

Hajcuk-Gillespie v King
2017 NY Slip Op 31032(U)
April 17, 2017
Supreme Court, Suffolk County
Docket Number: 13-32495
Judge: W. Gerard Asher
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SHORT FORM ORDER

PUBLISHINDEX No. 13-32495
CAL. No. 15-00657MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY***PRESENT:***Hon. W. GERARD ASHER
Justice of the Supreme CourtMOTION DATE 4-28-16 (005)
MOTION DATE 6-14-16 (006)
ADJ. DATE 9-27-16
Mot. Seq. # 005 - MD
006 - Mot D-----X
SHARRIE HAJCUK-GILLESPIE and TAYLOR
HAJCUK, an infant by her mother and natural
guardian, SHARRIE HAJCUK-GILLESPIE, and
MICHAEL GILLESPIE,

Plaintiffs,

- against -

DYLAN KING, KAREN M. DUNPHY, KARIN
A. KING, and THOMAS RYAN DUNPHY,Defendants.
-----XSILBOWITZ, GARAFOLA, SILBOWITZ,
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Upon the following papers numbered 1 to 35 read on these motions to compel and to strike supplemental bill of particulars; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 21-31; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 11-20; 32-35; Replying Affidavits and supporting papers ____; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motions (#006 and #007) by the defendants Dylan King and Karin King hereby are consolidated for the purposes of this determination; and it is

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ORDERED that the motion by the defendants Dylan King and Karin King for, inter alia, an order compelling the plaintiffs to produce the items requested in their discovery demand is denied; and it is further

ORDERED that the motion by the defendants Dylan King and Karin King for, inter alia, an order striking the plaintiff Sharrie Hajduk-Gillespie's supplemental bill of particulars is decided as follows.

The plaintiff Sharrie Hajduk-Gillespie, s/h/a Sharrie Hajduk-Gillespie, commenced this action on behalf of herself and her daughter, the infant plaintiff Taylor Hajduk, to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Express Drive North and Ocean Avenue in the Town of Islip on May 15, 2013. It is alleged that the accident occurred when the vehicle operated by the defendant Dylan King and owned by the defendant Karin King proceeded into the aforementioned intersection against a red traffic light striking the plaintiff Hajduk-Gillespie's vehicle. Following the impact between the King and Hajduk-Gillespie vehicles, the Hajduk-Gillespie vehicle allegedly was struck by the vehicle operated by the defendant Karen Dunphy and owned by the defendant Thomas Dunphy.¹ At the time of the accident, the infant plaintiff Hajduk was riding as a front seat passenger in the Hajduk-Gillespie vehicle. In addition, the plaintiff Hajduk-Gillespie's husband, Michael Gillespie, instituted a derivative claim for loss of consortium.

The defendants now move for an order compelling the plaintiffs to respond to their letter, dated January 25, 2016, demanding the production of outstanding discovery items. In particular, the defendants are seeking authorization to obtain the medical records related to the plaintiff Hajduk-Gillespie pregnancy and birth of her youngest child, which occurred subsequent to the subject accident, and authorization to obtain the tax returns of the plaintiffs for the years 2009 through 2014. The defendants contend that the plaintiff Hajduk-Gillespie's medical records may reveal that her pregnancy was the cause of her spinal limitations and not the subject accident, as well as whether her pregnancy exacerbated or re-injured her alleged cervical and lumbar spine injuries. The defendants further assert that the plaintiff Hajduk-Gillespie, who is making a claim for loss of earnings, failed to state at her examination before trial that she filed for bankruptcy in 2009. In addition, the defendants seek an order compelling the plaintiff Michael Gillespie to appear for an examination before trial. The plaintiffs oppose the motion on the grounds that the defendants cannot rely on the same post-note discovery demand letter as their affirmation of good faith, that defendants have failed to make the requisite showing of unusual or unanticipated circumstances arising subsequent to the filing of the note of issue to warrant post-note of issue discovery, and that the

¹ By order of the undersigned dated October 29, 2015, the defendants Karen Dunphy and Thomas Dunphy's motion for summary judgment dismissing the complaint was granted, and the action was severed as against them.

defendants' discovery demands are improper.

22 NYCRR §202.7 (a) of the Uniform Rules of Trial Courts states that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (*see* Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]). Furthermore, the filing of the note of issue and certificate of readiness certifies that all discovery is complete, waived or not required, and that the action is ready for trial, foreclosing further discovery (*see* 22 NYCRR § 202.21[b]; *Tirado v Miller*, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]). Once the note of issue has been filed, any further pretrial disclosure is only allowed upon a showing of "unusual or unanticipated circumstances" and "substantial prejudice" (*see Arons v Jutkowitz*, 9 NY3d 393, 850 NYS2d 345 [2007]; *Jones v Grand Opal Constr. Corp.*, 64 AD3d 543, 883 NYS2d 253 [2d Dept 2009]; *James v New York City Tr. Auth.*, 294 AD2d 471, 742 NYS2d 855 [2d Dept 2002]).

Under the instant circumstances, the defendants have failed to demonstrate the existence of unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue, which requires additional pretrial proceedings to prevent substantial prejudice to their case (*see* 22 NYCRR § 202.21[c]; *Wigand v Modlin*, 82 AD3d 1213, 919 NYS2d 868 [2d Dept 2011]; *Owen v Lester*, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]). Additionally, the affirmation of good faith submitted with the defendants' motion papers is insufficient, since it fails to adequately detail their efforts to resolve the issues raised by the instant motion (*see Cestaro v Chin*, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; *Barnes v NYNEX, Inc.*, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]).

Moreover, litigants do not have carte blanche to demand production of documents they speculate might contain useful information (*see Geffner v Mercy Med. Ctr.*, 83 AD3d 1283, 922 NYS2d 470 [2d Dept 2011]; *Buxbaum v Castro*, 82 AD3d 925, 925, 919 NYS2d 175 [2d Dept 2011]). A disclosure request will be considered palpably improper where it is determined that such information is privileged, irrelevant to the issues in the case, vague or overly broad, and, therefore, exempt from disclosure (*see Farkas v Orange Regional Med. Ctr.*, 97 AD3d 720, 948 NYS2d 651 [2d Dept 2012]; *Velez v South Nine Realty Corp.*, 32 AD3d 1017, 822 NYS2d 86 [2d Dept 2006]). Furthermore, the production of tax returns generally are disfavored due to their confidential and private nature (*see Altidor v State-Wide Ins. Co.*, 22 AD3d 435, 801 NYS2d 545 [2d Dept 2005]). Thus, a party seeking to compel the production of tax returns must make a strong showing of necessity and demonstrate the inability to obtain the information contained in the returns from other sources (*see Williams v New York City Hous. Auth.*, 22 AD3d 315, 802 NYS2d 55 [1st Dept 2005]; *Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 462, 773 NYS2d 116 [2d Dept 2004]).

Here, the defendants have failed to demonstrate a strong showing of necessity to justify the disclosure of the plaintiff Hajcuk-Gillespie's tax returns from 2009 through 2014 (see *Katz v Castlepoint Ins. Co.*, 121 AD3d 948, 995 NYS2d 131 [2d Dept 2014]; cf. *Kerman v Friedman*, 21 AD3d 997, 801 NYS2d 387 [2d Dept 2005]). More importantly, the fact that the plaintiff Hajduk-Gillespie filed for bankruptcy in the year 2009 is not material or relevant to the issues in this matter, and, therefore, the request of the release of her tax returns for the requested years was palpably improper and completely unnecessary to the defense of this action (see CPLR 3101[a]; *Panasuk v Viola Park Realty, LLC*, 41 AD3d 804, 839 NYS2d 520 [2d Dept 2007]; *Manzella v Provident Life & Cas. Co.*, 273 AD2d 923, 709 NYS2d 772 [4th Dept 2000]).

The defendants also move for an order, pursuant to CPLR 3042, striking plaintiffs' supplemental bill of particulars, dated April 11, 2016, arguing that it alleges new injuries to the plaintiff Hajduk-Gillespie's cervical spine, lumbar spine, and left wrist, and includes a new allegation of Reflex Sympathetic Dystrophy of the lower extremities. Alternatively, the defendants seek to compel the plaintiff Hajduk-Gillespie to appear for a further examination before trial and further independent medical examinations, along with providing authorizations for the release of her medical records regarding the additional injuries alleged in the supplemental bill of particulars. The plaintiffs oppose the motion on the grounds that the supplemental bill of particulars is an amplification of the plaintiff Hajduk-Gillespie's ongoing medical treatment for the injuries previously alleged and updated information regarding her special damages. Additionally, the plaintiffs contend that, pursuant to CPLR 3043(b), leave of the court is not required to serve a supplemental bill of particulars containing claims that are for continuing special damages and disabilities.

A bill of particulars is not itself a pleading (see *Linker v County of Westchester*, 214 AD2d 652, 625 NYS2d 289 [2d Dept 1995]) and, as a rule, may not be employed to supply allegations that are missing from the complaint (see *Sullivan v St. Francis Hosp.*, 45 AD3d 833, 846 NYS2d 228 [2d Dept 2007]; *Melino v Tougher Heating & Plumbing Co.*, 23 AD2d 616, 256 NYS2d 885 [2d Dept 1965]). Nor may it be used to add or substitute a new theory or cause of action or defense (see *Willinger v Greenburgh*, 169 AD2d 715, 564 NYS2d 466 [2d Dept 1991]). "[T]he purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial" (*Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 825, 877 NYS2d 424 [2d Dept 2009]; see *Jurado v Kalache*, 93 AD3d 759, 940 NYS2d 300 [2d Dept 2012]). A party may serve a supplemental or amended bill or particulars with respect to claims of continuing special damages and disabilities, provided that no new causes of action are alleged or new injuries claimed (see CPLR 3043; *Erickson v Cross Ready Mix, Inc.*, 98 AD3d 717, 950 NYS2d 717 [2d Dept 2012]; *Alami v 215 E6th St., L.P.*, 88 AD3d 924, 931 NYS2d 647 [2d Dept 2011]). Moreover, the court has broad discretion to grant or deny any further or different bills of particulars (see CPLR 3042(b); *Grande v Peteroy*, 39 AD3d 500, 833 NYS2d 615 [2d Dept 2007]), and, as long as there is no prejudice demonstrated, a supplemental bill of particulars may be permitted at the discretion of the court (see CPLR 3025[c]; *Nociforo v Pena*, 42 AD3d 514, 840 NYS2d 396 [2d Dept 2007]). The opposing party has the burden of demonstrating prejudice (see *Danne v Otis Elevator Corp.*, 276 AD2d 581,

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714 NYS2d 316 [2d Dept 2000]).

Here, the original bill of particulars alleged that the plaintiff Hadjuk-Gillespie sustained injuries to her cervical and lumbar spine, and left wrist, and that she had undergone left wrist synovectomy of the joint of the left wrist, as well as lumbar discectomy and fusion. It further advised, among other things, that she had sustained cervical disc bulges, lumbar herniations, and an exacerbation of a prior asymptomatic spinal degenerative condition. "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 defendant should have known about such injury or condition" (*Twiddy v Std. Marine Transp. Servs.*, 162 AD2d 264, 264, 556 NYS2d 622 [1st Dept 1990]). Based upon the record before the Court, it is clear that the alleged injuries included in the supplemental bill of particulars flow from the injuries alleged in the original bill of particulars, and, therefore, the defendants cannot legitimately claim to be prejudiced or surprised by their inclusion (see CPLR 3043[b]; *Tate v Colabello*, 58 NY2d 85, 459 NYS2d 422 [1983]; *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 911 NYS2d 174 [2d Dept 2010]; *Spiegel v Gingrich*, 74 AD3d 425, [1st Dept 2010]; *Zenteno v Geils*, 17 AD3d 457, 793 NYS2d 112 [2d Dept 2005]). Thus, the inclusion of such injuries as cervical and lumbar radiculopathy or herniations to the cervical and lumbar region do not rise to the level of new injuries. Instead they are sequela of the plaintiff Hadjuk-Gillespie's original injuries, and therefore, expand on the extent of the continuing disability (see *Shahid v New York City Health & Hosps. Corp.*, 47 AD3d 798, 850 NYS2d 521 [2d Dept 2008]; e.g. *Paul v Glickman*, 232 AD2d 465, 648 NYS2d 339 [2d Dept 1996]). However, the defendants have demonstrated that the inclusion of reflex sympathetic dystrophy of the lower extremities and hypersensitivity of the right foot are not merely sequela of the plaintiff Hadjuk-Gillespie's original injuries, but are new injuries. It cannot be said that the defendants were aware of or should have known about such complaints or injuries. Inasmuch as those are new injuries, they are stricken from the supplemental bill of particulars. Accordingly, the defendants' motion for, inter alia, an order striking the plaintiffs' supplemental bill of particulars is granted to the extent set forth herein, and is otherwise denied.

Dated: April 17, 2017

W. Gerard Asher
 J.S.C.
HON. W. GERARD ASHER

 FINAL DISPOSITION X NON-FINAL DISPOSITION