

**Thai v Weinberg**

2012 NY Slip Op 31943(U)

July 20, 2012

Supreme Court, New York County

Docket Number: 107067/10

Judge: Joan B. Lobis

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

PRESENT: Justice  
*Justice*

PART 6

John Thai  
- v -  
Dr. Gary Weinberg

INDEX NO. 107067/10  
MOTION DATE 5/1/12  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 30 were read on this motion to for amend supp. BP: ..

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1-8</u>
<u>9-21</u>
<u>22-23, 24-30</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

**FILED**

JUL 24 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/20/12

Joan B. Lobis J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**FILED**

**JUL 24 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
JOHN THAI,

Plaintiff,

Index No. 107067/10

-against-

**Decision and Order**

DR. CRAIG WEINBERG,

Defendant.

-----X  
**JOAN B. LOBIS, J.S.C.:**

Plaintiff John Thai moves, by order to show cause, pursuant to C.P.L.R. Rule 3025(b), for leave to amend his bill of particulars.<sup>1</sup> Defendant Craig Weinberg D.D.S. s/h/a Dr. Craig Weinberg opposes the motion and cross-moves for an order precluding plaintiff's expert from offering testimony at trial; or, in the alternative, striking the portions of plaintiff's expert testimony of certain items contained in plaintiff's expert disclosure; and granting him summary judgment.

Plaintiff commenced this dental malpractice action on or about May 28, 2010, by filing a summons and verified complaint. Plaintiff alleges that defendant negligently performed teeth restoration and teeth whitening procedures and that, as a result, he endured pain, suffering, infection, mental anguish, periodontal breakdown, and loss of tooth. On or about July 21, 2010, plaintiff served a verified bill of particulars, expounding upon his allegations. On or about May 24, 2011, plaintiff filed the note of issue, and on November 1, 2011, the parties appeared for a pre-trial conference and entered into a stipulation and order that calendared the trial for May 14, 2012. On

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<sup>1</sup> Although plaintiff seeks to move under C.P.L.R. Rule 3025(b), the court deems his motion to have been brought under C.P.L.R. Rule 3042(b), as his request for an amendment pertains to his bill of particulars. C.P.L.R. § 2001.

or about February 29, 2012, plaintiff served his expert disclosure, pursuant to C.P.L.R. § 3101(d), which was rejected by defendant for lack of specificity, and on or about April 5, 2012, plaintiff served a second expert disclosure, which was intended to supercede the prior disclosure. On or about April 9, 2012, plaintiff filed this instant motion seeking leave to amend his bill of particulars to include herpetic lesion as an injury. On April 24, 2012, the parties appeared for a second pre-trial conference and entered into a stipulation and order vacating the note of issue.

In support of his motion to amend his bill of particulars, plaintiff argues that there is no surprise or prejudice to defendant. Defendant opposes the motion, arguing that leave to amend should be denied because plaintiff failed to satisfy the standard of review when seeking an amendment on the eve of trial, such as establishing a reasonable excuse for the delay and including an affidavit of merit with his motion.

Under C.P.L.R. Rule 3042(b), a plaintiff has an absolute right to “amend the bill of particulars once as of course prior to the filing of a note of issue.” Once the note of issue is filed, a plaintiff must seek leave of the court, but such leave is to be freely given in the absence of prejudice or surprise to the opposing party. Cherebin v. Empress Ambulance Svc., Inc., 43 A.D.3d 364, 365 (1st Dep’t 2007). The burden of showing prejudice or surprise is on the opposing party. A.J. Pegno Constr. Corp. v. City of New York, 95 A.D.2d 655, 656 (1st Dep’t 1983).

The court notes that, on or about May 28, 2011, plaintiff served a “supplemental bill of particulars” (“Second Bill of Particulars”) wherein he included an “assistant” as an additional

individual who committed the alleged negligence. The court deems this Second Bill of Particulars to be an amended bill of particulars, as it included new claims and injuries. Vargas v. Villa Josefa Realty Corp., 28 A.D.3d 389, 391 (1st Dep't 2006). In light of the note of issue being stricken, the court deems the Second Bill of Particulars to have been served "as of right," and therefore any further amendments would require leave of the court. C.P.L.R. Rules 3025(b) and 3042(b).

As to the instant proposed amendment to include plaintiff's herpetic lesion injury, the court finds that defendant has not demonstrated prejudice or surprise. In a prior motion in which defendant sought to vacate the note of issue, defendant acknowledged in his reply affirmation, dated July 22, 2011, that plaintiff testified during his deposition that he suffered herpetic lesion, which was not in the bill of particulars, and defendant argued that he required additional discovery because of this newly asserted injury. See Motion Sequence Number 001.<sup>2</sup> Also, in the stipulation and order from the November 1, 2011 pre-trial conference, the parties described the nature of the alleged malpractice to be "unnecessary treatment and lip lesion." In light of the above, defendant is not surprised by the amendment, as he has been aware of this allegation since prior to July 2011. Any prejudice is minimized by plaintiff's counsel's willingness to provide defendant with further discovery, a further physical examination of plaintiff, and any additional information that defendant seeks. Moreover, the note of issue has been stricken and the trial date is adjourned. Therefore, the court grants plaintiff's motion seeking leave to amend his bill of particulars.

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<sup>2</sup> Motion Sequence Number 001 was withdrawn per stipulation. See decision and order dated July 28, 2011.

Defendant's cross motion to preclude plaintiff's expert from offering testimony at trial, in whole or in part, is denied. C.P.L.R. § 3101(d)(i) provides, in pertinent part, that the expert disclosure shall detail the subject matter on which the expert is expected to testify, the substance of the facts and opinions on which the expert is expected to testify, the qualifications of the expert witness, and a summary of the grounds for the expert's opinion. Although plaintiff's 3101(d) response is sparse, the matter has been stricken from the trial calendar for further discovery; thus, plaintiff's time to serve or amend his expert disclosure in accordance with the statute has not expired. Defendant does not seek a remedy compelling plaintiff to comply with his discovery demand; instead, defendant moves for a remedy of preclusion. Defendant fails to demonstrate any prejudice to him or willful and contumacious behavior on plaintiff's part that warrants the extreme remedy of preclusion. Plaintiff shall serve an amended 3101(d) response, which fully complies with the requirements of the statute, once the further limited discovery has concluded.

As plaintiff is not precluded from offering expert testimony at trial at this time, defendant's request for summary judgment is denied. As to defendant's request for a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), defendant fails to articulate a reason why such a hearing is warranted at this juncture. Accordingly, it is hereby

ORDERED that plaintiff's motion to amend her bill of particulars is granted and the proposed amended bill of particulars attached to her motion papers is deemed served on defendant; and it is further

ORDERED that defendant's cross-motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a conference on August 21, 2012, at 9:30

a.m.

Dated: July 20, 2012

ENTER:

  
\_\_\_\_\_  
JOAN E. LOBIS, J.S.C.

**FILED**

**JUL 24 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**