Olivo v Nazario
2013 NY Slip Op 34177(U)
January 24, 2013
Supreme Court, Bronx County
Docket Number: 300125/12
Judge: Ben R. Barbato
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 17M

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Alva, Rafael X

-against-

Christine Nozera X

Index Nº. 300125/12

Hon. [redacted] Justice.

HON. BEN R. BARBATO

The following papers numbered 1 to ____ Read on this motion,
Noticed on _____ and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers	JAN	26 2017
Memoranda of Law		

Upon the foregoing papers this

Motion is decided in accordance with memorandum decision filed herewith

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 1/24/17

Hon. _____ J.S.C.

HON. BEN R. BARBATO

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

RAFAEL OLIVO,

Plaintiff(s),

- against -

CHRISTINE NAZARIO, NEW YORK CITY HOUSING AUTHORITY, AND JOHN DOE,

Defendant(s).

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DECISION AND ORDER

Index No: 300125/12

Defendant NEW YORK CITY HOUSING AUTHORITY (NYCHA) moves seeking an order (1) pursuant to CPLR § 3043(b), striking plaintiff's expert exchange dated August 1, 2016 and supplemental bill of particulars dated August 26, 2016 on grounds that in alleging new injuries, plaintiff has impermissibly amended his bill of particulars without the requisite leave of court; (2) pursuant to CPLR § 3126, precluding plaintiff's expert from testifying regarding the claims in the forgoing exchange 2016 since such claims were pleaded absent leave of court; (3) pursuant to 22 NYCRR 202.21(d), striking plaintiff's note of issue and compelling him to appear for a further deposition and further Independent Medical Examination (IME) insofar as the injuries now being alleged constitute unusual and unanticipated circumstances; and (4) pursuant to CPLR § 3124, compelling plaintiff to provide authorizations for his employment records for purposes of annexing

it to a trial subpoena. Plaintiff opposes the instant motion asserting that the new injuries alleged are not new injuries and merely reiteration of previously pleaded injuries such that the bill of particulars at issue was supplemental and did not require leave of court. Based on the foregoing, plaintiff opposes NYCHA's motion seeking to strike his expert exchange and preclude testimony of its contents because the opinion proffered is based on properly pleaded injuries. Lastly, plaintiff asserts that insofar as it provided NYCHA with authorizations to obtain all of his employment records, the portion of the instant motion seeking to compel discovery ought to be denied as moot.

For the reasons that follow hereinafter, NYCHA's motion is denied.

The instant action is for alleged personal injuries allegedly sustained by plaintiff on June 7, 2011, when he was involved in a motor vehicle accident. It is alleged that the vehicle in which plaintiff was a passenger, owned and operated by defendant CRISTINE NAZARIO, came into contact with a vehicle owned by NYCHA and operated by defendant JOHN DOE (Doe) NYCHA's employee. It is alleged that the forgoing accident was a result of defendants' negligence and that plaintiff sustained injuries as a result.

Motion to Strike Plaintiff's Bill of Particulars

NYCHA's motion seeking to strike plaintiff's bill of particulars dated August 26, 2016 on grounds that he sought to

amend his original bill of particulars to plead new injuries absent leave of court is denied. The record establishes that the aforementioned bill of particulars merely supplemented the original by reiterating plaintiff's prior allegation that he would require future surgery to the injured body parts alleged. Thus, pursuant to CPLR 3043(b), not only was plaintiff not required to supplement his bill of particulars since he had already pleaded the need for future surgery, but his decision to reiterate already pleaded injuries was a supplementation for which leave of court was not required.

CPLR § 3043(b) governs the supplementation of bill of particulars. It delineates when leave of court is required and when it is not. Specifically, CPLR §3043(b), states that

> [a] party may serve a supplemental bill of particulars with respect to claims of continuing damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing damages or disabilities.

