UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREGORY MULHOLLAND,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

ORDER DENYING MOTION TO VACATE JUDGMENT

09 Civ. 6329 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Once again, defendant, the City of New York (the "City") moves to vacate a jury verdict and judgment in favor of plaintiff, Gregory Mulholland, and for a new trial. This time, the City's pretext is "newly-found" evidence under Federal Rules of Civil Procedure 60(b)(2) and (6). The City's motion has no more basis than its earlier motion and, for the reasons discussed below, I deny the City's motion.

Background

Mulholland was a deckhand who worked for the City on ferry boats transporting passengers and vehicles between Riker's Island (the City's jail) and Hart Island (the City's burial area). On July 2, 2009, Mulholland was working on the Rosemary Miller, a ferry chartered by the City while the City's own ferry was out of service. The Rosemary Miller tied-up to the Hart Island ferry landing and Mulholland jumped onshore to operate one of the two chain-pulls that leveled the bridge of the pier to the deck of the ferry. The chain jammed while Mulholland was pulling it, and Mulholland severely hurt his back. The jury heard evidence that the chain had not been maintained properly, and had not regularly been lubricated or cleaned of rust.

In the wake of his injury, Mulholland underwent two spinal surgeries, in July 2010 and May 2011, epidural injections and physical therapy. He wears a back brace, continues to receive

medical treatment for his back, suffers physical limitations that appear to be permanent, and is no longer employable as a seaman or in other suitable occupations.

On July 15, 2009, Mulholland filed this suit against the City seeking compensation pursuant to the Jones Act. The City filed its Answer on September 22, 2009. The parties proposed and, on December 8, 2009, I ordered, a Case Management Plan under which the parties were to complete fact discovery by April 9, 2010. The parties requested, and I granted, four extensions of the completion date, ultimately extending the discovery deadline to January 27, 2012. Finally, on April 30, 2012, the City represented that "[b]oth factual and expert discovery is complete."

Even before discovery ended, both counsel assured me that the case was well along towards settlement, even in face of the plaintiff's demand for $2.9 million. They asked me to allow settlement talks between counsel, and before U.S. Magistrate Judge Henry Pittman, to proceed. Finally, in the absence of resolution, I set December 14, 2012 for a final status conference, to select a trial date.

Meanwhile, on October 16, 2012, the City awoke to its neglect to pursue adequate medical discovery. Months after it had represented that "[b]oth factual and expert discovery is complete," the City filed a Request for Authorizations, seeking authorizations from Mulholland to obtain records from the Veterans Administration Medical Center at New York ("VAMCNY") and from one of its doctors, Barry Goozner. Mulholland objected, but I ruled in the City's favor. Mulholland complied promptly and, on February 21, 2013, the City received the VAMCNY records, including a notation that Mulholland had been treated on November 26-27, 2008 in the emergency room of Bellevue Hospital. That reference, it appears, was never followed up until the middle of the trial and is the subject of the City's belated motion for the relief that I now address.

Meanwhile, the pretrial conference of December 14, 2012 proceeded as scheduled. I set a firm trial date of April 8, 2013, a final pre-trial conference date of March 20, 2013, and I

allowed the parties to supplement discovery on Mulholland's medical condition and to take depositions of each other's experts.

Trial began on April 8, 2013, with a substituted counsel for the City. Apparently, in preparation for the third day of trial (April 15, 2013), counsel for the City read the VAMCNY records and took note of the reference to Mulholland's treatment at the Bellevue Hospital. On April 15, 2013, the City presented to me, and I signed, a trial subpoena for Bellevue Hospital's records, to be produced in court the following day, April 16, 2013. Friedman Decl. Ex. 6. However, Bellevue's representative did not attend court on April 16, 2013, or in the following days. The City rested its defense on April 18, 2013, without the records from Bellevue. Motions, the charging conference, counsels' summations and the court's charge followed. On April 22, 2013, the case was submitted to the jury. The jury returned a unanimous verdict the same day, for Mulholland in the amount of $3.2 million.

On May 24, 2013 the City moved to set aside the verdict, for judgment as a matter of law or, alternatively, for a new trial. I denied that motion on August 27, 2013. On September 13, 2013, the City filed its Notice of Appeal.

The City represents in its motion that records of the Bellevue Hospital emergency room came to its attention on July 3, 2013. Hence, its characterization of the records as "newly found evidence." However, the City had known of these records for months, since February 21, 2013 and probably earlier, for the subject of Mulholland's back and hospital treatments should have been the subjects of questioning at his depositions.

