

Barnwell v Kazmi

2019 NY Slip Op 30455(U)

February 22, 2019

Supreme Court, New York County

Docket Number: 162525/2014

Judge: Deborah A. Kaplan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART IAS MOTION 40

Justice

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MICHAEL BARNWELL,

Plaintiff,

- v -

FAQIR KAZMI, BLESSED CAB CORP, HENRY PACK

Defendants.

INDEX NO. 162525/2014

MOTION DATE 10/16/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR

In this action to recover for personal injuries related to an automobile accident, defendants move, by order to show cause, for an order (1) striking the note of issue; (2) precluding plaintiff from offering at trial any evidence in support of injuries and damages newly alleged in the supplemental bill of particulars dated October 1, 2018; (3) allowing defendants additional time to conduct necessary discovery arising under the supplemental bill of particulars; and (4) staying the trial of this matter until the completion of the necessary additional discovery. Plaintiff opposes.

Plaintiff's verified bill of particulars, dated April 7, 2015, alleged, as is relevant here, that plaintiff sustained "a. Surgical Fixation of the Right Hip Fracture, by Eric J. Strauss, M.D. from NYU Hospital for Joint Diseases, dated June 8, 2014, confirmed with the following diagnosis: right intertrochanteric hip fracture; b. Progress notes, by Eric J. Strauss, M.D., from NYU Hospital for Joint Diseases, dated from June 16, 2014 to September 12, 2014, confirmed with the following diagnosis: CMN fixation of a right IT fracture; c. Emergency Record, by Nirmal C.

Tejwani, from Bellevue Hospital Center, dated June 7, 2014 to June 9, 2014, confirmed with the following diagnosis: confirmed proximal femur fracture.”

The note of issue was filed in January 2017, after which early settlement conferences were held in May 2017 and a judicial mediation was held in June 2018, at which time the case was scheduled for trial on October 24, 2018.

On October 1, 2018, plaintiff served a supplemental bill of particulars. The supplemental bill of particulars alleges that plaintiff:

“sustained the following injuries, amongst others: Right hip: Right hip comminuted mildly displaced right femoral intertrochanteric fracture with disruption in at least two fragments of the posterior medial cortex and with increased varus angulation. This necessitated placement of intramedullary rod with proximal and distal interlocking screws; pain, stiffness and weakness in right hip; locking numbness and tingling; pain radiating down leg; pain on motion and limitation of motion of the right hip; possible future post-traumatic arthritis; possible total hip replacement surgery; 1 cm shortening of right lower extremity; mild limp; difficulty ascending/descending stairs; difficulty crouching and kneeling; difficulty with prolonged walking; difficulty with prolonged standing; right forearm 5 cm laceration; right humerus abrasion with 2 cm laceration near the elbow; left humerus abrasion with 1 cm laceration near the elbow.”

The supplemental bill of particulars further estimates a future medical expense of “approximately \$35,000” for a “possible total hip replacement.”

Following the service of the supplemental bill of particulars, the instant motion ensued, and the trial date previously scheduled for October 24, 2018 was adjourned to February 27, 2019.¹

Pursuant to CPLR 3043, “[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

¹ The court notes that this motion is returnable in Part 40 before the Honorable Judith N. McMahon. Since Justice McMahon no longer sits in this county, the motion has been reassigned to this court (Kaplan, J.) for decision.

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 special damages and disabilities.” It has been held that a supplemental bill of particulars may be served without court leave where it concerns “the continuing consequences of [a] previously identified injury” (*Anderson v Ariel Servs., Inc.*, 93 AD3d 525 [1st Dept 2012] [internal quotation marks and citation omitted]) or “merely elaborate[s] upon the previously asserted theories of negligence” (*Rodriguez v Pelham Plumbing & Heating Corp.*, 20 AD3d 314 [1st Dept 2005]). On the other hand, what purports to be a supplemental bill of particulars should be considered an amended bill of particulars, which cannot be served without court leave, where it “allege[s] new injuries and additional economic damages” (*Wolfer v 184 Fifth Ave. LLC*, 27 AD3d 280 [1st Dept 2006]; see *Marrone v Klein*, 33 AD3d 546 [1st Dept 2006]). A supplemental bill of particulars may only be used to “updat[e] allegations of special damages previously asserted,” not to “add[] a wholly new category of special damages” (*Pearce v Booth Mem. Hosp.*, 152 AD2d 553 [2d Dept 1989]).

Initially, the supplemental bill of particulars was served less than 30 days before the scheduled trial date and was therefore not proper without court leave. Nevertheless, the supplemental bill of particulars served in October 2018, for the most part, merely concerns the continuing consequences, and elaborates upon, the injuries previously identified in the original bill of particulars. Indeed, in opposition to the motion, plaintiff submits a copy of the medical reports of the two doctors who performed an independent medical examination (IME) of plaintiff. In her report, Dr. Lisa Nason, who performed an orthopedic examination of plaintiff in December 2015, recounts the history of the accident as follows:

“The claimant alleges that he injured his right hip as he was a bicyclist struck by a motor vehicle on June 7, 2014. The claimant denies the loss of consciousness at time of impact. He sustained a right arm laceration. The claimant reportedly presented by ambulance to Bellevue Hospital Emergency Room where he was evaluated and admitted for 3 days. X-rays were taken. The claimant allegedly sustained a right hip and right femur fracture. Following the accident, the claimant was clinically evaluated. He reports that he was receiving physical therapy treatments which have been discontinued. The claimant reportedly underwent ORIF of right femur fracture on June 8, 2014 due to the alleged accident.”

Dr. Ronald Grelsamer also performed an orthopedic IME of plaintiff. Dr.

Grelsamer noted that, as a result of the hip fracture, plaintiff was confined to bed for 30 days for the first 60 days immediately following the accident. Dr. Grelsamer concluded that plaintiff “sustained a right hip fracture.”

With the notable exception of the possible hip replacement surgery, defendants cannot claim surprise or prejudice with respect to the majority of the allegations in the supplemental bill of particulars, since the histories and conclusions recounted by Drs. Nason and Grelsamer describe all of the injuries claimed. However, nothing in the papers before this court indicates that defendants were previously apprised, in a timely fashion, that plaintiff would be seeking \$35,000 in damages for a possible future hip replacement surgery. The first time this allegation appears to have been made is in plaintiff’s CPLR 3101(d) exchange, dated September 28, 2018, which he attaches to his opposition. In the exchange, Dr. Mark S. McMahon, whom plaintiff seeks to call as an expert at trial, asserts, apparently for the first time in this case, that, “[a]s a result of the injury [plaintiff] sustained and the surgery he underwent, the patient is at increased risk of developing post-traumatic arthritis of the right hip, as well as at increased risk of requiring a total hip replacement (cost - \$35,000).” Dr. McMahon does not state in his report when this hip replacement surgery would need to take place, or how likely it is that plaintiff will need one.

In this court's view, the alleged need for a hip replacement surgery is a new category of damages that can only be asserted in an amendment of the bill of particulars rather than as a supplement (see *Pearce v Booth Mem. Hosp.*, 152 AD2d 553). In opposition, plaintiff has offered no reason why he was unable to serve an amended bill of particulars at an earlier time. There is nothing to indicate that, before Dr. McMahon offered his opinion, in September 2018, that plaintiff is at an unspecified degree of risk for a hip replacement surgery, the necessity for this surgery was ever previously mentioned by his treating physicians or explored during depositions or at the IMEs.

In the absence of this information, there is no basis upon which this court may exercise its discretion in order to permit an amendment to the bill of particulars at this late stage. As has been previously noted, the parties are scheduled to proceed with trial on February 27, 2019, which is mere days from now.

Accordingly, it is hereby:

ORDERED that the motion is granted to the extent that plaintiff is precluded from offering at trial any evidence in support of his claim that he will require \$35,000 in damages for a future hip replacement surgery; and it is further

ORDERED that the motion is in all other respects denied.

This constitutes the decision and order of the court.

2/22/2019
DATE



DEBORAH A. KAPLAN Hon. Deborah A. Kaplan

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

REFERENCE

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

J.S.C.