SHORT FORM ORDER

INDEX No. 621336/2016
CAL. No. 202000066OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 6/30/20
ADJ. DATE 7/2/20
Mot. Seq. # 001 MotD

FELICIA CLARK,

Plaintiff,

- against -

CLPF-BROADWAY KNOLLS, L.P., BRIGHTVIEW LANDSCAPES, LLC, INDIVIDUALLY and as d/b/a BRIGHTVIEW and BRICKMAN FACILITY SOLUTIONS,

Defendants.

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Upon the following papers read on this motion to dismiss : Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated May 27, 2020 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, by June 23, 2020 ; Replying Affidavits and supporting papers by defendants, dated June 30, 2020; Other ___; it is

ORDERED that the motion by defendants Brightview Landscapes, LLC and Brightview Enterprise Solutions, LLC for, inter alia, an order dismissing the complaint is decided as follows.

Plaintiff Felicia Clark commenced this action to recover damages for injuries she allegedly sustained as a result of a slip and fall on snow and ice that occurred in the parking lot of the premises

owned by defendant CLPF-Broadway Knolls, L. P. ("CLPF"), and known as Fairway Broadway Knolls, located at 2200 Dolphin Lane in the Town of Brookhaven on January 24, 2016. Defendants Brightview Landscapes, LLC and Brightview Enterprise Solutions, LLC, f/k/a, i/s/h/a Brickman Facility Solutions, LLC (hereinafter collectively known as "Brightview") were hired by CLPF to clear snow from the premises. By her complaint, plaintiff alleges that as she was traversing the subject parking lot she fell on compacted snow and ice.

Brightview now moves, pursuant to CPLR 3126, to dismiss plaintiff's complaint on the basis that plaintiff failed to submit to a further deposition and independent medical examination ("IME") following service of a supplemental verified bill of particulars dated January 9, 2020, containing new theories of liability, injuries and medical treatment that were not contained in the original bill of particulars. In particular, Brightview asserts that plaintiff now alleges it created the dangerous condition that resulted in her fall, that it directed her to park in the area where the accident occurred, and that Brightview had actual notice of the alleged dangerous condition prior to her fall. In addition, Brightview contends that plaintiff's allegations of epidural steroid injections to her lumbar spine, traumatic injury to her left shoulder necessitating cortisone injections with left shoulder impingement syndrome, right shoulder impingement syndrome, tingling and numbness of the left and right hands, continued low back pain radiating into the right groin and knee, and marked decrease in cognition and focusing are newly alleged injuries, and therefore, it is entitled to conduct an IME. Alternatively, Brightview seeks an order, pursuant to CPLR 3126, precluding plaintiff from presenting evidence at the time of trial as to any of the new claims of liability and injury set forth in the supplemental bill of particulars, or, pursuant to CPLR 3124, compelling plaintiff to submit to a further deposition and IME examination.

Plaintiff opposes the motion on the grounds that it is procedurally defective, that Brightview failed to make the requisite showing of unusual or unanticipated circumstances arising subsequent to the filing of the note of issue to warrant post-note of issue discovery, that the supplemental bill of particulars at issue does not contain any new injuries or theories of liability, that Brightview failed to demonstrate it will be prejudiced if it is unable to perform a further deposition and IME. Specifically, plaintiff contends that the note of issue was filed on January 10, 2020, and Brightview, if it is alleging plaintiff failed to respond to its subsequent discovery demand, was required to move to vacate the note of issue, and since it failed to do so, the motion is untimely. Plaintiff further asserts that she has not undergone any new epidural injections, and that Brightview was aware of the allegation of actual and constructive notice, since it questioned her extensively on the issue at her deposition.

CPLR 3126 states, in pertinent part, that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may order that the issues to which the information is relevant shall be deemed resolved for purposes of the action...or prohibit the disobedient party from supporting or opposing designated claims or defenses...from producing in evidence designated things or items of testimony...or from using certain witnesses" (*see* ***Wright v Mount Vernon Hosp.***, 88 AD3d 873, 931 NYS2d 237 [2d Dept 2011]; ***Dolny v Dolny***, 32 AD3d 818, 820 NYS2d 520 [2d Dept 2006]). The nature and degree of the penalty to be imposed pursuant to CPLR 3126 generally is a matter left to the trial court's discretion (*see* ***Roug Kang Wang v Chien-Tsang Lin***, 94 AD3d 850, 941 NYS2d 717 [2d Dept 2012]; ***Isaacs v Isaacs***, 71 AD3d 951, 897 NYS2d 225 [2d Dept 2010]). The willful and contumacious nature of a party's conduct can be

inferred from either the repeated failure to comply with court-ordered discovery over an extended period of time (*see* ***Malone v Sycamore Realty Corp.***, 87 AD3d 1113, 930 NYS2d 460 [2d Dept 2011]; ***Friedman, Harfenist, Langer & Kraut v Rosenthal***, 79 AD3d 798, 914 NYS2d 196 [2d Dept 2010]). Thus, the drastic remedy of dismissing an action pursuant to CPLR 3126 should only be imposed when there is noncompliance that is willful, contumacious, deliberate or in bad faith (*see* ***Kihl v Pfeffer***, 94 NY2d 118, 700 NYS2d 87 [1999]; ***Alto v Gilman Mgmt. Corp.***, 7 AD3d 650, 776 NYS2d 823 [2d Dept 2004]; ***Waterman v County of Westchester***, 274 AD2d 513, 712 NYS2d 373 [2d Dept 2000]; ***Watson v Esposito***, ***Magrabi v City of New York***, 211 AD2d 422, 647 NYS2d 233 [2d Dept 1996]).

Here, Brightview failed to demonstrate that plaintiff's failure to submit to a further deposition or IME following the service of the January 10, 2020 supplemental bill of particulars was done in bad faith or was willful and contuamcious, and leaves it without a means to establish a material and necessary element of its case (*see* ***Pecile v Titan Capital Group, LLC***, 113 AD3d 526, 979 NYS2d 303 [1st Dept 2014]; ***Buxbaum v Castro***, 82 AD3d 925, 919 NYS2d 175 [2d Dept 2011]; ***Peluso v Red Rose Rest., Inc.***, 78 AD3d 802, 910 NYS2d 378 [2d Dept 2010]; *cf.* ***Fritz v Burman***, 107 AD3d 934, 967 NYS2d 761 [2d Dept 2013]). Moreover, once the note of issue has been filed, any further pretrial disclosure is only allowed upon a showing of "unusual or unanticipated circumstances" and "substantial prejudice" (*see* ***Arons v Jutkowitz***, 9 NY3d 393, 411, 850 NYS2d 345 [2007]; ***Jones v Grand Opal Constr. Corp.***, 64 AD3d 543, 883 NYS2d 253 [2d Dept 2009]; ***James v New York City Tr. Auth.***, 294 AD2d 471, 742 NYS2d 855 [2d Dept 2002]). Brightview also failed to move to vacate the note of issue within 20 days after its filing on January 10, 2020 (*see* 22 NYCRR § 202.1 [e]; ***Owen v Lester***, 79 AD3d 992, 915 NYS2d 277 [2d Dept 2010]; ***Singh v 244 W. 39th St. Realty, Inc.***, 65 AD3d 1325, 866 NYS2d 226 [2d Dept 2009]; ***James v New York City Tr. Auth.***, *supra*). Accordingly, the branch of Brightview's motion to dismiss the complaint for failure to submit to a further deposition and IME is denied.

The branch of Brightview's motion to compel plaintiff to submit to a further deposition and IME, however, is granted. A bill of particulars is not itself a pleading (*see* ***Linker v County of Westchester***, 214 AD2d 652, 625 NYS2d 289 [2d Dept 1995]) and, as a rule, may not be employed to supply allegations that are missing from the complaint (*see* ***Sullivan v St. Francis Hosp.***, 45 AD3d 833, 846 NYS2d 228 [2d Dept 2007]; ***Melino v Tougher Heating & Plumbing Co.***, 23 AD2d 616, 256 NYS2d 885 [2d Dept 1965]). Nor may it be used to add or substitute a new theory or cause of action or defense (*see* ***Willinger v Greenburgh***, 169 AD2d 715, 564 NYS2d 466 [2d Dept 1991]). "[T]he purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial" (***Jones v LeFrance Leasing Ltd. Partnership***, 61 AD3d 824, 825, 877 NYS2d 424 [2d Dept 2009]; *see* ***Jurado v Kalache***, 93 AD3d 759, 940 NYS2d 300 [2d Dept 2012]). A party may serve a supplemental or amended bill or particulars with respect to claims of continuing special damages and disabilities, provided that no new causes of action are alleged or new injuries claimed (*see* CPLR 3043; ***Erickson v Cross Ready Mix, Inc.***, 98 AD3d 717, 950 NYS2d 717 [2d Dept 2012]; ***Alami v 215 E6th St., L.P.***, 88 AD3d 924, 931 NYS2d 647 [2d Dept 2011]). Moreover, the court has broad discretion to grant or deny any further or different bills of particulars (*see* CPLR 3042 [b]; ***Grande v Peteroy***, 39 AD3d 500, 833 NYS2d 615 [2d Dept 2007]), and, as long as there is no prejudice demonstrated, a supplemental bill of particulars may be permitted at the discretion of the court (*see* CPLR 3025 [c]; ***Nociforo v Pena***, 42AD3d 514, 840 NYS2d 396 [2d Dept 2007]). The opposing party has the burden of demonstrating prejudice (*see* ***Danne v Otis Elevator Corp.***, 276 AD2d 581, 714 NYS2d 316 [2d Dept 2000]).

Here, plaintiff served Brightview with a supplemental bill of particulars one day before filing the note of issue, and plaintiff, in her original bill of particulars, alleges Brightview had "both actual and constructive notice of the dangerous and defective condition by reason of the fact that Brightview actually created the defective and dangerous condition. Moreover, it is claimed that [Brightview] was actually at the premises prior to the accident and after the defective condition existed providing [it] both actual and constructive notice." "Evidence of injuries or conditions not enumerated by the plaintiff in the bill of particulars will not be permitted...[except] where the record reveals that defendant should have known about such injury or condition" (***Twiddy v Std. Marine Transp. Servs.***, 162 AD2d 264, 264, 556 NYS2d 622 [1st Dept 1990]). Based upon the record before the Court, it is clear that the inclusion of the allegations that "Brightview actually created the condition, directed plaintiff to park in the area where the accident occurred and that there were communications with Brightview providing it with alleged notice of the alleged dangerous condition" are not new theories of liability or that Brightview will be prejudiced or surprised by their inclusion, since the allegations arise out of the same set of facts as set forth in the original bill of particulars (*see* CPLR 3043 [b]; ***Tate v Colabello***, 58 NY2d 85, 459 NYS2d 422 [1983]; ***Koenig v Action Target, Inc.***, 76 AD3d 997, 907 NYS2d 692 [2d Dept 2010]; ***Fortunato v Personal Woman's Care, P.C.***, 31 AD3d 370, 817 NYS2d 649 [2d Dept 2006]; ***Balsamo v City of New York***, 287 AD2d 22, 733 NYS2d 431 [2d Dept 2001]). Thus, plaintiff merely amplified her negligence claims, thereby, specifically identifying the facts that support her cause of action, and Brightview was put on sufficient notice that such allegations would be asserted (*see* ***Simmons v City of New York***, 165 AD3d 725, 85 NYS3d 462 [2d Dept 2018]; ***Klimowicz v Powell Cove Assoc., LLC***, 111 AD3d 605, [2d Dept 2013]).

However, the original bill of particulars alleged that plaintiff sustained, among other things, a traumatic injury of the lumbar spine and the cervical spine, cerebral concussion, traumatic injuries to the upper extremities with bilateral neuropathies of the elbow and left wrist consistent with carpal tunnel syndrome, and traumatic injury to the right hip as well as right leg swelling in the knee area. Brightview has shown that the inclusion of traumatic injury of the left shoulder associated with cortisone injection, left shoulder impingement syndrome, right shoulder impingement syndrome, and paresthesias of the second to third bilateral fingers are not merely sequela of the plaintiff's original injuries, but are new injuries, and, therefore, it cannot be said that plaintiff was merely updating "claims of continuing special damages and disabilities" previously asserted, which can be asserted, as of right, pursuant to CPLR 3043 [b] (*see* ***Marrone v Klein***, 33 AD3d 546, 823 NYS2d 371 [1st Dept 2006]; ***Pines v Muss Dev. Co.***, 172 AD2d 600, 568 NYS2d 422 [2d Dept 1991]). Rather, plaintiff is adding a wholly new category of special damages and disabilities, which had not been asserted in the complaint, and thus, such attempt was improper (*see* ***Castleton v Broadway Mall Props., Inc.***, 41 AD3d 410, 837 NYS2d 732 [2d Dept 2007]; *cf.* ***Witherspoon v Surat Realty***, 82 AD3d 1087, 918 NYS2d 889 [2d Dept 2011]). Consequently, Brightview is entitled to additional pretrial proceedings to prevent substantial prejudice to its case (*see* 22 NYCRR 202.21 (d); ***Audiovox Corp. v Benyamini***, *supra*; *cf.* ***Blinds To Go (US), Inc. v Times Plaza Dev., L.P.***, 111 AD3d 775, 975 NYS2d 355 [2d Dept 2013]; ***Fortunato v Personal Woman's Care, P.C.***, 31 AD3d 370, 817 NYS2d 649 [2d Dept 2006]).

Plaintiff, in opposition, has failed to demonstrate that the supplemental bill of particulars served on January 10, 2020 did not contain new injuries or allegations that were not in the original bill of particulars. In addition, plaintiff's supplemental notice of exchange of medical records and

authorizations did not occur until January 8, 2020, approximately 2 days before plaintiff filed the note of issue, approximately 2 years after the original exchange of medical records occurred, and approximately 2 years after plaintiff was deposed by Brightview. Accordingly, Brightview's motion is granted to the extent that the Court directs plaintiff to appear for a further examination before trial and a further independent medical examination to be scheduled by defendant within 60 days of the date of this order, and it is otherwise denied. The Court cautions all parties to cooperate regarding the scheduling of the further examination before trial and independent medical examination in this action.

Dated: January 21, 2021

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION