

Asmar v 20th & Seventh Assoc., LLC

2018 NY Slip Op 30284(U)

February 16, 2018

Supreme Court, New York County

Docket Number: 157228/13

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

DAVID ASMAR,
Plaintiff

INDEX NO. 157228 /13

- Against-

MOTION DATE 02-14-2018

20TH AND SEVENTH ASSOCIATES, LLC, RELATED
MANAGEMENT COMPANY, LP., ALLIANCE
ELEVATOR COMPANY D/B/A UNITEC ELEVATOR
AND UNITEC ELEVATOR SERVICES COMPANY,

MOTION SEQ. NO. 008

Defendant.

-----X
20TH AND SEVENTH ASSOCIATES, LLC., RELATED
MANAGEMENT COMPANY LP., ALLIANCE ELEVATOR
COMPANY D/B/A UNITEC VER-TECH ELEVATOR S/H/A
ALLIANCE ELEVATOR COMPANY D/B/A UNITEC ELEVATOR,
Third-party Plaintiffs,

- against-

G.A.L. MANUFACTURING CORPORATION AND
HOLLISTER-WHITENY ELEVATOR CORP.,
Third-party Defendants.

MOTION CAL. NO. _____

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

The following papers, numbered 1 to 5 were read on this motion to dismiss those claims alleged in plaintiff's supplemental Bill of Particulars or in the alternative to vacate the note of issue and order further discovery on the injuries alleged in the supplemental Bill of particulars.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion by defendants 20th and SEVENTH ASSOCIATES, L.L.C., RELATED MANAGEMENT COMPANY, L.P. And ALLIANCE ELEVATOR COMPANY d/b/a UNITEC VER-TECH ELEVATOR COMPANY s/h/a ALLIANCE ELEVATOR COMPANY d/b/a UNITEC ELEVATOR (hereinafter "Defendants") to dismiss the claims for injuries alleged in plaintiff's supplemental Bill of Particulars or in the alternative precluding plaintiff from offering any evidence at the time of trial of this action as to the new injuries alleged, or in the alternative to vacate plaintiff's Note of Issue, order discovery on these new injuries alleged and staying the trial of this matter until discovery is complete, is granted solely to the extent of ordering that plaintiff appear for an additional deposition and IME regarding the injuries and disabilities alleged in the Supplemental Bill of Particulars pertaining to plaintiff's left leg, the remainder of the motion is denied.

Plaintiff brings this action to recover against the defendants for personal injuries sustained when Defendants' elevator malfunctioned. On September 25, 2013 Plaintiff served the defendants with a Bill of Particulars alleging injuries sustained to his leg and post-traumatic stress disorder. On November 3, 2014 Plaintiff was deposed by the defendants and was asked about the injury to his legs as well as his emotional and psychological condition. At his deposition plaintiff gave testimony regarding the complaints, injuries and disabilities to his right and left leg, and his psychological injuries. (See Plaintiff's deposition Pages 75-91). Defendants later conducted an orthopedic IME of plaintiff's right leg and left knee, and a psychiatric IME.

On November 15, 2017 plaintiff served defendants with a Supplemental Bill of Particulars amplifying the disabilities and injuries to plaintiff's left leg, as well as further amplifying his emotional and psychological complaints(in accordance with plaintiff's testimony at his deposition). Plaintiff also served the defendants with a copy of the expert reports of Drs. Moustafa Shafey, M.D. (regarding his psychological condition) and Dr. Leonard Harrison (regarding the condition of his left leg).

Defendants allege that this Supplemental Bill of Particulars alleges new injuries and moves for an order striking the Supplemental Bill of Particulars, or precluding plaintiff from offering evidence of these new injuries at trial, or vacating the Note of Issue and ordering plaintiff to provide additional discovery in the nature of further IME's and EBT's regarding these injuries. Plaintiff opposes the motion on the grounds that the Supplemental Bill of Particulars does not allege new injuries but merely amplifies injuries detailed in the original Bill of Particulars and about which plaintiff testified at length in his deposition of November 3, 2014.

Pursuant to CPLR§ 3043(b), a plaintiff in a personal injury action may serve a supplemental bill of particulars containing continuing special damages and disabilities without leave of court at any time, but not less than 30 days before trial, if it alleges no new cause of action or claims no new injury(*Shahid v. New York City Health & Hospitals Corporation*, 47 A.D.3d 798, 850 N.Y.S.2d 521 [2nd. Dept. 2008]). In the absence of any legitimate claim of prejudice or surprise a plaintiff should be allowed to supplement a bill of particulars in a personal injury action (*Spiegel v. Gingrich*, 74 A.D.3d 425, 905 N.Y.S.2d 141 [1st. Dept. 2010]).

