

Dos Santos v Linden TB LLC

2023 NY Slip Op 34743(U)

October 13, 2023

Supreme Court, Kings County

Docket Number: Index No. 523121/2019

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, NY 11201, on the ___ day of _____ 2023.

OCT 13 2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

-----X
TIAGO DOS SANTOS,

Petitioner,
-against-

**DECISION
and
ORDER**

LINDEN TB LLC, ELEVATION HOLDINGS, LLC,
DAWNY CONSTRUCTION LTD and BROOKLAND
CAPITAL LLC,

Index No.: 523121/2019
Mot. Seq. 5

Respondent.

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The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF #
Defendants Linden TB LLC and Dawny Construction LTD Cross-Motion to Dismiss, dated February 23, 2022; Attorney Affirmation of Lisa M. Rolle, Esq., sworn to on February 23, 2022; Exhibits A-K.....	49-61
Plaintiff's Attorney Affirmation of Carmine J. Goncalves, Esq. in Opposition, sworn to on March 1, 2022; Exhibits D-G; Copy of Justice Knipel's Order referring Motion Sequence #5 to Part 99, dated March 2, 2022; Plaintiff's Attorney Affirmation of Carmine J. Goncalves, Esq. in Opposition, sworn to on March 31, 2022; Exhibits A-E...	69-87
Defendants' Attorney Affirmation of Lisa M. Rolle, Esq. in Reply, sworn to on April 5, 2022.....	88

Plaintiff commenced this Law Labor action by filing a summons and complaint on December 23, 2019. Plaintiff alleges he was injured on January 30, 2018 after an accident at a construction site. Issue was joined by defendants Linden TB LLC and Dawny Construction LTD by service of an answer on March 3, 2020.

Before the court is defendants Linden TB LLC and Dawny Construction LTD's motion for an order (1) pursuant to CPLR § 2104, compelling the court to honor the stipulation signed on consent by both parties; (2) pursuant to CPLR § 3042(b), striking plaintiff's supplemental verified bill of particulars which alleged new injuries; (3) pursuant to CPLR § 3211(a)(5), to dismiss plaintiff's cause of action as it pertains to all injuries claimed in the plaintiff's bill of particulars as to the back, neck and shoulder because of the May 19, 2020 decision of the Workers' Compensation Board, which amounts to collateral estoppel; and (4) dismissing plaintiff's complaint in its entirety as there are no cognizable injuries for which plaintiff can recover.

To the extent defendants also oppose plaintiff's motion (Motion Sequence #4), pursuant to CPLR § 3124 and CPLR § 3126(2), to preclude defendants from offering evidence, testifying at trial, or submitting an affidavit in response to any dispositive motion, these arguments need not be addressed as they were considered by Justice Knipel and decided on March 2, 2022. (NYSCEF #75).

The branch of defendants' motion, pursuant to CPLR § 2104, compelling the court to honor the stipulation signed on consent by all parties (NYSCEF #27) is moot. That stipulation withdrew Motion Sequence #2, which was marked by the court as withdrawn.

Defendants also move, pursuant to CPLR § 3042(b), to strike plaintiff's supplemental verified bill of particulars (NYSCEF #56). Plaintiff served defendants with what he deemed a "supplemental bill of particulars" on April 26, 2021, but did not file this document with the court. However, it is an amended, not supplemental, bill of particulars as it seeks to add new injuries to plaintiff's left hand which were not alleged in the original bill of particulars. *Fuentes v. City of New York*, 3 A.D.3d 549, 550, 771 N.Y.S.2d 178, 179 (2d Dep't 2004).

"Leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise." *Lorincz v. Castellano*, 208 A.D.3d 573, 574, 172 N.Y.S.3d 735, 737 (2d Dep't 2022). An amended bill of particulars must be served before the note of issue is filed. *Golub v. Sutton*, 281 A.D.2d 589, 590, 723 N.Y.S.2d 59, 60 (2d Dep't 2001). While plaintiff served defendants with the amended bill of particulars on April 26, 2021, plaintiff never filed it with the court and failed to seek leave from the court to do so. A Note of Issue was filed on March 25, 2022 (NYSCEF #78). *Leon v. First Nat. City Bank*, 224 A.D.2d 497, 498, 637 N.Y.S.2d 482, 483 (2d Dep't 1996) ("Since the amended bill of particulars was not served prior to the note of issue and the plaintiffs did not seek leave of court to amend the bill of particulars, the amended bill of particulars was a nullity.") Additionally, plaintiff did not provide any explanation for the delay in alleging the injuries in the second bill of particulars (*Fuentes v. City of New York*, 3 A.D.3d 549, 550, 771 N.Y.S.2d 178, 179 [2d Dep't 2004]) and all the facts which form the basis of the newly alleged injuries were or should have been known to plaintiff when the original bill of particulars were served on July 1, 2020 (*Stewart v. Dunkleman*, 128 A.D.3d 1338, 1340, 8 N.Y.S.3d 515, 517 [4th Dep't 2015]). Accordingly, this branch of defendants' motion is granted, and the second bill of particulars that was served on defendants is stricken.

Defendants also move, pursuant to CPLR § 3211(a)(5), to dismiss plaintiff's causes of action which involve injuries to the plaintiff's back, neck and shoulder due to a decision of the Workers' Compensation Board, dated May 19, 2020. The Workers' Compensation Board decision found "that the claim for injuries to the claimant's neck, back, and left shoulder is not supported by the evidence should be disallowed" (NYSCEF #55). While defendants argue these claims should be precluded in this action based on collateral estoppel, New York Workers' Compensation Law §118-a, effective December 30, 2022, states:

With respect to an action for a workers' compensation claim permissible under this chapter, no finding or decision by the workers' compensation board, judge or other arbiter shall be given collateral estoppel effect in any other action or proceeding arising

out of the same occurrence, other than the determination of the existence of an employer employee relationship.

Accordingly, plaintiff is not collaterally estopped by the Workers' Compensation Board's May 19, 2020 decision. *Pacheco v. P.V.E. Co., LLC*, No. 522742/2020, 2023 WL 6053769, at *2 (N.Y. Sup. Ct. 2023). As these causes of action remain, the defendants' request to dismiss the complaint in its entirety must also be denied.

Based on the foregoing, it is

ORDERED that the branch of defendants' motion to compel the court to honor the stipulation signed on consent by both parties withdrawing Motion Sequence #2 (NYSCEF #27) is **DENIED** as moot as Motion Sequence #2 is marked withdrawn; and it is further

ORDERED that the branch of defendants' motion to strike the plaintiff's described supplemental bill of particulars which the court deemed an amended verified bill of particulars (NYSCEF #56) is **GRANTED**; and it is further

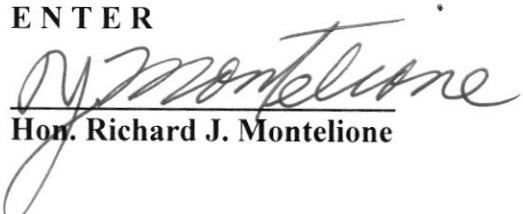
ORDERED that the branch of defendants' motion to dismiss plaintiff's causes of action that involve back, neck, and shoulder injuries pursuant to the May 19, 2020 Workers' Compensation Board decision is **DENIED**; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff's complaint in its entirety is **DENIED**; and it is further

ORDERED that all other requests for relief are **DENIED**.

This constitutes the decision and order of the court.

ENTER


Hon. Richard J. Montelione