

**Einheber v Bodenheimer**

2006 NY Slip Op 30689(U)

January 18, 2006

Supreme Court, New York County

Docket Number: 114682/01

Judge: Eileen Bransten

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

PRESENT: Eileen Bransten  
*Justice*

PART 6

Jack Elin Heber

INDEX NO. 114682b1

MOTION DATE 10/25/05

MOTION SEQ. NO. 04

MOTION CAL. NO. 04

Henry Bronsheimer

- v -

The following papers, numbered 1 to 2 were read on this motion to/for postpone trial

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

*(Large diagonal line indicating no reasons listed)*

Dated: 1-18-06

Eileen Bransten  
**EILEEN BRANSTEN** J.S.C.

**FILED**  
JAN 26 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X  
JACK EINHEBER,

Plaintiff,

-against-

Index No. 114682/01  
Motion Date: 10/25/05  
Motion Seq. No.: 04  
Motion Cal. No.: 04

HENRY BODENHEIMER, M.D., CHARLES  
MILLER, M.D., PATRICIA SHEINER, M.D.,  
LEONA KIMSCHLUGER, M.D., SUKRU  
EMRE, M.D., THOMAS FISHBEIN, M.D.,  
BEN HAIM, M.D., DR. KELLY, M.D., CECILIA  
DAVID, R.N., LINDSAY ARNOTT, R.N.,  
UNKNOWN NAME PHYSICAL THERAPIST,  
DOES 1-100, ALEXANDER KIRSCHENBAUM, M.D.,  
DOES 1-100, EUGENE FINE, M.D., SHELDON  
GLABMAN, M.D., ANTHONY SQUIRE, M.D.,  
DR. SUTTON, M.D., FRANKLIN KLION, M.D.,  
UNKNOWN NAME UROLOGY RESIDENT PHYSICIAN,  
MT. SINAI SURGICAL ASSOCIATES, MT. SINAI  
UROLOGICAL ASSOCIATES, MT. SINAI SCHOOL OF  
MEDICINE RENAL DISEASE AND NEPHROLOGY  
ASSOCIATES, MT. SINAI SCHOOL OF MEDICINE  
CARDIOLOGY ASSOCIATES, MT. SINAI SCHOOL OF  
MEDICINE LIVER DISEASES AND HEPATOLOGY,  
MT. SINAI MEDICAL CENTER, and DOES 1-100,

Defendants.

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

**FILED**  
JAN 26 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Pursuant to CPLR 3025(b), plaintiff Jack Einheber ("Mr. Einheber") moves for permission to amend his bill of particulars. Defendants Henry Bodenheimer, M.D., Charles Miller, M.D., Patricia Sheiner, M.D., Leona Kim-Schluger, M.D., Eugene Fine, M.D., Sukru Emre, M.D., Thomas Fishbein, M.D. ("Dr. Fishbein"), Cecilia David, R.N., Lindsay Arnett, R.N., Sheldon Glabman, M.D., Mount Sinai Urology Associates, Mount Sinai School of

Medicine Renal Diseases and Nephrology Associates, Mount Sinai School of Medicine Cardiology Associates, Mount Sinai School of Medicine Liver Diseases and Hepatology Associates, Mount Sinai Surgical Associates and The Mount Sinai Hospital (“Mount Sinai”) (collectively “Defendants”) oppose the motion and cross-move to strike the Note of Issue.

#### Background

On May 9, 1996, Mr. Einheber – then forty-seven years-old – presented to Mt. Sinai suffering from end-stage liver disease. On February 1, 1999, Dr. Fishbein performed a liver transplant on Mr. Einheber. His body began rejecting the liver on or about February 17, 1999.

In this medical malpractice action commenced in 2001, Mr. Einheber claims that Defendants negligently failed to: treat his osteopenia, osteoporosis and thyroid condition; adequately staff the transplant operation with two major surgeons; properly monitor the wound after surgery; and timely remove his stent.

On June 3, 2004, plaintiff filed the Note of Issue, averring that discovery was complete and that he was prepared to proceed to trial. Thus, on July 20, 2004, the parties participated in a pre-trial conference with the Court and agreed to a November 29, 2004 trial date. Affirmation in Opposition (“Opp.”), Ex. A, at 1. After several adjournments, the parties were scheduled to go to trial on November 14, 2005.

More than one year after the first pre-trial conference, on October 17, 2005, Mr. Einheber made this motion for permission to amend his bill of particulars to allege new claims. In particular, Mr. Einheber now seeks to allege that Defendants negligently placed the transplanted liver in an unorthodox position, causing an abscess infection. Affirmation in Support of Motion (“Aff.”), at ¶ 12. He claims that because of Defendants’ negligence in placing the liver, he has developed hepatic artery thrombosis (HAT), a recurring form of sepsis that required him to endure over 70 days of hospitalization. Affirmation of Mr. Einheber (“Einheber Aff.”), at ¶¶ 3-4. Mr. Einheber also argues that he should be permitted to amend his bill of particulars at this late stage in the litigation because he discovered only recently that he was suffering from HAT and that it was the result of Defendants’ negligence. Aff., at ¶ 2. He further requests an extension of the trial date, alleging that he needs to undergo surgery in November to correct the placement of the transplanted liver. Einheber Aff., at ¶ 8.

Defendants oppose this motion, asserting that they will be prejudiced by the amendment because it is the eve of trial and they have not had an opportunity to depose the treating physicians or examine the medical records regarding the new claims. Opp., at ¶ 9. Furthermore, Defendants allege that plaintiff’s motion should be denied because he failed to submit an affidavit of merit from a physician. Opp., at ¶ 8. Finally, Defendants cross-move to strike the note of issue in the event that plaintiff’s motion is granted. Opp., at ¶ 2.

Analysis

Amend Bill of Particulars

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 altogether 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, the party seeking leave to amend must establish a reasonable excuse for the delay.” *Oil Heat Inst. of Long Island Ins. Trust v. RMTS Assoc., LLC*, 4 A.D.3d 290, 293 (1st Dept. 2004). If the amendment is sought on the eve of trial, “judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious.” *Kassis v. Teachers Ins. and Annuity Assoc.*, 258 A.D.2d, at 272.

Leave to amend the bill of particulars is denied because it is inordinately late, plaintiff has not presented any reasonable excuse for the delay in seeking an amendment, and the late amendment would prejudice Defendants.

Case law is clear that a motion for leave to amend made on the eve of trial or later should be denied if it will prejudice the non-movant. 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 and plaintiff provided no excuse for delay); *Videobox Networks v. Durst*, 259 A.D.2d 429 (1st Dept. 1999) (denying amendment on eve of trial because plaintiff presented no excuse for delay); *Orros v. Yick Ming Yip Realty, Inc.*, 258 A.D.2d 387, 388 (1st Dept. 1999) (denying amendment made nearly one year after filing of note of issue because it raised new theory of liability); *Boland v. Koppelman*, 251 A.D.2d 176 (1st Dept. 1998) (denying amendment made two months before trial because delay caused prejudice to defendant); *see also, Smith v. Hercules Constr. Corp.*, 274 A.D.2d 467 (2d Dept. 2000) (denying amendment of bill of particulars on eve of trial because plaintiff provided no excuse for the inordinate delay).

Here, less than 30 days before trial, plaintiff for the very first time moves to amend his bill of particulars to allege new claims of malpractice against Defendants. For the last three-and-one-half years, Defendants have been preparing for trial based on the theories of liability Mr. Einheber asserted in his original complaint and bill of particulars. Defendants have not had an opportunity to examine plaintiff with regard to the newly-claimed injuries, nor have they been able to depose plaintiff's treating physicians or examine the medical records. Because it would prejudice Defendants to be forced to defend another theory of malpractice at this late date after the period for disclosure has long been over and plaintiff has failed to explain why he waited more than a year after filing the note of issue and certifying his readiness for trial before making this motion, the amendment is denied.

Furthermore, plaintiff's motion to amend cannot be granted because he has failed to submit an affidavit demonstrating that the proposed amendment has any merit. 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 (denying amendment made only three weeks before trial); *see also, Spada v. Sepulveda*, 306 A.D.2d 270, 271 (2d Dept. 2003) (denying amendment for failure to submit affidavit of merit); *Torres v. Educ. Alliance, Inc.*, 300 A.D.2d 469, 470 (2d Dept. 2002); *Volpe v. Good Samaritan Hosp.*, 213 A.D.2d 398, 398-99 (2d Dept. 1995) (denying amendment for failure to submit affidavit of merit). In support of his motion, Mr. Einheber submits only his own affidavit, which is insufficient to establish the merit of his claim because he is not a physician. *See, Barrera v. City of New York*, 265 A.D.2d 516, 518 (2d Dept. 1999) (denying amendment because plaintiff failed to submit medical affidavit).

In the end, Mr. Einheber has failed to demonstrate a reasonable excuse for his delay and that the proposed amendment is meritorious; therefore, the motion to amend is denied. The Court will, however, adjourn the trial so that Mr. Einheber can undergo corrective surgery and amply recover before appearing for trial.



Since plaintiff's motion to amend the bill of particulars is denied, Defendants' cross-motion to vacate the Note of Issue is similarly denied because there is no need for further disclosure.

Accordingly, it is

ORDERED that plaintiff's motion to amend his bill of particulars is denied; and it is further

ORDERED that plaintiff's motion to adjourn the trial is granted; and it is further

ORDERED that Defendants' cross-motion to vacate the Note of Issue is denied; and it is further


ORDERED that all parties are to appear for a pre-trial conference on February 7, 2006; and it is further

ORDERED that all parties are to appear for trial on March 6, 2006.

This constitutes the Decision and Order of the Court.

Dated: New York, NY  
January 18, 2006

ENTER

  
Hon. Eileen Bransten

**FILED**  
JAN 26 2006  
NEW YORK  
COUNTY CLERK'S OFFICE