

Jelic v Mirasol

2006 NY Slip Op 30869(U)

August 29, 2006

Supreme Court, New York County

Docket Number: 115302/04

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART SIX

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 JOSEPH JELIC,

Plaintiff,

-against-

Index No. 115302/04
 Motion Date: 08/29/06
 Motion Seq. No.: 01

ALAN P. MIRASOL, M.D., PETER J. BRUNO, M.D.,
 ARIE L. LIEBESKIND, M.D., ALAN BERNSTEIN, M.D.,
 HEDVA SHAMIR, M.D., HORTON MEDICAL CENTER,
 ORANGE REGIONAL MEDICAL CENTER, PARK
 AVENUE RADIOLOGISTS, P.C., MADISON MEDICAL,
 THE PRIVATE PRACTICE GROUP OF NEW YORK, LLP,
 and ADVANCED REHABILITATION CENTER,

Defendants.

-----X
 PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3025(b), plaintiff Joseph Jelic ("Mr. Jelic") moves for permission to amend his bill of particulars. Defendants oppose the motion.

Background

In this medical malpractice action commenced August 17, 2004, Mr. Jelic claims that defendants negligently failed to timely diagnose his ankle fracture. Affirmation in Support of Motion ("Aff."), at ¶¶ 2,3; Dr. Liebeskind's Affirmation in Opposition ("Opp. 1"), at ¶ 3. Mr. Jelic filed the Note of Issue on April 27, 2006, averring that discovery was complete and that he was prepared to proceed to trial. Opp. 1, at ¶ 4.

On May 17, 2006, Mr. Jelic returned to his treating physician David Levine, M.D. ("Dr. Levine") for a follow-up appointment. Aff, at ¶ 6. After examining Mr. Jelic's ankle,

Dr. Levine informed him that, as a result of his prior injuries, he may be required to undergo further ankle surgery. *Id.* Mr. Jelic then promptly informed the Court and defendants of these new allegations on June 13, 2006 at a pre-trial conference. *Aff.*, at ¶ 7. Because defendants were unwilling to stipulate to amendment of plaintiff's bill of particulars, the Court directed Mr. Jelic to move to amend. *Id.*

Plaintiff now moves for permission to amend his bill of particulars to include additional damages based on the future surgery he now allegedly requires. *Aff.*, at ¶ 5. Mr. Jelic argues that the surgery required on his ankle is consistent with the injuries previously alleged and flows from the alleged malpractice. *Aff.*, at ¶ 12. He claims, moreover, that defendants are not prejudiced by the amendment because the trial is scheduled to take place months from now on January 9, 2007. *Aff.*, at ¶¶ 14-16.

In support of his motion, Mr. Jelic submits the affirmation of Dr. Levine, who opines that Mr. Jelic's ankle is likely to become arthritic and require further surgery. *Aff.*, Ex. C, at ¶ 7. Dr. Levine also concludes to a reasonable degree of medical certainty that Mr. Jelic's need for future surgery is directly related to his prior injuries. *Aff.*, Ex. C, at ¶ 8.

Defendants oppose the motion, asserting that they will be prejudiced by the amendment because they have not had an opportunity to depose plaintiff or Dr. Levine regarding the new claim. *Opp.* 1, at ¶ 6. Defendants further allege that plaintiff's motion should be denied because Mr. Jelic was aware of the possibility of additional surgery on

January 9, 2004, when Dr. Levine first performed surgery on plaintiff. Dr. Mirasol's Affirmation in Opposition ("Opp. 2"), at ¶ 3.

In the alternative, defendants request permission to conduct further disclosure on the new alleged injuries. Opp. 1, at ¶ 6,8; Opp. 2, at ¶ 4; Dr. Bernstein's Affirmation in Opposition ("Opp. 3"), at ¶ 3.

Analysis

Plaintiff's motion to amend the bill of particulars is granted.

Leave to amend the bill of particulars is ordinarily freely given unless it would unduly prejudice the non-moving party. CPLR 3025(b); *Kassis v. Teachers Ins. and Annuity Assoc.*, 258 A.D.2d 271, 272 (1st Dept. 1999). Mere lateness does not bar amendment; rather, for a motion to amend to be denied, the amendment must cause significant prejudice to the non-movant. *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d 20 (1st Dept. 2003).

Nonetheless, when there has been "an extended delay in moving to amend, an affidavit of reasonable excuse for the delay in making the motion and an affidavit of merit should be submitted in support of the motion." *Kassis v. Teachers Ins. and Annuity Assoc.*, 258 A.D.2d, at 272; *see also, Spada v. Sepulveda*, 306 A.D.2d 270, 271 (2d Dept. 2003); *Torres v. Educ. Alliance, Inc.*, 300 A.D.2d 469, 470 (2d Dept. 2002); *Volpe v. Good Samqritan Hosp.*, 213 A.D.2d 398, 398-99 (2d Dept. 1995).

Here, plaintiff has submitted an affidavit of merit – namely, the affirmation of Dr. Levine, who opines that Mr. Jelic may need future surgery as a result of his present injuries. Mr. Jelic has also presented a reasonable excuse for the delay – the recent declaration of Mr. Jelic's treating physician that he may require subsequent surgery as a result of his prior injuries.

• Case law is clear that absent prejudice, an amendment should only be denied on the eve of trial or later. *See e.g., Licht v. Trans Care N.Y., Inc.*, 3 A.D.3d 325 (1st Dept. 2004) (denying amendment of bill of particulars on *eve of trial* because it changed theory of liability from heart injury to brain injury); *Heller v. Louis Provenzano, Inc.*, 303 A.D.2d, at 21 (denying amendment of bill of particulars *after trial*); *Smith v. Hercules Constr. Corp.*, 274 A.D.2d 467 (2d Dept. 2000) (denying amendment of bill of particulars on *eve of trial* because, among other things, it was late in violation of a preliminary conference order); *Videobox Networks v. Durst*, 259 A.D.2d 429 (1st Dept. 1999) (denying amendment on *eve of trial*); *Mitchell v. LaBarge*, 257 A.D.2d 834 (3d Dept. 1999) (denying amendment of bill of particulars *on appeal*).

In this case, however, the trial date is not until January 9, 2007 and it need not be adjourned to accommodate the amendment. Moreover, defendants' claim that the amendment would prejudice them because they have not had a full opportunity to conduct disclosure on the newly-alleged injuries is easily curable. *See, e.g., Sahdala v. New York City Health and Hosps. Corp.*, 251 A.D.2d 70 (1st Dept. 1998); *Cepeda v. Hertz*, 141

A.D.2d 394 (1st Dept. 1988); *Kurnitz v. Croft*, 91 A.D.2d 972 (2d Dept. 1983). This Court will re-open disclosure as to the new injuries. All disclosure, including depositions, is to be completed by October 17, 2006.

Accordingly, it is

ORDERED that plaintiff's motion to amend his bill of particulars is granted and the bill of particulars is deemed served on defendants *nunc pro tunc*; and it is further

ORDERED that all disclosure related to the newly-alleged injuries is to be completed by October 17, 2006; and it is further

ORDERED that plaintiff will make a demand for settlement purposes by October 17, 2006; and it is further

ORDERED that the parties are to appear on November 14, 2006 at 10:00 a.m. for a pre-trial conference to discuss settlement; and it is further

ORDERED that the parties are to appear on January 9, 2007 for trial.

This constitutes the Decision and Order of the Court.

Dated: New York, NY
August 29, 2006

ENTER


Hon. Eileen Bransten

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