Brenning v City of New York

2007 NY Slip Op 31793(U)

June 19, 2007

Supreme Court, New York County

Docket Number: 0101702/2005

Judge: Donna Marie Mills

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SCANNED ON 6/25/2007

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART** 21

Justice

JANYCE BRENNING

Plaintiff,

-v-

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSPORTATION AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, and JOHN P. PICONE, INC.,

Defendants.

INDEX NO. 101702/05

MOTION DATE 003

MOTION SEQ. NO.

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for Summary Judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1 & 2
Answering Affidavits– Exhibits	3
Replying Affidavits	

CROSS-MOTION: ✓ YES _____ NO

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 6/19/2007

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

JANYCE BRENNING,

Petitioner,

-against-

Index No. 101702/05

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSPORTATION AUTHORITY, THE METROPOLITAN TRANSPORTATION AUTHORITY, and JOHN P. PICONE, INC.,

DECISION / ORDER

Respondent.

----------X

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

DONNA M. MILLS, J.:

This is an action to recover damages for personal injuries plaintiff sustained on September 24, 2004 as a result of a trip and fall. At approximately 10:00 AM plaintiff alleges that as she was walking on the sidewalk adjacent to 504 Sixth Avenue, in the County, City, and State of New York, she stepped on a section of plywood that formed a temporary sidewalk. The plywood yielded and she fell to the ground, resulting in her injuries. The alleged defect is the unsupported piece of plywood measuring 5/8 of an inch thick, 106 inches by 46 inches. Plaintiff claims the accident occurred because of the carelessness, recklessness, and gross negligence of the defendants.

Plaintiff filed a note of issue and certificate of readiness on or about February 20, 2005. The co-defendants New York City Transit Authority, the Metropolitan Transportation Authority, and John P. Picone, Inc. (hereinafter "movants"), however, move to strike the note of issue because discovery is not complete. The movants seek plaintiff's medical records from physicians who treated her before September 24, 2004. Additionally, to test its claim that plaintiff was

using her cellular phone at the time of the accident and thus may be charged with comparative fault, the movants also seek plaintiff's cellular phone records for the month of September 2004. The City of New York (hereinafter "the City") cross-moves for an order granting summary judgment dismissing the complaint and cross-claims pursuant to CPLR § 3212. Plaintiff has no opposition to the City's cross-motion..

Plaintiff, however, opposes the movants' requests as overly broad and unnecessarily invasive of her privacy. In opposition to this motion to vacate the note of issue plaintiff has, first, provided her medical records dating back to January 1997, and second reproduced redacted phone records for September 24, 2004, two hours before and after the alleged accident. In plaintiff's brief, she represents that all requested authorizations have been provided to the defendant.

APPLICABLE LAW & DISCUSSION

Courts generally preclude parties from filing a note of issue unless it can be assured that all discovery has been completed. Additionally, liberal discovery has been stressed to encourage fair and effective resolution of disputes on the merits (Crespo v Metropolitan Transp. Authority, 2007 N.Y. Slip Op. 50738). The striking of a pleading should be restricted to occasions when the failure to comply or disclose is found to be willful or in bad faith (Kauffman v Triborough Bridge & Tunnel Authority, 743 N.Y.S.2d 109 [2002]).

In the instant action, the movants contend that the plaintiff has unilaterally filed a note of issue even though discovery is not yet complete. To try to show plaintiff's comparative fault in this accident, the defendants have requested her cellular phone records for September 2004. For privacy reasons, Plaintiff has provided redacted cellular phone records for the date of the accident

that do not include her phone number, name, account number, or reference number. The movants claim they cannot be certain that these records belong to plaintiff.

In this case, the movants also seek plaintiff's medical records and insurance records from 6 to 42 years prior to the accident. Courts have also been split regarding its approach to compel HIPAA compliant authorizations. Some trial courts' approaches have been to deny motions to compel authorizations. Others have commented on the need for the legislature to establish guidelines (Ottinger v Mausener, 816 N.Y.S.2d 698).

Viewing these submissions, the branch of the movants' motion seeking HIPAA compliant authorizations is denied. Plaintiff has complied with discovery and has submitted medical records that date back to 1997, seven years prior to the accident. Additionally, the plaintiff's physician, Dr. Brandon, is the only physician who had previously treated the plaintiff's elbow. There appears to be little reason to acquire the plaintiff's entire medical history from childhood.

That branch of the movants' motion requesting unredacted telephone records is granted, however, to the limited extent that plaintiff is directed to produce unredacted cellular phone records for the two hours before and after the accident on September 24, 2004. Unredacted telephone records are relevant and material to deciding plaintiff's comparative fault, if any. She is to provide further proof that the cellular phone records do actually belong to her. Failure to comply may lead to the note of issue being stricken.

Accordingly, it is hereby

ORDERED that the movants' motion to vacate the note of issue is denied. Plaintiff, however, is directed to produce her unredacted cellular phone records in accordance with this decision, within 30 days of receiving a copy of this order with notcie of entry; it is further

ORDERED that the City of New York's cross-motion for summary judgment is granted without opposition. The clerk is directed to enter judgment dismissing the complaint and cross-claims, if any, against the City of New York; it is further

ORDERED that the remainder of the action shall continue.

Dated: 6-19-07

ENTER:

J.S.C.

FILED
JUN 25 2007
COUNTY CLERK'S OFFICE
NEW YORK