

Verdugo v S&P Carting Serv., Inc.

2007 NY Slip Op 30151(U)

February 25, 2007

Supreme Court, Suffolk County

Docket Number: 0026148

Judge: Thomas F. Whelan

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This opinion is uncorrected and not selected for official publication.

ORDERED that this motion (#003) by plaintiff for an Order pursuant to CPLR 3124 and/or 3126, striking defendants' answer for failure to provide discovery and compelling a further examination before trial is granted to the extent that the parties are directed to appear at a discovery conference scheduled for **March 20, 2007**, at 9:30 a.m., in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York; and it is further

ORDERED that defendants' counsel is directed to serve a copy of this Order with Notice of Entry upon the attorney for plaintiff within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1),(2) and (3) and thereafter file the affidavit of service with the Clerk of the Court.

This is an action for personal injuries allegedly sustained by plaintiff when, while walking, he was struck by a vehicle owned by the defendant, S&P Carting Service, and driven by the co-defendant, Thomas C. Besch (hereinafter collectively "S&P"). S&P now moves (motion #002) to compel the plaintiff to provide certain documentation pertaining to his immigration status. In his bill of particulars, plaintiff made a claim for lost wages and in his opposition to S&P's motion, plaintiff also indicated the probability of a claim for future lost earnings. The court notes that plaintiff's claim for lost wages is not for any job related injury.

CPLR 3101(a) requires a party to make full disclosure upon request of "all evidence material and necessary in the prosecution or defense of an action regardless of the burden of proof." The Court of Appeals has stated the words "material and necessary" are, in their view, to be interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]; see also *The Roman Catholic Church of the Good Shepard v Tempco Sys.*, 202 AD2d 257, 608 NYS2d 647 [1st Dept 1994]).

While the plaintiff's causes of action in *Balbuena v IDR Realty*, 6 NY2d 338, 812 NYS2d 416 (2006), concerned an alien's lost wage claim under the labor law, the Court found that any question regarding said claim and any possible conflict with federal law could be alleviated by permitting a jury to consider a plaintiff's immigration status as one factor in a determination of a lost wage claim. "In other words a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case" (*Barahona v Trustees of Columbia Univ. in the City of New York*, 11 Misc3d 1035, 1038, 816 NYS2d 851 [Sup Ct. Kings County 2006]). "A plaintiff's immigration status is relevant to the determination of damages to be resolved by a jury" (*Majlinger v Cassino*, 25 AD3d 14, 30, 802 NYS2d 56 [2d Dept 2005] citations omitted).

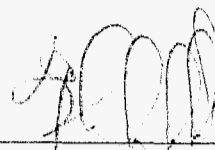
Therefore, in applying the principles of this broad discovery mandate, all facts which are material and relevant to plaintiff's alien status are discoverable and defendants' motion is granted. Plaintiff is directed to comply with the discovery notice within thirty-five (35) days of the date herein and in the event plaintiff is unable to comply with said notice and provide the proper documentation to defendants, he shall then provide

an affidavit to that effect as the plaintiff cannot be compelled to produce that which may not exist (*see Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793, 803 NYS2d 171 [2d Dept 2005]).

Accordingly defendants' motion is granted as herein indicated and plaintiff's motion is scheduled for a discovery conference. This constitutes the Order and decision of the Court.

DATED: _____

2/22/07



THOMAS F. WHELAN, J.S.C.