Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

ROBERT MARTELL and DEANNA MARTELL,

Plaintiff,

-against-

K&K AUTO & TOWING CORP., JASPAL PERSAUD a/k/a JASPAL PERSOD,

Defendants.

Index No.: 700371/11

Motion Date: 6/6/13

Motion Seq. No.: 7

The following papers numbered 62 to 89 read on this motion by plaintiffs for an Order (1)precluding defendants from submitting evidence that plaintiff's alleged injuries are pre-existing or degenerative; (2)precluding defendants' expert witnesses, Morr, Feuer and Eisenstadt, from testifying at trial as such testimony would advance new defenses not previously asserted; (3)precluding defendants' expert bio-engineer, Morr, from testifying at trial on the grounds that his testimony and opinions are based on "junk-science; (4)striking defendants' answer for failure to provide discovery; (5)dismissing all of the defendants' affirmative defenses; and (6)compelling defendants to exchange defendants' complete surveillance record of plaintiff; and cross-motion by defendants for summary judgment dismissing so much of plaintiff's complaint as it seeks recovery for a "serious injury" based upon allegations that he sustained a "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system"; directing the plaintiff to appear for a further deposition based upon the contents of the Surveillance footage obtained by defendants and striking the plaintiff's "Notice to Admit"

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Affidavit of Service	62 - 74
Notice of Cross-Motion-Answering Affirmation-Exhibits	75 - 85
Replying Affirmation-Affidavit of Service.....	87 - 89

Upon the foregoing papers it is ordered that the motion and cross-motion are determined as follows.

This is an action to recover damages for the plaintiff's, Robert Martell's alleged "serious injury", sustained on November 23, 2010 in an automobile accident while he was a passenger in a tow truck owned by the defendant, K&K Auto & Towing Corp., and operated by defendant, Jaspal Persaud a/k/a Jaspal Persod (hereinafter Persaud).

The branch of plaintiff's motion to preclude defendants' medical experts from testifying and precluding the defendants from submitting any evidence that plaintiff's alleged injuries are pre-existing or degenerative and not causally related to the accident is denied.

The defendants' served an answer containing nine affirmative defenses. In response, the plaintiff served a demand for Bill of Particulars as to Defendants' Affirmative Defenses (Bill of Particulars). Insofar as it is relevant in this motion, the Plaintiffs' demands, Items 5, 8 & 9, were directed to the defendants' third affirmative defense that the plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law. The defendants timely served, on August 30, 2011, a Bill of Particulars in responsive to plaintiff's demand.

The plaintiffs claim that the defendants' Bill of Particulars is insufficient and does not fully respond to the plaintiff's demands for particulars regarding their defense that the plaintiff's injuries are pre-existing and/or degenerative conditions and that the injuries are not cuasally related to the accident.

The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial (see Keenan v. Sears Roebuck & Co., 193 AD2d 719 [1993]; see also, Ferrigno v. General Motors Corp., Cadillac Motor Car Div., 134 AD2d 479 [1987]; Scott v General Motors Corp., 117 AD2d 662 [1986]).

The defendants' Bill of Particulars was proper in all respects having been served prior to discovery proceedings. The defendants objected to Items 8 and 9 on the ground that the matters demanded were evidentiary in nature (see Haszinger v. Praver, 12 AD3d 485 [2004]; Hillside Equities v. UFH Apts., 297 AD2d 704 [2002]; Ginsberg v. Ginsberg, 104 AD2d 482, 484 [1984]) and require expert information (see Scalone v. Phelps Memorial Hosp. Center, 184 AD2d 65, 76 [1992]). As for Item 5, defendants

properly responded that they did not yet have the information necessary to respond and must await discovery (see Brynes v. New York Hosp., 91 AD2d 907 Afrecan v. Caledonian Hospital, 29 AD2d 544 [1965]). Such a response is reasonable where, as here, the information necessary to fully respond, plaintiff's injuries and medical condition, is solely within the plaintiff's knowledge and the demand is made during the pre-discovery stage of the action (see Harrell v. county of Nassau, 227 AD2d 590 [1996]; cf. Snitow v. Central Coal Co. Inc. [Appeal No. 3] 241 App .Div. 756 [1934]. Moreover, on or about September 11, 2012, six months prior to plaintiffs' instant motion, the defendants served their CPLR 3101(d) responses which contained the reports of their expert examining doctors thereby providing full and complete responses to Item 5 sufficiently apprising plaintiffs of the particulars of defendants' affirmative defense.

Contrary to plaintiff's claim, the defendants were not required to move for a protective Order (see CPLR 3042[c]). CPLR 3042(c) provides in pertinent part that if a party fails to comply fully with a demand for a bill of particulars the party making the demand, the plaintiffs in this case, may move to compel compliance or, if such failure is willful, then for the imposition of penalties in accordance with CPLR 3042(d)(Haszinger v. Praver, 12 AD3d 485 [2004]; Hess v. Wessendorf, 102 AD2d 926 [1984], appeal dismissed 64 NY2d 602 [1984]). A motion to preclude or to compel discovery is not the equivalent of a motion made pursuant to CPLR 3042(c) (see Martin v. We're Associates, Inc., 127 AD2d 568 [1987]; Siegel, N.Y. Prac. § 241 [5th ed.]).