On October 23, 2013, after another three months of delay even after its belated discovery (or appreciation) of the Bellevue records, the City filed this second motion to vacate the jury's verdict. The City argues that the Bellevue Hospital records describe a visit by Mulholland to the emergency room of Bellevue Hospital in November 2008 after an automobile accident, six months or so before the July 2, 2009 accident with the jammed pull-chain at Hart Island. The City

contends that the "newly-discovered" hospital records contradict Mulholland's testimony, and that the injuries to his back were caused, substantially, by his car crash, not by the rusted pull-chain.

In fact, the City's attorneys—after taking note of the reference to Mulholland's visit to the Bellevue Hospital emergency room in preparation for the third day of trial, April 15, 2013—attempted to incorporate their theory that a prior car crash was the cause of Mulholland's back injuries into the City's case at trial. They cross examined Dr. Lattuga, one of the doctors who treated Mulholland, on that subject. Tr. 4/15/2013, 397:10-398-9. The City asked Dr. Lattuga whether "[i]f [Mulholland] had been involved in an automobile accident," it could have "result[ed] in trauma to the cervical and lumbar spine." Id. at 397:17-18. Dr. Lattuga testified that "[a] motor vehicle accident is a classic example as a mechanism for herniating a disk." Id. at 398:7-9. However, the City failed to elicit evidence that Mulholland had in fact been involved in a car crash from Dr. Lattuga—who testified that he did not recall Mulholland telling him about any previous accidents, id. at 397:10-11—or any other witness. That was the City's own fault, due to its own neglect.

The District Court Retains Jurisdiction Over Defendant's Motion

Although the City has filed a Notice of Appeal to the Second Circuit Court of Appeals, Federal Rule of Civil Procedure 62.1(a) gives me a tenuous jurisdiction to consider this motion. Under that rule, if a timely motion for relief is made that the district court cannot consider because an appeal is pending, the district court "may" consider the motion and defer decision, or deny the motion, or state to the court of appeals that it would grant the motion or that the motion raises a substantial issue if the court of appeals were to remand the pending appeal to the district court. Fed. R. Civ. P. 62.1(a); see also Gucci Am., Inc. v. Weixing Li, 10 CIV. 4974 RJS, 2012 WL 1883352, at *2 n.3 (S.D.N.Y. May 18, 2012); BFI Grp. Divino Corp. v. JSC Russian Aluminum, 298 F. App'x 87, 93 n. 4 (2d Cir. 2008).

One precondition to my Rule 62.1(a) jurisdiction is that the motion be "timely." Since the City's motion is for a new trial under Rules 60(b)(2) and 60(b)(6), it "must be made within a reasonable time," and the 60(b)(2) component must be made "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). As my recitation of the facts makes clear, the City cannot show that it pursued the Bellevue Hospital records with reasonable diligence. However, I find that the City's motion itself scrapes through the requirement that it "be made within a reasonable time," since the motion was filed within two months of my order denying the City's first motion for a new trial and within four months of the City's receipt of the Bellevue records. The Rule 60(b)(2) component of the motion is not barred by the one year time-limit on such motions, as it was filed within six months of the entry of Judgment. I therefore have jurisdiction to consider this motion under Rule 62.1(a).

Discussion

"A motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances." United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 391 (2d Cir. 2001). The City cannot show "exceptional circumstances."

> A movant seeking relief under Rule 60(b)(2) must demonstrate that:
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> (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching.

Int'l Bhd. of Teamsters, 247 F.3d at 392.

In this case, the City had more than three years, between December 8, 2009 and January 27, 2012, including numerous enlargements of time requested by the City, to conduct all relevant pre-trial discovery. The condition of Mulholland's back, before and after his accident as a

deck hand on July 2, 2009, was basic to the case. Any competent defense counsel surely would seek to elicit from a plaintiff his prior accidents and obtain all relevant medical records, including hospital records. The failure of the City to learn about Mulholland's Bellevue records well before the onset of trial is incomprehensible. This failure alone shows an absence of "reasonable diligence."

Moreover, the evidence suggests strongly that the City knew about Mulholland's auto accident and his hospital visit before actually receiving the Bellevue records, since it cross-examined Dr. Lattuga about whether Mulholland's injuries could have been caused by a car accident. See Tr. 4/15/2013, 397:10-398-9. The City is not entitled to relief under Rule 60(b)(2).

Neither is the City entitled to relief under Rule 60(b)(6). That rule may be invoked only when the asserted grounds for relief are not recognized by the other subparts of Rule 60(b). Int'l Bhd. of Teamsters, 247 F.3d at 391-92. It cannot be invoked here because the City's motion is based on asserted newly discovered evidence, which is recognized as a ground for relief in 60(b)(2). See Morgan v. Gaind, 96 CV 6336 LAP, 2013 WL 443977 (S.D.N.Y. Jan. 30, 2013).

Conclusion

The City's motion is denied. The Clerk shall mark the motion (Doc. No.75) as terminated.

SO ORDERED.

Dated: December 9, 2013
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge