On September 22, 2022, plaintiff deposed defendant's building manager (NYSCEF Doc No. 108). On September 23, 2022, plaintiff filed a note of issue, together with a certificate of readiness (NYSCEF Doc No. 109).

On January 22, 2025, plaintiff filed his expert exchange, identifying Dr. Gabriel L. Dassa, D.O., F.A.A.O.S. as an expert witness, along with a copy of Dr. Dassa's comprehensive orthopedic evaluation report for an examination that occurred on December 20, 2024 (NYSCEF Doc No. 110). As part of the evaluation, Dr. Dassa recommended treatment in the form of physical therapy and pain management and found a "[h]igh probability of needing left ankle fusion" (NYSCEF Doc No. 110 at 6). On May 6, 2025, plaintiff filed a supplemental bill of particulars alleging continuing special damages and disabilities consisting of left ankle fusion surgery and physical therapy, amounting to \$54,500.00 in additional damages (NYSCEF Doc No. 111 at 1). Defendants now move to vacate the notice of issue, for further discovery, for a new date for completion of outstanding discovery, or, alternatively, for preclusion of plaintiff's evidence pertaining to his claims of proximate cause and damages.

## DISCUSSION

### *Note of issue*

Defendant argues that the note of issue should be vacated because discovery was incomplete when plaintiff filed it with the court. According to defendant, the new allegations in the supplemental bill of particulars reveal a material misstatement of facts in the certificate of readiness sufficient to nullify the note of issue in that nearly three years after plaintiff filed the note of issue, plaintiff filed a supplemental bill of particulars alleging additional damages. Further, defendant insists that plaintiff impermissibly served a supplemental bill of particulars without leave of court because it alleges new injuries and surgeries. Consequently, defendant claims, it is entitled to additional discovery.

Plaintiff counters that defendant's motion is untimely as it was filed more than 20 days after service of the note of issue. Plaintiff asserts that a party may only make an untimely motion to vacate a note of issue where it can demonstrate the presence of unusual or unanticipated circumstances. Plaintiff insists there are no such circumstances present here since plaintiff has not alleged new injuries or diagnoses in the supplemental bill of particulars. Plaintiff asserts that the supplemental bill of particulars merely includes the continuation of a previously pled injury and evolving treatment recommendations as permitted by CPLR 3043 (b).

Pursuant to 22 NYCRR 202.21 (e), parties may move to vacate a note of issue within 20 days after service of the note of issue and the certificate of readiness, and "the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect" (*Taylor v Enterprise FM Trust*, 214 AD3d 493, 493-494 [1st Dept 2023]). When parties fail to make a timely motion to vacate, they may only do so upon a showing of good cause (22 NYCRR 202.21 [e]; see *Peterson v City of New York*, 222 AD3d 564, 564 [1st Dept 2023]; *Allen v*

*Hirald*, 144 AD3d 434, 435 [1st Dept 2016]). It has been held that “[g]ood, cause is established when the party seeking post-note discovery demonstrates unusual or unanticipated circumstances and substantial prejudice” (*Taylor*, 214 AD3d at 494). Further, “[a]t any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect” (22 NYCRR 202.21 [e]).

Regarding the supplemental bill of particulars, CPLR 3043 (b) permits service of a supplemental bill of particulars

“with respect to claims of continuing special damages and disabilities without leave of court at any time . . . Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall . . . be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities.”

Here, the supplemental bill of particulars does not include a new cause of action and merely concerns the continuing consequences of plaintiff’s previously identified injury—the injury to the left ankle—which was disclosed in the prior bill of particulars (*see Anderson v Ariel Servs., Inc.*, 93 AD3d 525, 525 [1st Dept 2012]; *Villalona v Bronx-Lebanon Hosp. Ctr.*, 261 AD2d 185, 185 [1st Dept 1999]; NYSCEF Doc No. 106, ¶ 15; NYSCEF Doc No. 111 at 1). Thus, plaintiff was not required to seek leave of court prior to filing the supplemental bill of particulars.

Further, the supplemental bill of particulars does not reveal the presence of unusual or unforeseen circumstances requiring the vacatur of the note of issue. The prior bill of particulars identified injuries to plaintiff’s left ankle and alleged that “FURTHER SURGICAL INTERVENTION MAY BE REQUIRED IN THE FUTURE” (caps in the original) (NYSCEF Doc No. 106, ¶ 15). The supplemental bill of particulars sets forth continuing special damages and disabilities in the form of left ankle fusion surgery and physical therapy. Under these circumstances, the fact that a new physical examination revealed that defendant may require left

ankle fusion and physical therapy is not unusual or unforeseen (*see Tatev Colabello*, 58 NY2d 84, 87 [1983]; *Prevost v One City Block LLC*, 155 AD3d 531, 537 [1st Dept 2017]; *Schroeder v IESINY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]).

