

Lirano v Grimble & Logudice, LLC

2014 NY Slip Op 32346(U)

September 3, 2014

Supreme Court, New York County

Docket Number: 154676/2013

Judge: Eileen A. Rakower

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER
Justice PART 15

MARITZA LIRANO, Administratrix of the Estate of
EDUARDO PENA, and MARITZA LIRANO,
Individually,

Plaintiff,

INDEX NO. 154676/13

- v -

MOTION DATE

GRIMBLE & LOGUDICE, LLC, ROBIN
LOGUDICE and ROBERT GRIMBLE,

MOTION SEQ. NO. 1
MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1-4

Answer — Affidavits — Exhibits _____ 5, 6

Replying Affidavits _____

Cross Motion: X Yes No

Plaintiff, Maritza Liriano, as administratrix of the Estate of Eduardo Pena (“Pena” or “Decedent”) and individually, commenced this action against defendants, Grimble & Logudice, LLC (“G&L”), Robin Logudice, and Robert Grimble (collectively, “Defendants”) for legal malpractice.

As alleged in the Verified Complaint, Decedent suffered injuries in an accident while working on December 21, 2010, at 175 East 96th Street, New York, New York 10128, and died on December 23, 2010 as a result of his injuries. Plaintiff retained Defendants to “investigate and advise her with respect to all potential claims relating to the accident of December 23, 2010 and Mr. Pena’s death.” The Complaint alleges, by letter dated December 28, 2012, G&L “rejected the case without commencing a lawsuit or filing a Workers’ Compensation claim on behalf of the decedent, Eduardo Pena, or his estate.” It further alleges, “Pursuant to the applicable statute, a Workers Compensation claim must be filed within two (2) years. Therefore, the decedent and/or his estate are precluded from filing a Workers’ Compensation claim as a result of the accident of December 21, 2010.” Plaintiff claims that Defendants were negligent “in not advising the administratrix that the estate had a viable Workers’ Compensation claim; in not

informing her that a Workers' Compensation claim had to be commenced within two (2) years of the date of the accident and in failing to refer her to a lawyer and/or firm that focused on Workers' Compensation claims and in failing to advise her to consult with a lawyer and/or firm that focused on Workers' Compensation claims," and resulting damages.

In its Answer, G&L denies that the injuries sustained by Pena on the date of the incident was the sole factor causing Pena's death because Pena had preexisting medical conditions. Furthermore, G&L contends Decedent was intoxicated at an after-hours Christmas party when the injury occurred, which would not be covered by Workers' Compensation. G&L further contends that (1) Plaintiff failed to state a cause of action; and (2) Plaintiff was aware that G&L was retained solely with regard to an action based upon negligence of others, and not with respect to a Workers' Compensation claim.

G&L submitted a demand for a Verified Bill of Particulars from Plaintiff to inquire about the specifics regarding Decedent's injury and how the death occurred. It further requested from Plaintiff calculations of how much Plaintiff would have received had she been eligible for Workers' Compensation, facts supporting Plaintiff's claim, the amount claimed by Plaintiff in her representative capacity for compensatory damages, any statutes relied on by Plaintiff, and an itemized statement of each expense incurred or to be incurred with regard to any items of special damages claimed.

G&L now moves to strike the complaint in this matter and to dismiss this action on the grounds that Plaintiff has failed to adequately respond to G&L's Demand for a Verified Bill of Particulars and G&L's demands.

More specifically, G&L claims that Plaintiff's Bill of Particulars is unresponsive with respect to the following paragraphs of G&L's Demand for a Bill of Particulars and in the following manner:

- (1) The first paragraph of the Bill states, "With regard to the Decedent's injury, set forth the date, time and location of that injury." G&L states that Plaintiff's response fails to set forth the time of the incident.
- (2) The second paragraph states, "With regard to the Decedent's injury, set forth the nature of that injury." G&L states that Plaintiff's response relates to the damages being sought in this action and is not responsive to the demand.

(4) The fourth paragraph states, "Set forth the hours of employment of the Decedent on the date(s) of his injury, identifying the commencing time of work and the ending time of work." Plaintiff's response states, "The decedent, Eduardo Pena used to commence work at 7 AM and end it at 3:30 PM." G&L states that this response fails to respond as to the particular date of Plaintiff's injury.

(5) The fifth demand provides, "Set forth, in reasonable detail, the basis for the claim that Decedent's injuries occurred while he was working." Plaintiff responded, "Pena sustained serious personal injuries resulting in death, while he was at the company Christmas party at 175 East 96th Street, New York, New York, 10128." G&L contends that the response is non responsive because it fails to set forth any basis for the claim that the injuries were suffered "while he was working."

(13) The thirteenth paragraph states, "With regard to legal advice given by Defendants to Plaintiffs, set forth in reasonable detail, with regard to each item of legal advice, the nature of the advice and the identity of the person giving the advice, whether the advice was oral or in writing, and the date and time of giving said advice." In response, Plaintiff stated, "Upon information and belief, the advices given to the plaintiff were oral. Plaintiff is unaware of the exact dates and times of the advices. However, plaintiff reserves her right to amend and/or supplement this response up to and including the time of trial of this action." G&L states that Plaintiff's response is unresponsive.

(14) The fourteenth paragraph states, "Set forth, in reasonable detail, the facts supporting the claim that Plaintiff would have realized a recovery had a workers compensation claim been filed." Plaintiff's response calculates that amount of damages allegedly owed. G&L alleges that the response does not provide the information requested.

(17) The seventeenth paragraph states, "Identify any statutes relied upon by Plaintiff." Plaintiff's response states, "The statutes and codes violated by defendants will be provided upon completion of the discovery." G&L states that this response is not proper.

(19) The nineteenth paragraph states, "Set forth the basis that Plaintiff has a claim in her representative capacity as administrator." Plaintiff's response

states, "Plaintiff, Maritza Liriano, is the wife of the decedent, Eduardo Pena, and she was appointed Administratrix of the Estate of Eduardo Pena, as per Surrogate's Court of the State of New York's decision dated April 4, 2013." G&L states that this response is not responsive to the information sought; however, Plaintiff has responded to the information sought.

(20) The twentieth paragraph states, "Set forth, in reasonable details, facts constituting a notice to any Defendants that allegedly gave rise to the incidents alleged in the Complaint." The response states that G&L was negligent by not filing the workers compensation claim. G&L states that this response does not provide the information requested as to notice.

G&L also states that Plaintiff's response to its Demand for a Bill of Particulars is not verified because there is no affidavit or affirmation stating that the responses are believed to be true.

G&L also claims that Plaintiff has failed to produce the following: collateral source information, employment authorizations, tax returns, a list of witnesses, notes taken at meetings between Plaintiff and Defendants, e-mails relating to any wrongful death claim, social security statements, insurance documents relating to death benefits, documents sent to Plaintiff from Decedent's employer relating to his death, notes, reports, investigations, records relating to Decedent's injury, communications from non-parties relating to Decedent's injury, notes relating to advice received by Plaintiff from G&L, communications from G&L's employer, documents relating to Decedent's alcohol use, time records relating to Decedent's employment in December 2010, communications regarding Decedent's accident, and records relating to the dates of meetings between Plaintiff and G&L.

Plaintiff opposes G&L's motion to strike and cross-moves for a Protective Order. Plaintiff contends that G&L's demands are "unduly burdensome, over broad, request no relevant information and request no information which would ultimately lead to the discovery of relevant evidence on the sole issue of defendants' failure to advise plaintiff to file a timely claim for Workers' Compensation, to protect its estate's rights for the future."

Plaintiff contends that the claimed deficiencies in Plaintiff's Bill of Particulars is an attempt by Defendant to seek evidentiary material upon which Plaintiff will attempt to prove her case. Plaintiff further contends that Defendant

seeks rules/statutes/laws violated when no such violations were alleged in Plaintiff's Complaints/Summons.

With respect to G&L's claims of deficiency in Plaintiff's response to Defendant's discovery demands, Plaintiff submits the following: Decedent's death certificate; collateral source information including proof of distribution of Decedent's 401K Fidelity account and distribution of proceeds from a Met Life Insurance Policy; funeral bill; 2009 and 2010 W2; the autopsy report; limited letters of administration; employment authorization; Limited Letters of Administration; Defendant's retainer with Plaintiff and correspondence addressed to her providing advice.

Plaintiff requests that rather than ask for e-mails between the parties, audio-visual material, and the other demands asked for by G&L, which is currently the subject of Plaintiff's Protective Order, G&L should lay a foundation as to the documents existence during deposition before demanding them.

Defendant opposes Plaintiff's cross-motion and contends that Plaintiff's motion for a Protective Order is overly broad. G&L contends that the information they seek is crucial because if Plaintiff's correspondence and emails demonstrate that Plaintiff understood that only a negligence claim was within the scope of employment, this case has no merit. G&L further contends that its demands are relevant because Plaintiff is required to plead and prove that she would have been eligible for Workers' Compensation had Defendant filed the claim on time and only then would Plaintiff have a claim for legal malpractice. In addition, many of the particulars seek to illuminate details of the injury that occurred at the Christmas party, which is relevant to the Workers' Compensation claim. Defendant reiterates that the information is important because a crucial part of the merits of a Workers' Compensation claim is that the incident in question is one covered by Workers' Compensation.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). "It is immaterial that the information sought may not be admissible at trial as pretrial discovery extends not only to proof that is admissible but also to matters that may

lead to the disclosure of admissible proof.” *Romano v. Steelcase Inc.*, 30 Misc. 3d 426, 428 (Sup. Ct. Suffolk Cty. 2010).

However, CPLR §3103(a) provides that:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept. 1998]).

“A bill of particulars serves the purpose of amplifying a pleading, of limiting the proof and preventing surprise at the trial.” *Berkey Photo, Inc. v. Movie Lab, Inc.*, 37 A.D. 2d 549, 549 [1st Dept 1971]. The purpose is “not to supply evidentiary material.” *Harding v. Spofford Laundry Corp.*, 44 A.D. 2d 80, 804 [1st Dept. 1974]. *See generally Nazario v. Fromchuck*, 90 A.D. 2d 483, 483-84 [2nd Dept 1982] (“Defendant's demand [in its Demand for a Bill of Particulars] for the names and addresses of witnesses to the incident is also improper since there has been no showing of special and unusual circumstances to warrant such disclosure at this time. In addition defendant's demand for a breakdown of the general damages claimed by plaintiff is also improper.”).

Here, the paragraphs of Defendant’s Demand for a Bill of Particulars identified above request information to amplify Plaintiff’s Complaint. Upon review of those paragraphs and Plaintiff’s responses which are deemed to be inadequate and incomplete, Plaintiff is directed to supplement and respond to those specific paragraphs with the information requested (with the exception of paragraph 19, to which Plaintiff has responded).

Additionally, Plaintiff is directed to produce the outstanding documents that were requested in Defendant’s First Notice for Discovery and Inspection, including the correspondence and e-mails, prior to Plaintiff’s deposition.

Wherefore, it is hereby

ORDERED that Defendant's motion is granted to the extent that Plaintiff is directed to supplement Plaintiff's Bill of Particulars with respect to the paragraphs of G&L's Demand for a Bill of Particulars as referenced above and to produce outstanding discovery that is requested in Defendant's First Notice for Discovery and Inspection; and it is further

ORDERED that Plaintiff's cross motion for a protective order is granted only to the extent that Plaintiff need not supplement any other portions of its Bill of Particulars not identified above.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: SEPTEMBER 3, 2014



J.S.C.
HON. EILEEN A. RAKOWER