Thus, while supplementation involving no new injuries or theories is allowed without need to involve the court, any supplementation alleging new injuries or new theories of liability, does require leave of court. Whether an injury is new or merely *sequelae* is a determination of law, requiring a case by case analysis, medical

testimony and often depends on the injury initially claimed and the supplementation sought.

By contrast, CPLR § 3042(b), allows a party to amend a bill of particulars once by right prior to the filing of the note of issue. CPLR §3042(b) reads that

> [i]n any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue.

Thus, a party can amend a bill of particulars one time prior to the filing of a note of issue without court intervention. Thereafter, as inferred by the foregoing statute, any amendments require court intervention. Thus, pursuant to CPLR § 3043(b), leave of court is required when the supplemental bill of particulars alleges new injuries or theories (in such instance, no matter the label, the pleading is actually one seeking to amend the original), when the plaintiff seeks to amend a bill particulars for the second time, or when an amendment is sought after the filing of the note of issue.

Based on the foregoing, a subsequent bill of particulars which seeks to add new injuries or theories is labeled and treated as an amended bill of particulars rather than a supplemental bill of particulars (*Kassis v Teacher's Insurance and Annuity Association*, 258 AD2d 271, 272 [1st Dept 1999]; *Fuentes v City of New York*, 3 AD3d 549, 550 [2d Dept 2004]; *Danne v Otis Elevator Corporation*, 276 AD2d 581, 582 [2d Dept 2000]; *Wonh v. County of Suffolk*, 237

AD2d 412, 412 [2d Dept 1997]; *Leon v First National City Bank*, 224 AD2d 497, 498 [2d Dept 1996]). Significantly, an amended bill of particulars, denominated as on to supplement an original is a nullity if leave of court is required for the amendment sought (*Kassis* at 272; *Leon at* 498). Moreover, it is well settled that expansion of already pleaded injuries and/or disabilities within a bill of particulars is a supplementation of the same rather than an amendment (*Kellerson v Asis*, 81 AD3d 1437, 1438 [4th Dept 2011] ["Here, plaintiffs' supplemental bill of particulars merely expanded upon the continuing disabilities alleged in the original bill of particulars and did not set forth a new legal theory of liability or new injuries."]; *Cardone v Univ. Hosp.*, 78 AD2d 645, 645 [2d Dept 1980] ["The proposed supplemental bill of particulars does not set forth a new legal theory of liability or new injuries, but merely expands upon the continuing disabilities alleged in the original bill. As such, plaintiffs should have been permitted to serve their supplemental bill in Action No. 1."]; *Shillingford v Eckert*, 73 AD2d 601, 601 [2d Dept 1979] ["The amended bill of particulars does not seek to set forth new injuries, but merely expands upon continuing disabilities alleged in the original bill of particulars. Thus, plaintiffs had a right to serve this amended bill of particulars" (internal quotation marks omitted).])

Here, plaintiff's supplemental bill of particulars dated August 26, 2016 and served upon NYCHA almost two years after

October 27, 2014, the date on which plaintiff filed his note of issue, alleges, *inter alia*, "[c]ervical spine lesion due to radiculopathy that will require cervical fusion and decompression of cervical root," and "[f]uture right shoulder total joint replacement." NYCHA contends that the foregoing surgeries and conditions warranting the same constitute new injuries such that the foregoing bill of particulars sought to amend the original, which to the extent served absent leave of court, is a nullity, which must be stricken. NYCHA's assertion is meritless. To be sure, as discussed above, the expansion of already pleaded injuries and/or disabilities within a bill of particulars is a supplementation of the same rather than an amendment (*Kellerson* at 1438; *Cardone* at 645; *Shillingford* at 601), and pursuant to CPLR § 3043(b), a party may supplement a bill of particulars without leave, when no new injuries are alleged, at anytime prior to the thirty days preceding trial. Here, the record reveals that on February 26, 2012, within his bill of particulars, plaintiff not only claimed injuries to his right shoulder and cervical spine, but he pleaded that he "require[d], continue[d] to require and [would] require for an indefinite period (in all probability, permanently *surgeries*, continuous medical care and monitoring." Accordingly, here not only was future surgery pleaded, but given the injuries previously pleaded, the surgeries thereto are clearly "anticipated sequelae of the injuries described in the original bill of