Additionally, defendant has not demonstrated that a material fact in the note of issue is incorrect (*Witherspoon v Surat Realty Corp.*, 82 AD3d 1087, 1088 [2d Dept 2011]). Defendant's argument that the certificate of readiness incorrectly states that pretrial discovery has been completed is unavailing. As discussed above, after serving the note of issue, plaintiff filed a supplemental bill of particulars concerning the continuing consequences of plaintiff's previously identified injury. In response, defendant moved for post-note-of-issue discovery. Defendant does not claim that there was outstanding disclosure at the time plaintiff filed the certificate of readiness. The cases defendant cites in support of its argument that the post-note supplemental bill of particulars reveals that a material fact in the certificate of readiness is incorrect are distinguishable on the facts (*see Young v Destaso Funding, LLC*, 92 AD3d 778, 778-779 [2d Dept 2012]; *Gaskin v Ilowitz*, 69 AD3d 563, 563 [2d Dept 2010]; *Gregory v Ford Motor Credit Co.*, 298 AD2d 496, 497 [2d Dept 2002]; *Ortiz v Arias*, 285 AD2d 390, 390 [1st Dept 2001]). Accordingly, the court declines to vacate the note of issue filed on September 23, 2022.

*Further discovery*

Defendant argues that due to the severity of the ankle injury Dr. Dassa describes in the evaluation report, and the increased damages plaintiff now claims, further discovery in the form of additional deposition and medical examination of plaintiff is necessary. Defendant asserts that plaintiff will not be prejudiced since he filed a supplemental bill of particulars nearly three years after the note of issue, signaling a willingness to engage in further discovery. Defendant insists that, on the other hand, it will be prejudiced without the opportunity to conduct an additional

deposition and medical examination since six years elapsed between the accident and Dr. Dassa's new evaluation, and the potential surgery Dr. Dassa now recommends is extensive and serious.

Plaintiff again counters that the treatment recommendations in Dr. Dassa's report and the additional damages in the supplemental bill of particulars do not constitute the kind of unusual or anticipated circumstances contemplated by the law. Additionally, plaintiff claims that defendant has not identified remaining additional factual issues requiring further inquiry.

Pursuant to CPLR 3101 (a), "[t]here should be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that "[t]he words 'material and necessary', are . . . 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" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). However, "[t]he right to disclosure, although broad, is not unlimited . . . [t]hus, when courts are called upon to resolve a dispute, discovery requests must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (*Forman v Henkin*, 30 NY3d 656, 662 [2018] [internal quotation marks and citations omitted]).

This court has already determined that under the circumstances present in this case, the supplemental bill of particulars does not include new injuries or disabilities but merely sets forth continuing special damages and disabilities that are not unusual or unforeseen in nature. However, since plaintiff exercised his right to serve a supplemental bill of particulars concerning continuing disabilities and additional damages, defendant is entitled to "newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities" (CPLR 3043 [b]; see *Brown v Brink El. Corp.*, 125 AD3d 421, 422 [1st Dept 2015] [citations

omitted]). These rights “include the right to take a further deposition (CPLR 3106), and to notice a physical examination by a ‘designated physician’” (CPLR 3121 [a])” (*Brown*, 125 AD3d at 422; see *Hickey v City of New York*, 159 AD3d 511, 511 [1st Dept 2018] [citations omitted]; *Anderson*, 93 AD3d at 525). For the foregoing reasons, defendant’s motion seeking an additional deposition and IME of plaintiff is granted but only with respect to the continuing special damages and disabilities plaintiff alleged in the supplemental bill of particulars.

All remaining arguments are either without merit or need not be addressed given the findings above.

### CONCLUSION

Accordingly, it is

ORDERED that defendant Deco Towers Associates LLC’s motion to vacate the note of issue and certificate of readiness pursuant to NYCRR 202.21 (e) is denied; and it is further

ORDERED that defendant’s motion to strike this case from the court’s trial calendar is denied; and it is further

ORDERED that defendant Deco Towers Associates LLC’s motion to preclude plaintiff Mack Noble from offering evidence in support of his claims is denied; and it further

ORDERED that defendant’s motion is granted to the extent that defendant may conduct an additional deposition and medical examination of plaintiff limited to the issues of the ankle fusion surgery and physical therapy plaintiff alleged in the supplemental bill of particulars, provided that said deposition and independent medical examination shall be completed by no later than 60 days from service of a copy of this order with notice of entry; and it is further

ORDERED that defendant shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General

Clerk's Office; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).


9/30/2025  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  FIDUCIARY APPOINTMENT  REFERENCE

INCLUDES TRANSFER/REASSIGN

  
**HON. LESLIE A. SCROTH**  
J.S.C.