

**Stanton v Morgan**

2007 NY Slip Op 33129(U)

September 28, 2007

Supreme Court, Suffolk County

Docket Number: 0010019/2004

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 10019/2004

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

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

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EDWARD STANTON and  
 LORETTA STANTON,

Plaintiffs,

-against-

JOSEPH MORGAN and VW CREDIT  
 LEASING, LTD.,

Defendants.

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**ORIG. RETURN DATE:** JUNE 1, 2007  
**FINAL SUBMISSION DATE:** JUNE 7, 2007  
**MTN. SEQ. #:** 002  
**MOTION:** MG

**ORIG. RETURN DATE:** JULY 5, 2007  
**FINAL SUBMISSION DATE:** JULY 26, 2007  
**MTN. SEQ. #:** 003  
**MOTION:** MG

**PLTF'S/PET'S ATTORNEY:**

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Upon the following papers numbered 1 to 15 read on these motions \_\_\_\_\_

**TO QUASH SUBPOENA AND TO COMPEL**

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in opposition and supporting papers 6; Reply Affidavit and supporting papers 7, 8; Notice of Motion and supporting papers 9-11; Affirmation in Opposition and supporting papers 12, 13; Affirmation in opposition and supporting papers 14; Reply Affidavit and supporting papers 15; it is,

**ORDERED** that this motion by plaintiffs for an Order vacating a “Subpoena Duces Tecum on Examination Before Trial,” dated September 15, 2006, and a “Judicial Subpoena for Deposition of a Non-Party Witness Before Trial,” dated May 2007, each served upon JOSEPH W. WEILMANN by counsel for defendants, is hereby **GRANTED** for the reasons set forth hereinafter; and it is further

**ORDERED** that this motion by defendant VW CREDIT LEASING, LTD. (“VW”) for an Order, pursuant to CPLR 3124, compelling plaintiffs to comply with VW’s Notice for Discovery and Inspection dated May 25, 2007, is hereby **GRANTED** for the reasons set forth hereinafter.

The Court has consolidated these two motions solely for the purpose of rendering the within decision and Order.

This action arises out of an automobile accident that took place on March 15, 2004. Plaintiffs allege that the accident occurred when the vehicle that plaintiff EDWARD STANTON was a passenger in, which was completely stopped for a red light, was struck in the rear by the vehicle operated by defendant JOSEPH MORGAN. By Order dated July 21, 2005 (Werner, J.), the Court granted plaintiffs’ motion for summary judgment on the issue of liability. The Court found that defendant MORGAN’s explanation that he experienced a “cramp” in his left foot, which caused him to “grab” his leg and remove his foot from the brake pedal, did not provide a non-negligent explanation for the accident.

Plaintiffs have now filed an application to vacate a “Subpoena Duces Tecum on Examination Before Trial,” dated September 15, 2006, and a “Judicial Subpoena for Deposition of a Non-Party Witness Before Trial,” dated May 2007, each served upon JOSEPH W. WEILMANN by counsel for defendants. The grounds for plaintiffs’ application is that Mr. Weilmann, a non-party, was previously deposed in this matter on November 3, 2006. Mr. Weilmann was the driver of the car in which plaintiff EDWARD STANTON was a passenger when this accident occurred. Plaintiffs allege that at the end of Mr. Weilmann’s deposition, counsel for defendants indicated that he had no further questions, and that no additional discovery was requested.

Both defendants have filed affirmations in opposition to plaintiffs’ application. Defendants argue that a further deposition of Mr. Weilmann is

necessary in that photographs of Mr. Weilmann's vehicle utilized at plaintiff's deposition were not provided to defense counsel prior to the deposition of Mr. Weilmann; that since Mr. Weilmann's deposition, plaintiffs have amended their bill of particulars to allege twenty four (24) new injuries, and the need for four separate therapies; and that it is unclear whether the photographs depict Mr. Weilmann's vehicle immediately after the accident or after he performed certain repairs thereto.

CPLR 3101(a)(4) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a non-party upon notice stating the circumstances or reasons such disclosure is sought or required. What is material and necessary is in the "sound discretion" of the trial court and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Andon ex rel. Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). The Second Department has equated the catch-all provision of CPLR 3101(a)(4) with the more stringent requirements of CPLR 3101(d)(1)(iii), by requiring that the moving party show adequate special circumstances to warrant disclosure (see *Attinello v DeFilippis*, 22 AD3d 514 [2005]; *Lanzello v Lakritz*, 287 AD2d 601 [2001]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]). Special circumstances are shown by establishing that the information sought is not only relevant, but also cannot be obtained through other sources (see *Tannenbaum v Tenenbaum*, 8 AD3d 360 [2004]; *Murphy v Macarthur Holding B.*, 269 AD2d 507 [2000]).

Here, the Court finds that defendants have failed to establish such special circumstances. The Court notes that an extensive deposition of Mr. Weilmann was already conducted on November 3, 2006. Further, contrary to VW's assertion, plaintiffs amended their bill of particulars prior to the deposition of Mr. Weilmann. Plaintiffs allege that the amended bill of particulars was personally served upon defendants on November 1, 2006, two days prior to the deposition. With respect to the photographs of Mr. Weilmann's vehicle, these photographs have since been provided to defense counsel, and Mr. Weilmann testified at his deposition as to the condition of his vehicle immediately prior to and following the accident (see Transcript of James Weilmann, November 3, 2006, p. 38-39; p. 65-71). As such, this motion by plaintiffs to vacate the "Subpoena Duces Tecum on Examination Before Trial," dated September 15, 2006, and "Judicial Subpoena for Deposition of a Non-Party Witness Before Trial," dated May 2007, is granted.

Turning to VW's motion to compel, VW seeks an Order compelling plaintiffs to comply with VW's Notice for Discovery and Inspection dated May 25, 2007. Specifically, VW requested records relating to plaintiff's cellular phone, personal digital assistant, Blackberry and/or other portable communication device. VW alerts the Court that this demand was made after the plaintiffs' children testified at depositions held on April 17, 2007 and May 22, 2007. VW argues that this demand became necessary in light of the children's testimony regarding plaintiff's use of a Blackberry device, as plaintiff allegedly cannot perform such tasks. By correspondence dated May 31, 2007, plaintiffs objected to this demand as overbroad, burdensome, and untimely.

Plaintiffs' children testified that plaintiff has difficulty concentrating, has double vision, has difficulty with depth perception, and has difficulty maneuvering small things with his hands. In addition, plaintiffs' amended bill of particulars alleges injuries such as post traumatic vision syndrome, post traumatic brain injury with vision symptoms, decreased binocularity and fusional control resulting in inability to perform sustained visual tasks, visual scotomata (sic), impairment of ability to perform activities of daily living, inability to perform job tasks, and necessity to undergo visual therapy, among others.

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]). Although CPLR 3101 favors liberal disclosure, such disclosure must be material and necessary to the defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340 [2004]; *DeStrange v Lind*, 277 AD2d 344 [2000]). Plaintiffs' children's testimony, in conjunction with the injuries alleged in plaintiffs' amended bill of particulars, lead to the conclusion that the information sought in VW's Notice for Discovery and Inspection dated May 25, 2007 is material and necessary. As such, VW's application to compel plaintiffs compliance with its demand is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: September 28, 2007



HON. JOSEPH FARNETI  
Acting Justice Supreme Court