The plaintiffs are not entitled to sanctions pursuant to CPLR 3042(d) or CPLR 3126 since they never objected to the defendants' Bill of Particulars, never demanded a further Bill of Particulars, and despite plaintiffs' three prior discovery motions, never moved pursuant to CPLR 3042(c) to compel compliance supported by, among other things, an affirmation demonstrating good faith efforts to resolve the issue (see 22 NYCRR 202.7[a]; Barnes v. NYNEX, Inc., 274 AD2d 368 [2000]; Kovacs v. Castle Restoration & Constr., 262 AD2d 165 [1999]) nor demonstrated that any alleged failure was willful, contumacious, or in bad faith (see Castellano v. Mainco El. & Elec. Corp., 292 AD2d 556 [2002]). Although plaintiffs claim otherwise, the Preliminary Conference(PC) Order, dated August 3, 2011, makes no mention nor directs the defendants to serve a Bill of Particulars as to Affirmative Defenses or a further Bill, since plaintiffs only served their demand by mail on August 3, 2011. Although plaintiffs' motions following the PC alleged that defendants failed to provide a Bill of Particulars, the Stipulations and Orders, which resulted from these motions did not direct defendants to serve a further Bill of Particulars', but, rather

to provide responses to Plaintiffs' August 3, 2011 "discovery" demands. A Bill of Particulars is a pleading, not a discovery response.

The branch of the plaintiffs' motion to preclude the defendants' expert biomechanical engineer , Douglas R. Morr, P.E., from testifying at trial with respect to the cause of plaintiff's alleged injuries as being based on "junk science" is denied.

Contrary to plaintiffs' citations and representations, biomechanical engineering has been found generally accepted as reliable in the scientific community and New York courts have specifically held that a biomechanical engineer is qualified to give an opinion testimony regarding injury causation (see Plate v. Palisade Film Delivery Corp., 39 AD3d 835 [2007]; Valentine v. Grossman, 283 AD2d 571 [2001]).

To the extent that plaintiffs seek the defendants' entire surveillance records, it appears that defendants have provided all surveillance records that exist on or about February 22, 2013. Defendants have also offered to provide the surveillance film in another format if, as plaintiffs claim, they are unable to view the film in the format in which it was provided. The plaintiffs have failed to demonstrate that they made any effort, much less a "good faith" effort (22 NYCRR 202.7[a]) to resolve this problem.

That branch of the plaintiffs' motion seeking to strike the defendants' answer for failure of defendant K&K Auto & Towing Corp.(K&K Auto) to appear for a deposition is denied.

In support of their motion plaintiffs claim that defendants disobedience of two orders and a stipulation directing defendants to appear for deposition is wilful and contumacious warranting the sanction of the dismissal of their answer. In opposition, defendants contend that Persaud appeared for the defendants and that the plaintiffs' "relentless" motion practice prevented earlier production of the principal of K&K Auto.

The plaintiffs' have failed to sustain their burden of making a "clearly showing" that the failure of defendants to appear for a deposition was wilful and contumacious or in bad faith so as to warrant the drastic remedy of striking their answer (CPLR 3216; Harris v. City of New York, 211 AD2d 663, 664 [1995]).

The plaintiffs' Notice For Depositions, dated August 3, 2011 is a general demand for deposition of defendants by a person with

"knowledge" of the facts and circumstances of this action. It is undisputed that the defendants produced for deposition, Gospel Persaud a/k/a Jaspal Persod(Persaud) the driver of the tow truck and the employee of K&K Auto to testify on behalf of the defendants. "A corporate entity has the right to designate, in the first instance, the employee who shall be examined" (Nunez v. Chase Manhattan Bank, 71 AD3d 967, 967 [2010] quoting Sladowski-Casolaro v. World Championship Wrestling, Inc., 47 AD3d 803, 803 [2008]; see Barone v. Great Atl. & Pac. Tea Co., 260 AD2d 417, 417-418 [1999]). Never the less, plaintiffs have insisted on the deposition of Rashid Chaudry, the principal of K&K Auto, who has no "personal knowledge" of the facts and circumstances regarding the happening of the accident since he was not there, and without plaintiffs' asserting, much less demonstrating, that the deposition of Persaud was insufficient in any way (see Nunez v. Chase Manhattan Bank, 71 AD3d 967, 967 [2010] quoting Sladowski-Casolaro v. World Championship Wrestling, Inc., 47 AD3d 803, 803 [2008]).

Although defendants agreed to produce Chaudry for a deposition, they claim that scheduling his deposition was complicated since K&K Auto is no longer doing business and Chaudry moved to Texas. It appears that defendants tried to arrange a telephonic deposition which plaintiffs rejected. The defendants attempted to schedule the deposition for September 6, 2012, but the date was unacceptable to plaintiffs. Moreover, it is undisputed that the plaintiffs have made several motions in this action, this motion being the sixth, since the commencement of this action which stalled the discovery process. In addition, plaintiffs do not dispute that they agreed to hold Chaudry's deposition in abeyance during the pendency of the motions regarding production of the insurer's claim file which was finally disposed on February 6, 2013. The parties then resumed attempts to schedule the deposition. Defendants maintain that in the interim Chaudry had changed his phone number requiring hiring an investigator to contacting him. However, on March 11, 2013 the defense attorney notified the plaintiffs' attorney that they had reached Chaudry and were arranging for a deposition date. The plaintiffs did not hesitate and immediately, on the very next day, March 12, 2013, served the instant motion to, among other things, strike the defendants' answer. By letter dated March 25, 2013 defendants notified plaintiffs that Chaudry was available for depositions during the week of March 25, 2013. In view of these circumstances, it appears that plaintiffs are not interested in deposing Chaudry.

Accordingly, the plaintiffs' motion is denied in all respects.

The defendants' cross motion for partial summary judgment dismissing the plaintiffs' claim of "serious injury" based upon allegations that he sustained a "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" is denied as untimely and without considering the merits of the motion. (Brill v. City of New York, 2 NY3d 648, 652 [2004]; Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]).

The defendants' cross-motion for a further deposition of the plaintiff with respect to the surveillance film is denied.

Additional discovery after the filing of a note of issue and certificate of readiness may be granted where the moving party demonstrates that "unusual or unanticipated circumstances" developed subsequent to the filing requiring additional pretrial proceedings (22 NYCRR 202.21[d]; see Stock v. Morizzo, 92 AD3d 672 [2012]; Lopez v. Retail Prop. Trust, 84 AD3d 891 [2011]; Audiovox Corp. v. Benyamini, 265 A.D.2d 135, 140 [2000]). The defendants have failed to demonstrate that "unusual or unanticipated circumstances" developed subsequent to the filing of the Note of Issue. The plaintiff filed a Note of Issue on October 31, 2012. The surveillance of plaintiff took place on October 11, 15, and 28 2012, November 7, 8, 16, 17, 2012 and February 9, 2013. The defendants have failed to submit any explanation why the surveillance could not have been conducted earlier (see Singh v. 244 W. 39th Street Realty, Inc., 65 AD3d 1325 [2009]; Audiovox Corp. v. Benyamini, supra) or to demonstrate any prejudice resulting from the denial of a further deposition and failed explain the delay in moving for this relief.

The branch of the defendants' cross-motion to strike the plaintiffs' Third Notice to Admit is granted.

The purpose of a Notice to Admit is to eliminate from the litigation factual matters which are easily provable and about which there should be no dispute thereby expediting the trial and not to obtain information in lieu of other disclosure devices (see Tolchin v. Glaser, 47 AD3d 922 [2008]; Rosenfeld v. Vorsanger, 5 AD3d 462 [2004]). The admissions requested in a Notice to Admit must be by a party who "reasonably believes there can be no substantial dispute at the trial" of those matters (CPLR 3123[a]; Vasquez v. Vengroff, 295 AD2d 421, 422 [2002]; Taylor v. Blair, 116 AD2d 204, 206 [1986]). A pretrial motion is available to test the reasonableness of the items contained in the notice (see Epstein v. Consolidated Edison Co. of New York, 31 AD2d 746 [1969]; see also South Slope Holding Corp. v. Board of Assessment Review, 254 AD2d 684, 686 [1998]).

The plaintiffs' Fifth Notice to Admit is patently improper inasmuch it does not seek the admission of clear-cut matters of fact that plaintiffs could "reasonably believe" are not subject to dispute, but instead, calls for legal conclusions and admissions as to ultimate issues of fact on matters not relevant to any cause of action or claim asserted in this action (see Singh v. G & A Mounting & Die Cutting, Inc., 292 AD2d 516 [2002]; Vasquez v. Vengroff, supra; Khoury v. Khoury, 280 AD2d 454 [2001]). The plaintiffs' claim that the corporate status of K&K Auto is at issue is without merit. The defendants in their answer have unequivocally admitted the defendant's corporate status, i.e. that K&K Auto is a domestic corporation authorized to do business in New York and denied all other allegations in this regard.

Equally unavailing is the plaintiffs' claim that the motion to strike should be denied as untimely. The plaintiffs' cannot "reasonably believe" that no substantial dispute exists with respect to the 41 matters sought to be admitted. The defendants' four day delay in moving to strike the Notice to Admit, is excusable in view of the patently defective and improper nature of the Notice and which are contrary to the defendants' prior pleading (see Riner v. Texaco, Inc., 222 AD2d 571 [1995]; see also Ashkenazi v. City of New York, 239 AD2d 186 [1997]).

Dated: August 19, 2013
D# 48

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J.S.C.