

**Cervera v Verizon N.Y. Inc.**

2017 NY Slip Op 30364(U)

February 23, 2017

Supreme Court, New York County

Docket Number: 161689/2013

Judge: Gerald Lebovits

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: PART 7**

VICTOR CERVERA,

Plaintiff,

-against-

VERIZON NEW YORK INC., 435 WEST 50<sup>TH</sup> LLC,  
435 WEST 50 PROPERTY OWNER, L.P., 435 WEST  
50<sup>TH</sup> STREET CONDOMINIUM AND BOARD OF  
435 WEST 50<sup>TH</sup> STREET CONDOMINIUM,

Defendants.

Index No.: 161689/2013  
**DECISION/ORDER**  
Motion Sequence No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion under 22 NYCRR 202.21 (e) and under CPLR 3124.

<b>Papers</b>	<b>Numbered</b>
Defendants' Notice of Motion .....	1
Plaintiff's Affirmation in Opposition.....	2
Defendants' Reply Affirmation in Support.....	3

*Gorayeb & Associates. P.C.*, New York City (Roy A Kuriloff of counsel), for plaintiff.  
*Goldberg Segalla LLP*, White Plains (Laura Ashley Martin of counsel), for defendants.

Gerald Lebovits, J.

Defendants move to (1) vacate plaintiff's Note of Issue and Certificate of Trial Readiness under 22 NYCRR 202.2 (e); (2) compel plaintiff to appear for a vocational rehabilitation independent medical examination (IME) under CPLR 3124; (3) compel plaintiff to appear for further examination before trial (EBT) and to respond to further disclosure demands and further IMEs under CPLR 3124; and (4) to secure an extension of time to move for summary judgment once disclosure is complete.

Defendants argue that plaintiff claims new injuries in its Amended Bill of Particulars dated October 7, 2016. Defendants seek a further EBT and an IME of the plaintiff, and request answers to disclosure demands regarding the newly alleged injuries. Defendants argue that plaintiff did not comply with the order issued on September 21, 2016, that the rehabilitation IME should be done within 30 days, and that defendants were never informed of plaintiff's new injuries. Therefore, according to defendants, plaintiff's Certificate of Readiness was filed inappropriately.

According to defendants, plaintiff's Amended Bill of Particulars dated October 7, 2016, provides that plaintiff has additional injuries (collectively referred to as "additional injuries"):

“post traumatic carpal tunnel syndrome to right wrist; post traumatic ulnar neuropathy right wrist at guyons canal; reflex sympathetic dystrophy entire right upper extremity; posterior disc herniation’s at L3-4 and L4-5; post traumatic lumbar pain with L5-S1 radiculitis, electrodiagnostically confirmed; and excision of ulnar and dorsal scars, flap rearrangement and removal of pins to right second finger.” (Defendants’ Notice of Motion, ¶ 15 & Exhibit J.)

Defendants allege that plaintiff never informed them of plaintiff’s additional injuries.

Plaintiff argues that

“An exchanged report by plaintiff’s treating doctor Jeffery S. Kaplan M.D. (Exhibit 2) found posttraumatic carpal tunnel syndrome, right wrist, with ulnar neuropathy, and anticipated the need for future surgery in that regard, but, no such surgery has been undertaken, reflex sympathetic dystrophy (“RSD”) in the right upper extremity; electrodiagnostically confirmed lumbar pain with L5-S1 radiculopathy; and disc herniation at L5-S1, and disc bulges L2-L3, L3-L4 and L4-L5, along with the ‘excision of ulnar and dorsal scars, flap rearrangement and removal of pins to right second finger....’ ” (Plaintiff’s Affirmation in Opposition, ¶ 3 & Exhibit 2.)

Plaintiff also argues that the disc injuries at L5-S1 and L2-L5 were particularized in the April 7, 2015, Supplemental Bill of Particulars and the June 9, 2015, Supplemental Bill of Particulars. (Defendants’ Notice of Motion, Exhibit F.) Plaintiff further alleges that the March 3, 2015, report from defendant’s orthopedist, Dr. Strauss, addressed the hand and finger injury at length and the related surgery; the removal of the pins in connection with the quoted latter surgical procedure on the hand and finger that was performed on January 30, 2014; lumbar conditions L5-S1 and L2-L3, L3-L4 and L4-L5, including MRIs and EMG in regard to the L5-S1 radiculopathy; the EMG of the right wrist and ulnar nerve neuropathy, including Dr. Kaplan’s right carpal tunnel syndrome diagnosis. (Plaintiff’s Affirmation in Opposition, ¶ 4 & Exhibit 3). Plaintiff further addresses that “as Dr. Strauss examined the right shoulder from the shoulder surgery, the wrist and hand, the RSD in the right upper extremity should also be within the purview of the doctor.” (Plaintiff’s Affirmation in Opposition, ¶ 4.) Therefore, plaintiff concludes that the Amended Bill of Particulars dated October 7, 2016, is not about new injuries that are post-disclosure.

Defendants further argue that although Dr. Kaplan’s report was dated May 5, 2015, plaintiff did not send this report to defendants until May 9, 2016, and that this report was sent after the completion of all IMEs and plaintiff’s continued EBT held in November 2015. Defendants argue that plaintiff has the obligation to set forth the claims in a Bill of Particulars and thus that Dr. Kaplan’s report, which was sent on May 9, 2016, was essentially meaningless until plaintiff adopted into his Amended Bill of Particulars on October 7, 2016. Defendants also

argue that plaintiff has no grounds to substantiate his argument that Dr. Strauss should have known to evaluate plaintiff for RSD when he did plaintiff's IME well before any records showing RSD or pleadings claiming that condition were disclosed.

Defendants' motion is denied. CPLR 3043 (b) provides that "[a] party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than 30 days prior to trial."

Although plaintiff never mentioned the additional injuries in his earlier bill of particulars, defendants should have known about these additional injuries since at least May 9, 2016, when plaintiff sent Dr. Kaplan's report to the defendants.

In addition, defendants conducted an IME on March 3, 2015. Defendants' expert, Dr. Strauss, noted in his report about the examination of the injury of hand and finger, lumbar conditions, wrist and ulnar and also mentioned Dr. Kaplan's prediction of possible carpal tunnel syndrome. (Plaintiff's Affirmation in Opposition Exhibit 3.) Furthermore, plaintiff disclosed the disc injuries at L5-S1 and L2-L5 in the April 7, 2015, and June 9, 2015, Supplemental Bill of Particulars.

Given that Dr. Kaplan's report was sent to the defendants on May 9, 2016, the IME conducted by defendants' own expert on March 3, 2015 and the disclosure in the earlier bill of particulars, this court finds that plaintiff's additional injuries claimed in the Amended Bill of Particulars dated October 7, 2016, are not new injuries.

Defendants have not been prejudiced or surprised. (*See Spiegel v Gingrich*, 74 AD3d 425, 427 [1st Dept 2010] [noting that CPLR 3043 gives a motion court the discretion to determine whether to allow a late supplemental, or amended, bill of particulars, provided that defendant is not prejudiced]; *accord Acunto v Conklin*, 260 AD2d 787, 788-789 [3d Dept 1999] ["Evidence of injuries or conditions not enumerated by the plaintiff in the bill of particulars will not be permitted . . . [except] where the record reveals that the defendant should have known about such injury or condition."]; *Twiddy v Std. Marine Transp. Servs.*, 162 AD2d 264, 264 [1st Dept 1990] [noting that a bill of particulars is meant "to amplify the pleadings, limit the proof and prevent surprise at trial"].) Because defendants in this case should have known about plaintiff's complaints regarding the additional injuries at least since May 9 2016, when plaintiff sent Dr. Kaplan's report to defendants, defendants cannot claim prejudice or surprise.

In addition, after learning about the additional injuries at least since May 9, 2016, defendants did not request a further EBT, disclosure, or additional IMEs at the Compliance Conference held on May 25, 2016 and the Status Conference held on September 21, 2016. Compelling plaintiff to appear for a further EBT, respond to further disclosure demands and appear for further IMEs are not necessary.

The court is troubled that plaintiff waited a year to send Dr. Kaplan's report to defendants. And plaintiff offers no explanation for the delay. At least three court orders noted that IME reports be served within 45 days of IMEs. (Notice of Motion, Exhibits E, G, H.) Nonetheless, defendants received the report on May 9, 2016, and did nothing until after plaintiff

filed its Note of Issue on October 11, 2016, when defendants moved for the instant relief on October 26, 2016. Defendants cannot now claim prejudice or surprise.

Defendants allege that plaintiff has not yet appeared for his vocational rehabilitation IME scheduled for November 8, 2016, and that he did not comply with the court order issued on September 21, 2016. Plaintiff argues that he appeared for the vocational rehabilitation IME on November 8, 2016. Defendants concede that plaintiff appeared for the IME on November 8, 2016. (Defendants' Reply Affirmation in Support, ¶ 3.) Thus, that aspect of defendants' motion to compel plaintiff to appear for his vocational rehabilitation IME is denied as academic; it has already been completed.

Plaintiff served defendants with his Amended Bill of Particulars not less than 30 days before trial. The General Clerk's Office has not yet scheduled this matter for trial. Defendants are not prejudiced or surprised by the information contained in plaintiff's Amended Bill of Particulars. In any event, defendants do not move to strike plaintiff's Amended Bill of Particulars.

Defendants' request for an extension of time to move for summary judgment is granted. Defendants have 60 days from service of a copy of this decision and order with notice of entry to file its summary-judgment motion.

Accordingly, it is

ORDERED that defendants' motion is granted in part and denied in part: Defendants' request for an extension of time to move for summary judgment is granted. Defendants have 60 days from service of a copy of this decision and order with notice of entry to file its summary-judgment motion. Defendants' motion is denied in all other respects; and it is further

ORDERED that this matter shall remain on the trial calendar; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on all parties.

Dated: February 23, 2017



J.S.C.

**HON. GERALD LEBOVITS**  
J.S.C.