Plaintiff alleged, and detailed, in his original bill of particulars injury to leg (without specifying which one), and post traumatic stress disorder. Plaintiff was deposed by defendants in November 2014 and questioned extensively about the disabilities and injuries to his legs, and his psychological complaints. Defendants performed an orthopedic examination of his legs and a psychiatric examination. Plaintiff served the defendants with expert witness reports in November 2017 and properly supplemented his bill of particulars to elaborate on his injuries and psychological condition by setting forth the extent of his continuing disabilities as they became more apparent over time (see *Khorosova v. Hampton Bays Union Free School District*, 151 A.D.3d 953, 54 N.Y.S.3d 164 [2nd. Dept. 2017]; *Villalona v. Bronx-Lebanon Hospital Center*, 261 A.D.2d 185, 690 N.Y.S.2d 31 [1st. Dept. 1999]).

Given that defendants had prior knowledge of plaintiff's complaints and disabilities to his legs and his psychological condition from the first bill of particulars, and from his deposition testimony, defendants cannot allege prejudice or surprise or that the disabilities alleged are new injuries (see *Khosrova v. Hampton Bays Union*

Free School district; Spiegel v. Gingrich; Shahid v. New York City Health & Hospitals Corporation, Supra).

Accordingly, the motion to strike the Supplemental Bill of particulars or preclude evidence of the injuries alleged in the Supplemental Bill of Particulars is denied.

Uniform Rule 202.21(e)(1) provides the vehicle for vacating a note of issue and striking a case from the trial calendar. It states that the motion must be made within twenty (20) days of service of the note and certificate of readiness. (See NY Practice § 31:12). A party which seeks to vacate the note of issue after the 20 day time limit must seek court leave upon a showing of good cause.

A note of issue and certificate of readiness will be vacated where there is still extensive discovery to be completed or where the certificate of readiness erroneously states that all discovery is complete (see *Carte v. Segall*, 134 A.D. 2d 396, 520 N.Y.S. 2d 943 [2nd. Dept. 1987] note of issue vacated where extensive discovery yet to be completed); *Ortiz v. Arias*, 285 A.D. 2d 390, 727 N.Y.S. 2d 879[1st. Dept. 2001], vacating note of issue that contained erroneous facts including incorrect statement that discovery had been completed or waived); *Nielsen v. New York State Dormitory Authority*, 84 A.D. 3d 519, 923 N.Y.S. 2d 66 [1st. Dept. 2011], a note of issue should be vacated where it is based upon a certificate of readiness that incorrectly states that all discovery has been completed).

However, where the discovery remaining is not extensive the court may deny the motion to vacate a note of issue and allow the case to remain on the trial calendar, while Permitting defendant a reasonable period of time within which to conclude discovery(see *Mac Asphalt contracting Co., Inc., v. CMI Corp.*, 46 A.D.2d 888, 361 N.Y.S.2d 393 [2nd. Dept. 1974]; the court may exercise its discretion and decline to vacate a note of issue where few discovery items remain outstanding, and the court directs the parties to complete discovery by a date certain (see *Rampersant v. Nationwide Mut. Fire Ins. Co.*, 71 A.D.3d 972, 898 N.Y.S.2d 567 [2nd. Dept. 2010]; *Torres v. New York City Transit Authority*, 192 A.D.2d 400, 596 N.Y.S.2d 66 [1st. Dept. 1993]).

The discovery remaining in this action is not extensive. Defendants may conduct an IME of plaintiff-limited to the disabilities of the left leg as alleged in the Supplemental Bill of Particulars- and a further deposition of plaintiff-limited to questions regarding the disabilities of the left leg as alleged in the Supplemental Bill of Particulars. Plaintiff has provided defendants with authorizations to obtain additional records from his medical providers. Defendants would not be prejudiced by having plaintiff appear for a further limited IME and limited deposition, while allowing the case to remain on the trial calendar.

Accordingly, it is hereby ORDERED that defendants motion to strike plaintiff's Supplemental Bill of Particulars dated November 15, 2017 or in the alternative to preclude plaintiff from presenting evidence, at the time of trial, of the injuries alleged in the supplemental bill of particulars, or in the alternative to vacate the note of issue and order discovery on the injuries alleged in the Supplemental Bill of Particulars, is granted solely to the extent of ordering that plaintiff appear for an additional deposition and IME limited to the injuries alleged in the Supplemental Bill of Particulars pertaining to plaintiff's left leg, and it is further


ORDERED that the remainder of the motion is denied, and it is further

ORDERED that defendants are permitted to obtain post-note of issue discovery in the nature of a further IME and deposition limited to the injuries and disabilities alleged in the Supplemental Bill of Particulars pertaining to plaintiff's left leg, and it is further

ORDERED that plaintiff appear for, and defendant arrange for the further IME and deposition as stated in this order within 45 days from the date of service on defendant of a copy of this order with notice of entry.

**ENTER: MANUEL J. MENDEZ
J.S.C.**

Dated: February 16, 2018



**Manuel J. Mendez
J.S.C.**

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE