

Keller v Rippowam Cisqua Sch.
2021 NY Slip Op 33684(U)
December 3, 2021
Supreme Court, Westchester County
Docket Number: Index No. 66626/2016
Judge: Joan B. Lefkowitz
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – COMPLIANCE PART

-----X
ROBERT KELLER,

Plaintiff,

DECISION & ORDER

-against-

Index No. 66626/2016
Motion Seq. No. 4

RIPPOWAM CISQUA SCHOOL and CONSIGLI
CONSTRUCTION CO., INC.,

Defendants.

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RIPPOWAM CISQUA SCHOOL and CONSIGLI
CONSTRUCTION CO., INC.,

Third-Party Plaintiffs,

-against-

KANE CONTRACTING INC.,

Third-Party Defendant.

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LEFKOWITZ, J.

The following papers were read on the motion by defendants/third-party plaintiffs, Rippowam Cisqua School and Consigli Construction Co., Inc. for an order pursuant to 22 NYCRR 202.21(e), vacating the note of issue and striking the case from the trial calendar on the grounds that plaintiff served a fourth supplemental bill of particulars alleging new injuries and supplemental discovery responses, compelling plaintiff to provide additional discovery including appearing for a further deposition and a further physical examination, and for such other and further relief as this Court deems just and proper.

- Notice of Motion - Affirmation in Support - Affirmation of Good Faith - Exhibits
- Affirmation in Opposition
- Affirmation in Support
- Affirmation in Reply

Upon the foregoing papers, this motion is determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on August 12, 2016 when he fell from a ladder while working at a construction project on premises owned by defendant Rippowam Cisqua School (hereinafter Rippowam).¹ It is alleged that defendant Consigli Construction Co., Inc. (hereinafter Consigli) was the general contractor. Plaintiff alleges violations of Labor Law 200, 240(1), and 241(6) (Defendants' Exhibit A). Defendants commenced a third party action against Kane Contracting Inc. Plaintiff subsequently filed an amended complaint asserting claims against Kane Contracting Inc. Plaintiff's motion for partial summary judgment against defendants Rippowam and Consigli (hereinafter collectively referred to as defendants) on the Labor Law 240(1) and 241(6) claims was granted (Smith, J., February 11, 2020) (NYSCEF doc #91).

A trial readiness order was issued on June 4, 2019. A note of issue was filed on June 19, 2019 (Defendants' Exhibits I, J). The case has been referred to the Trial Ready Part, but a trial date has not yet been issued. Plaintiff served a third supplemental bill of particulars, dated September 30, 2021, as to third-party defendant Kane Contracting, Inc. Plaintiff served a fourth supplemental bill of particulars, dated September 30, 2021, as to defendants Rippowam and Consigli.

The alleged injuries in plaintiff's initial bill of particulars include injections to the right knee and right knee surgeries (Defendants' Exhibit H). Defendants now seek an order vacating the note of issue, arguing the supplemental bills of particulars allege plaintiff underwent two additional surgeries after the note of issue was filed. In plaintiff's third and fourth supplemental bills of particulars, dated September 30, 2021, plaintiff alleges he underwent arthroscopic surgery to the right knee on October 2, 2020 and a right total knee arthroplasty on March 23, 2021 (Defendants' Exhibit H, p.58-59). Plaintiff alleges that following his most recent surgery he was advised that he can no longer work in the construction trade, and he returned to work in May 2021 on a part time basis as a driving instructor (Defendants' Exhibit H, p. 59). Plaintiff alleges loss of earnings in the amount \$1,000 per week. Plaintiff alleges special damages related to medical expenses and loss of benefits (Defendants' Exhibit H, p. 60-61). Defendants argue that they will be severely prejudiced if they are forced to proceed to trial without discovery related to the new allegations, including additional medical records, a further deposition, and a further physical examination. Defendants served a supplemental demand, dated October 13, 2021, seeking additional authorizations and records (Affirmation in Reply, p. 3). Third party defendant Kane Contracting Inc. submits an affirmation in support of the motion.

Plaintiff opposes that portion of the motion which seeks to vacate the note of issue and strike this case from the trial calendar. However, plaintiff does not object to producing plaintiff for a further deposition and a further physical examination.

Once the note of issue has been filed and discovery presumably completed, the applicable standard for allowing additional discovery is governed by 22 NYCRR 202.21(d)(e). If more than twenty days have elapsed since service of the note of issue and a moving party demonstrates unusual or unanticipated circumstances developed subsequent to the filing of the note of issue

¹ Plaintiff was employed by nonparty Specialty Trades Contracting as a foreman (Defendants' Exhibit H, p. 6).

and certificate of readiness which require additional discovery to prevent substantial prejudice, the Court upon motion may grant permission to conduct further discovery (Uniform Rules for Trial Cts [22 NYCRR] §202.21[d]).

Here, defendants demonstrate unusual or unanticipated circumstances arose after the note of issue was filed, warranting vacatur of the note of issue and further discovery to prevent substantial prejudice. On September 30, 2021, plaintiff's counsel served third and fourth supplemental bills of particulars, alleging that since the note of issue was filed plaintiff underwent two additional surgeries. Plaintiff also alleges loss of earnings, and special damages related to medical expenses and lost benefits. The third and fourth supplemental bills of particulars were served more than two years after the note of issue was filed. It would be prejudicial to defendants to permit this case to proceed to trial without allowing defendants the opportunity to obtain additional discovery related to the allegations asserted for the first time in the third and fourth supplemental bills of particulars. The note of issue shall be vacated for the limited purpose of allowing defendants the opportunity to obtain further discovery related to the new allegations in plaintiff's third and fourth supplemental bills of particulars, including the October 2, 2020 and March 23, 2021 surgeries, the newly alleged treatment, loss of earnings, loss of benefits, and special damages.

In view of the foregoing, it is

ORDERED that defendants' motion to vacate the note of issue and strike the case from the trial calendar is granted; and it is further

ORDERED that the branch of defendants' motion seeking to compel further discovery is granted to the extent that plaintiff is directed to provide on or before December 17, 2021 all updated authorizations for plaintiff's medical, union, and employment records; and it is further

ORDERED that on or before December 17, 2021, plaintiff shall provide proof of damages as to plaintiff's alleged loss of earnings and special damages; and it is further

ORDERED that on or before December 17, 2021, defendants shall designate in writing a physician to conduct an additional physical examination of plaintiff; and it is further

ORDERED that plaintiff shall be produced for a further deposition to be completed on or before January 14, 2022; and it is further

ORDERED that plaintiff shall be produced for a further physical examination on or before January 28, 2022; and it is further

ORDERED that all physical examination reports shall be exchanged by February 18, 2022; and it is further

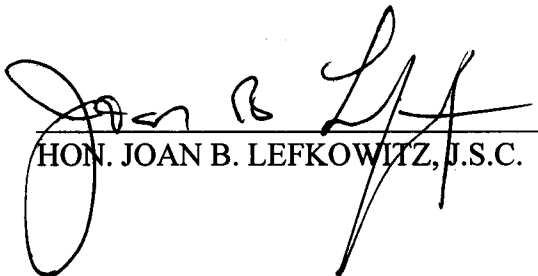
ORDERED that all additional discovery shall be limited to plaintiff's alleged injuries, treatment and damages from the date of his last deposition session to present; and it is further

ORDERED that all parties are directed to appear for a final compliance conference. The Court anticipates that all discovery will have been completed by the next conference date and a new trial readiness order will be issued at that time. The parties will be contacted by the Court with further instruction concerning this appearance; and it is further

ORDERED that defendants shall serve a copy of this Order with notice of entry upon all parties within seven (7) days of entry. Defendants shall file proof of service on the NYSCEF website within five (5) days of service.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 3, 2021



HON. JOAN B. LEFKOWITZ, J.S.C.

TO: All Counsel via NYSCEF

cc: Compliance Part Clerk