

Horn v Costco Wholesale Corp.

2007 NY Slip Op 30395(U)

March 6, 2007

Supreme Court, Suffolk County

Docket Number: 0014527

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JULES HORN,

Plaintiff,

-against-

COSTCO WHOLESALE CORPORATION
and MEADOWBROOK PARKING AREA
CONTRACTORS,

Defendants.

ORIG. RETURN DATE: DECEMBER 21, 2006
FINAL SUBMISSION DATE: JANUARY 25, 2007
MTN. SEQ. #: 003
MOTION: MD

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Upon the following papers numbered 1 to 7 read on this motion _____
TO DISMISS OR PRECLUDE OR COMPEL

Notice of Motion and supporting papers 1-3; Answering Affidavits and supporting papers 4, 5;
Replying Affidavits and supporting papers 6, 7; it is,

ORDERED that this motion by defendant, COSTCO WHOLESALE CORPORATION ("COSTCO"), for an Order, pursuant to CPLR 3124 and 3126, dismissing the action based upon plaintiff's alleged willful failure to comply with COSTCO's discovery demands, or in the alternative, precluding plaintiff from offering any evidence upon the trial of this action, or in the alternative, compelling plaintiff to comply with COSTCO's outstanding discovery demands, is hereby **DENIED**.

This is an action to recover for personal injuries allegedly sustained by plaintiff on December 8, 2003 when he slipped and fell in the parking lot of COSTCO's wholesale store located in Holbrook, New York. In the instant application, COSTCO alleges that plaintiff has failed to comply with its Demands

for Authorizations dated May 26, 2006 and August 11, 2006, as well as a Stipulation of the parties dated June 20, 2006, wherein COSTCO sought authorizations for the release of plaintiff's medical records and legal file with respect to plaintiff's involvement in a motor vehicle accident on April 12, 2006. Although plaintiff did provide COSTCO authorizations on or about September 23, 2006 in response to the demands and Stipulation, COSTCO argues that the authorizations provided were "overly restrictive," in that plaintiff's medical records were limited to records concerning plaintiff's coccyx/sacrum and lumbar spine, and plaintiff's legal file was limited to non-privileged pleadings. As such, by letter dated October 5, 2006, COSTCO wholly rejected plaintiff's authorizations as improper and insufficient.

In opposition, plaintiff submits that as he responded to COSTCO's demands for authorizations, to the extent they were not improper, he has acted in good faith and without willful or deliberate conduct that would warrant dismissal. Plaintiff contends that COSTCO is not entitled to an unrestricted authorization for plaintiff's legal file relating to plaintiff's claim arising from the motor vehicle accident that occurred on April 12, 2006. Plaintiff argues that the legal file authorization provided was proper, as it permitted the release of any non-privileged pleadings, copies of medical records, reports, and diagnostic tests and films with respect to plaintiff's accident on April 12, 2006. Further, plaintiff argues that the medical record authorizations provided were also proper, as they pertain to the injuries of which he is complaining, to wit: fracture of the coccyx/sacrum; lumbar sprain; lumbar contusion; aggravation and/or exacerbation of Grade I spondylolisthesis at L4-5; and prolapsed internal hemorrhoid.

Moreover, plaintiff alerts the Court that COSTCO had previously moved for similar relief. In 2005, COSTCO sought an Order compelling plaintiff to provide unrestricted medical record authorizations for plaintiff's medical providers. That application was denied by Order dated December 6, 2005 (Werner, J.), in which the Court held in pertinent part:

Here, [COSTCO] has "failed to provide a foundation to warrant discovery of the extent and breadth demanded". Manley v. New York City Hous. Auth., [190 AD2d 600 (1993)]. Notably, Costco does not submit affidavits from medical experts attesting to any link between the plaintiff's injuries and the demanded wholesale intrusion

into the entire medical history of Jules Horn, a plaintiff in his nineties, presenting nothing “other than ‘hypothetical speculations calculated to justify a fishing expedition’. *Id. citing Ministers of Refm. Prot. Dutch Church v. 198 Broadway*, 59 NY2d 170, 451 N.E.2d 164, 464 N.Y.S.2d 406 (1983). Defendant has not met its burden to establish the relevance of the demanded discovery.

CPLR 3101(a) provides for disclosure of “all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR 3101[a]). By commencing the instant action to recover for personal injuries, the physician/patient privilege held by plaintiff was waived with respect to his relevant past medical history (see *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]; *Gill v Mancino*, 8 AD3d 340 [2004]; *McLane v Damiano*, 307 AD2d 338 [2003]; *DeStrange v Lind*, 277 AD2d 344 [2000]). However, plaintiff did not waive the privilege with respect to unrelated illnesses or treatments (see *McLane v Damiano*, *supra*; see also *Sadicario v Stylebuilt Accessories*, 250 AD2d 830 [1998]). Although CPLR 3101 and 3121 favors liberal disclosure, such disclosure must be material and necessary to the defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340, *supra*; *DeStrange v Lind*, 277 AD2d 344, *supra*).

In the instant application, COSTCO has again failed to meet its burden to show that plaintiff’s records, beyond what had been previously authorized, are material and necessary to its defense of this action. Accordingly, the instant application is denied. The Court parenthetically notes that a nonagenarian plaintiff such as the plaintiff herein is entitled to a trial preference, pursuant to CPLR 3403(a)(4), upon application pursuant to CPLR 3403(b).

The parties are reminded that a compliance conference of this matter is currently scheduled for **March 15, 2007 at 9:30 a.m., Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead.**

The foregoing constitutes the decision and Order of the Court.

Dated: March 6, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court