

Naughton v City of New York

2012 NY Slip Op 32691(U)

October 12, 2012

Supreme Court, New York County

Docket Number: 104026/05

Judge: Martin Shulman

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

**PRESENT: MARTIN SHULMAN
J.S.C.
*Justice***

PART 1

Index Number : 104026/2005
NAUGHTON, PATRICK, JR.
vs.
PETROCELLI CONSTRUCTION
SEQUENCE NUMBER : 013
STRIKE

INDEX NO. 104026/05
MOTION DATE _____
MOTION SEQ. NO. 013

The following papers, numbered 1 to _____, were read on this motion to for strike/preclude


Notice of Motion/Order to Show Cause — Affidavits — Exhibits <u>A-I</u>	No(s) <u>1</u>
Cross-motion — Exhibits <u>1-5</u>	No(s) <u>3, 4, 5</u>
Answering Affidavits — Exhibits <u>A-C</u>	No(s) <u>6, 7</u>
Replying Affidavits <u>- Exhibit 1</u>	No(s) <u>6, 7</u>

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
OCT 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Oct. 12, 2012


MARTIN SHULMAN, J.S.C.
J.S.C.

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
PATRICK NAUGHTON, JR.,

Plaintiff,

Index No. 104026/05

-against-

Decision & Order

THE CITY OF NEW YORK and PETROCELLI
CONSTRUCTION, INC.,

Defendants.

-----X
PETROCELLI CONSTRUCTION, INC.,

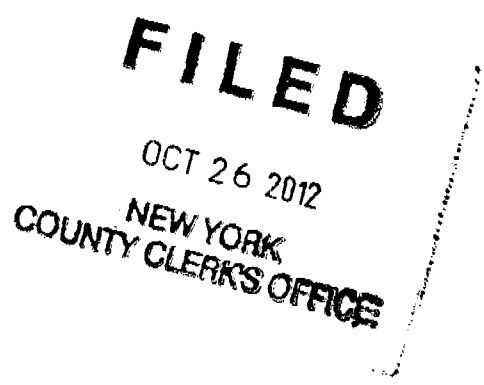
Third-Party Plaintiff,

-against-

W&W GLASS SYSTEMS, INC. and METAL SALES,

Third-Party Defendants.

-----X
MARTIN SHULMAN, J.:



In this personal injury action, defendant Petrocelli Construction, Inc. ("Petrocelli" or "defendant") moves to strike plaintiff's amended bill of particulars and preclude plaintiff from introducing evidence or testimony at trial pertaining to injuries and damages not included in plaintiff's initial bill of particulars. Alternatively, Petrocelli seeks an order vacating the note of issue and compelling plaintiff to submit to a further deposition and independent medical examination ("IME"). Finally, defendant's motion seeks to preclude testimony from Ronald Missun, plaintiff's expert as to economic loss, based upon plaintiff's failure to comply with defendant's discovery demands, or alternatively to compel plaintiff to respond to Petrocelli's discovery demands with respect to plaintiff's expert.

Plaintiff opposes the motion and cross-moves for leave to serve an amended bill of particulars. Petrocelli opposes the cross-motion and third-party defendant W&W Glass Systems, Inc. joins in Petrocelli's motion and opposition to the cross-motion.

Relevant Factual and Procedural Background

Plaintiff Patrick Naughton, Jr. commenced this action based upon injuries he sustained on July 21, 2004 while working as an ironworker. Plaintiff served a bill of particulars on or about June 22, 2005 averring that he sustained injuries to his left ankle and foot for which he underwent surgery and obtained other medical treatment. See Motion at Exh. E, ¶15. After extensive discovery and motion practice, plaintiff filed the note of issue on February 22, 2010. *Id.* at Exh. C. Two years later¹ and without leave of court, plaintiff served an amended bill of particulars dated April 5, 2012 alleging further injuries to his lumbar spine for which he will receive additional medical treatment.² *Id.* at Exh. F. Plaintiff's cross-motion attaches copies of pertinent medical records and alleges that plaintiff first complained of lower back pain on February 8, 2012, underwent an MRI on March 15, 2012 and obtained the MRI results on April 5, 2012, the same day plaintiff's counsel served the amended bill of particulars first apprising defendants of this new injury. See *Levien Aff. in Supp. of Cross-Motion and in Opp. to Motion*, at ¶4 and Exh. 1.

¹ In the interim, the parties engaged in summary judgment motion practice and pursued their appellate remedies with respect thereto. See *Naughton v City of New York*, 94 AD3d 1 (1st Dept 2012).

² Plaintiff's amended bill of particulars alleges that as a result of his foot injury he walks with an altered gait which in turn has adversely affected his lumbar spine.

Amended Bill of Particulars

A party is permitted to amend a bill of particulars once as of right prior to filing the note of issue. CPLR 3042(b). Further, a supplemental bill of particulars may be served without leave of court up to 30 days before trial, provided no new cause of action is alleged and no new injury is claimed. CPLR 3043(b).

Here, plaintiff's amended bill of particulars alleges a new injury. As it was served after filing the note of issue and without leave of court, it is a nullity. *Sawyer v Town of Lewis*, 6 Misc 3d 1024(A), 2003 WL 24013815, at *11 (Sup Ct, Lewis County 2003), *affd as mod*, 11 AD3d 938 (4th Dept 2004). Nonetheless, this court "has discretion to preclude, grant the [p]laintiff's request to amend, or strike the case from the trial calendar (citations omitted)." *Id.*

As stated in *Fuentes v City of New York*, 3 AD3d 549, 550 (2d Dept 2004):

While leave to amend a bill of particulars is ordinarily to be freely granted in the absence of prejudice and surprise, when leave to amend is sought on the eve of trial, judicial discretion should be exercised in a "discreet, circumspect, prudent and cautious manner". Moreover, where there has been an inordinate delay in seeking leave the plaintiff must establish a reasonable excuse for the delay, **and submit an affidavit to establish the merits of the proposed amendment.** (Internal citations omitted and emphasis added).

Here, plaintiff contends there has been no delay because his lower back injury is a new condition for which he first sought treatment in February 2012 and he served his amended bill of particulars, albeit improperly, immediately upon obtaining his MRI results. Plaintiff further argues the proposed amendment will not prejudice defendants because, although the note of issue was filed over 2 years ago, no trial date has been set and plaintiff is willing to submit to further discovery, which can be completed prior to

this case's Standards and Goals deadline of July 27, 2013. Plaintiff urges that the case can remain on the trial calendar while this limited discovery is completed without vacating the note of issue.

Unfortunately, on this record, plaintiff fails to establish that the proposed amendment is meritorious. *Fuentes v City of New York, supra*. Specifically, although plaintiff provides copies of his medical records detailing his treatment for the alleged back injury, these records are not in admissible form and they do not link his back condition to his July 2004 injury. In *Fuentes*, plaintiff's motion to amend her bill of particulars to allege a new injury was denied where there was no affidavit from a medical expert establishing a nexus between plaintiff's newly alleged injuries and the subject accident. See also *Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636, 637 (2d Dept 2005)(motion to amend bill of particulars to allege a new injury denied where plaintiff's expert affidavit was conclusory as to causation); *Diaz v Ford Motor Co.*, 29 AD3d 339, 340 (1st Dept 2006)(amendment of bill of particulars denied where medical reports provided no nexus between the alleged newly discovered injuries and the accident).

Like the plaintiff in *Fuentes*, the plaintiff here submits no affidavit from a medical expert. Rather, plaintiff proffers only an affirmation from his counsel stating that his treating physician attributes his back condition to his having an altered gait due to the accident.³ The actual medical records plaintiff relies upon contain no such affirmative

³ Similarly, the amended bill of particulars, verified by plaintiff's counsel, lacks any basis to conclude plaintiff's recent back condition is connected to his 2004 accident.

conclusion and, contrary to plaintiff's counsel's averments, Dr. Yakov Perper's April 4, 2012 medical report describes plaintiff's gait as "Normal". See Cross-Motion at Exh. 1. Further, the medical records are insufficient as they are "unsworn, un-notarized and unaccompanied by an affidavit or medical affirmation" and thus do not constitute competent proof of plaintiff's alleged new injury. See *Diaz v Ford Motor Co.*, *supra*.

Given the foregoing circumstances, this court declines to exercise its discretion to permit plaintiff to amend his bill of particulars. Case law is clear that plaintiff must demonstrate merit to the proposed amendment. While the result here may be harsh in light of the fact that it appears plaintiff acted promptly upon learning of his back injury and defendants would not be prejudiced if additional discovery were permitted, nonetheless, in this 7 year old case, this court cannot justify proceeding with additional discovery and further delaying the trial of this matter without an iota of admissible proof as to causation. For the foregoing reasons, Petrocelli's motion to strike plaintiff's amended bill of particulars is granted and plaintiff's cross-motion for leave to amend his bill of particulars is denied.

Expert Disclosure

Petrocelli seeks preclusion with respect to plaintiff's economic loss expert based upon plaintiff's failure to comply with defendant's discovery demands requesting copies of the expert's narrative report and documentation the expert relied upon. See Motion at Exhs. H and I. Plaintiff responds that all parties were served with the expert's report in October 2011 and has provided authorizations, albeit belatedly, for Petrocelli to obtain the remaining outstanding documents. This court can discern no significant

prejudice to defendants resulting from plaintiff's delay. Accordingly, the portion of defendant's motion seeking to preclude plaintiff's expert's testimony is denied as moot.

For all of the above reasons, it is hereby

ORDERED that the portion of defendant Petrocelli's motion to strike plaintiff's amended bill of particulars is granted and the remainder of the motion is denied; and it is further

ORDERED that plaintiff's cross-motion to amend his bill of particulars is denied.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
October 12, 2012



HON. MARTIN SHULMAN, J.S.C.

FILED
OCT 26 2012
NEW YORK
COUNTY CLERKS OFFICE