particulars" (Kellerson at 1438; *Tate by McMahon v Colabello*, 58 NY2d 84, 87 [1983] ["Reasonably and realistically read, especially in light of the dynamics of maturing injuries, we cannot say that the later, and therefore more definitive, statement of the hardly unanticipatable sequellae of essentially the self-same permanent injuries recited in the earlier bill could have come as a surprise."]), such that plaintiff was entitled to supplement his bill of particulars to assert the same as a matter of law (*Kellerson* at 1438). In fact, here, supplementation was unnecessary for purposes of presenting these damages to a jury because plaintiff had already pleaded the need for future surgery four years earlier in his original bill of particulars.

Accordingly, NYCHA's motion to strike plaintiff's supplemental bill of particulars is denied.

Motion to Strike Plaintiff's Expert Exchange

NYCHA's motion seeking to strike plaintiff's expert exchange, disclosing plaintiff's medical expert dated August 1, 2016 and precluding any testimony as to its contents is denied. To the extent that plaintiff's medical expert intends to testify regarding injuries which plaintiff pleaded, including the need for future surgeries discussed above, there is no cognizable reason for preclusion. Indeed, the exchange in question is timely under both CPLR § 3101(d) and 22 NYCRR 202.17(h) since it is being exchanged substantially prior to trial.

First, it is well settled that expert testimony must be based on facts in the record or personally known to the witness, and that an expert cannot reach a conclusion by assuming material facts not supported by record evidence *(Cassano v. Hagstrom*, 5 NY2d 643, 646 [1959]; *Gomez v New York City Hous. Auth.*, 217 AD2d 110, 117 [1995]; *Matter of Aetna Cas. & Sur. Co. v Barile*, 86 AD2d 362, 364-365 [1982]). Here, to the extent that the expert testimony NYCHA seeks to preclude is that within Danilo Humberto Sotelo-Garza's (Garza's) report dated July 5, 2016, on this record there is certainly no substantive basis to preclude his testimony. To be sure, as per the report, after a recent examination of plaintiff, Garza - plaintiff's treating doctor - opines that plaintiff will need future surgery, namely a cervical fusion the replacement of the right shoulder joint. Thus, here, it cannot be said, that Garza's opinion lacks factual basis in the record.

Second, insofar as neither CPLR § 3101(d) nor 22 NYCRR 202.17(h) prescribe a time period for the exchange of a notice and an expert report, respectively, there is no procedural basis for the preclusion of Garza's opinion. Indeed, "a trial court has the discretion to preclude expert testimony for the failure to reasonably comply with the statute" (*Schwartzberg v Kingsbridge Hgts. Care Ctr., Inc.*, 28 AD3d 463, 464 [2d Dept 2006]), but, preclusion is generally only warranted when the delay in disclosing an expert is inordinate and bereft of explanation for the delay

(*id.* at 464; *Bauernfeind v Albany Med. Ctr. Hosp.*, 195 AD2d 819, 820 [3d Dept 1993]) and where the failure to timely disclose will result in prejudice (*McDermott v Alvey, Inc.*, 198 AD2d 95, 95 [1st Dept 1993] ["we find there is no proof of intentional or willful failure to disclose, on plaintiff's part, and an absence of prejudice to the parties opposing the testimony."]). Here, although the exchange at issue came almost two years after the note of issue was filed, it came well before this action was given a firm trial date and less than two months after Garza's examination wherein he concluded plaintiff's need for future surgery. Moreover, given the claim for future surgery in plaintiff's bill of particulars in 2012, NYCHA can hardly or credibly claim surprise.

Motion to Strike Note of Issue

NYCHA's motion to strike the note of issue on grounds that the contents of Garza's most recent report are unusual and unanticipated thus, warranting further discovery, and thereafter a further IME and deposition is denied. Clearly, NYCHA has known about the claims in the foregoing report - future surgery - since 2012 and as such the claims at issue are hardly unusual or unanticipated.

Pursuant to 22 NYCRR 202.21(e), the court can vacate a Note of Issue when it is based on a Certificate of Readiness which contains erroneous facts (*Ortiz v Arias*, 285 AD2d 390, 390 [1st Dept 2001]). Specifically, a Note of Issue premised upon a Certificate of

Readiness which asserts that all discovery is complete when, in fact, it is not, should be vacated (*Savino v Lewittes*, 160 AD2d 176, 178 [1st Dept 1990]); *Spilky v TRW, Inc.*, 225 AD2d 539, 540 [2d Dept 1996]; *Levy v Schaefer*, 160 AD2d 1182, 1183 [3d Dept 1990]). A motion pursuant to 22 NYCRR 202.21(e) must be made within 20 days of the note's service upon the party seeking to vacate it (22 NYCRR 202.21[e]; *Tirado v Miller*, 75 AD3d 153, 157 [2d Dept 2010]), otherwise, the court should deny such motion (*Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 794 [2d Dept 2006]; *Rodriguez v Sau Wo Lau*, 298 AD2d 376, 377 [2d Dept 2002]), and a defendant to whom discovery is owed then waives the right to such discovery (*Manzo v City of New York*, 62 AD3d 964, 965 [2d Dept 2009] ["The defendants waived their right to conduct an additional physical examination of the injured plaintiff when they failed to move to vacate the note of issue within 20 days after service of the note of issue and the certificate of readiness."]; *James v New York City Transit Authority*, 294 AD2d 471, 472 [2d Dept 2002]).

However, it is equally true that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings (22 NYCRR § 202.21[d]). Thus, when it is demonstrated that unusual and unanticipated circumstances merit

post-note of issue discovery, the court has the discretion to order the same (*Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005] ["The other method of obtaining post-note of issue disclosure is found in 22 NYCRR 202.21 (d). This section permits the court to authorize additional discovery '[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness' that would otherwise cause 'substantial prejudice.' Because this section requires both unusual and unanticipated circumstances and substantial prejudice, it has been described as the 'more stringent standard.']; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 140 [2d Dept 2000] ["Applying the above rules to the facts of this case, it is undisputed that the defendant did not move to vacate the note of issue within 20 days of its filing. Accordingly, the defendant was required to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness which required additional discovery to prevent substantial prejudice."]). The foregoing is equally applicable to non-party discovery and can form the basis for the grant of motion seeking to quash a subpoena on grounds that post-note of issue discovery is unwarranted (*Maron v Magnetic Const. Group Corp.*, 128 AD3d 426, 427 [1st Dept 20015]; *White v Bronx Lebanon Hosp. Ctr.*, 240 AD2d 212, 212 [1st Dept 1997]).

Here, because the instant motion is made almost two years

after the note of issue was filed, NYCHA seeks vacatur of the same pursuant to 22 NYCRR 202.21(d) averring that the contents of plaintiff's expert exchange and his supplemental bill of particulars give rise to unusual and unanticipated circumstances - namely, the need for future surgery. For the reasons already discussed at considerable length, NYCHA's motion must denied. Essentially, NYCHA contends that despite notice as early as 2012 that plaintiff intended to have surgery in the future, and to the body parts alleged in his original bill of particulars - his right shoulder and cervical spine - it is surprised by plaintiff's reiteration of the foregoing in the exchanges at issue. That the foregoing assertion is disingenuous is obvious.

Motion to Compel

Inasmuch as on June 22, 2016, plaintiff - in an exchange annexed to his opposition - provided NYCHA with fresh authorizations, including those for his employers, NYCHA's motion to compel the foregoing discovery is denied as moot. It is hereby

ORDERED that plaintiff serve a copy of this Decision and Order with Notice of Entry upon plaintiff within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : January 24, 2013
Bronx, New York

BEN BARBATO, JSC.