SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LAWRENCE MILLER and DIANE MILLER
Plaintiffs,

-against-

FAIRWAY PLAINVIEW, LLC.,
Defendant.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 5922/05
Motion Seq. Nos.:02 & 03

DECISION AND ORDER

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In Motion Seq. No. 2 the Plaintiffs move for an order allowing them to amend their Summons and Complaint and to amend their second Amended Bill of Particulars and directing the Defendant to accept Plaintiff's Supplemental/Third Amended Verified Bill of Particulars. The Plaintiffs also move to strike the Defendant's Answer. The Defendant moves in Seq. No. 3 for an order pursuant to CPLR § § 3101 and 3108 directing the issuance of an open commission to a notary public authorized to take the acknowledgment of deeds by the Real Property Laws of the States of New Jersey and Connecticut or to administer oaths by the law of the United States or the State of New York and who is not an attorney, for a party or prospective party herein, and is not a person who will be disqualified to act as a juror because of interest or because of consanguinity or because of affinity to any party herein to take depositions upon oral examination of Dr. Jeffrey A.

Miller of Shaws Cove Orthopedics, 6 Shaws Cove, New London, Connecticut 06320 and Dr. Barry M. Cohen of Associates in Cardiovascular Disease, LLC, 211 Mountain Avenue, Springfield, New Jersey 07081 as non party witnesses.

The Plaintiff's sought to strike the Defendant's Answer based on the Defendant's failure to comply with two Court orders. Plaintiff claims that the Defendant willfully refused to comply with two Court Orders directing production of all transcripts and memoranda regarding the February 21, 2007, February 24, 2007 and April 3, 2007 video surveillance of the injured Plaintiff. This issue was resolved in Court by the parties.

Where a claim is made that requested documents do not exist, the Plaintiff "is entitled to a detailed statement, made under oath, by an employee or officer with direct knowledge of the facts concerning the past and present status of the disputed documents." *Wilensky v JRB Marketing & Opinion Research, Inc.*, 161 AD2d 761 (2d Dept 1990); *accord Mercado v St. Andrews Housing Development Fund Company, Inc.*, 289 AD2d 148 (1st Dept 2001); *Longo v Armor Elevator Co., Inc.* 278 AD2d 127 (1st Dept 2000). The affidavits submitted must show that the production of requested documents including the surveillance tapes and accompanying notes is impossible. *Abbadessa v Sprint*, 291 AD2d 363 (2d Dept 2002); *Wilensky v JRB Marketing & Opinion Research, Inc., supra.*

At a conference on January 8, 2008, the parties entered a stipulation which was signed by the Court, wherein they agreed to the following:

The Defendant to produce the following within 2 weeks:

1. All surveillance tapes taken by Wayne Booker including all out-takes. If there were no out-takes Defendant to provide an affidavit to that effect from Wayne Booker.

2. All new surveillance tapes, including out-takes not previously provided to Plaintiffs if any. If no out-takes, Defendant to provide an affidavit(s) to that effect from Defendants surveillance videographer(s) who conducted the surveillance.

Compliance with this Order will be reviewed at the Certification Conference.

The Court now turns to the Plaintiff's application to amend their pleadings.

A party may amend his pleadings or supplement them by setting forth additional or subsequent transactions or occurrences, at any time, by leave of court. Permission to amend the pleadings shall be given freely in the absence of prejudice. See CPLR §3025(b). Plaintiffs' application to remove the *ad damnum* demands of $2,000,000 (and $500,000 for spousal loss of services claim) from the April 11, 2005 Summons and Compliant (allegations 42 and 46) and the Wherefore Clause and replace them with the following language: "Plaintiffs demand judgment against the Defendants in the First and Second Causes of Action in sums which exceed the jurisdiction of all lower courts that would otherwise have jurisdiction including the costs and disbursements of this action and interest from the date of the accident," is **granted**. Plaintiff asserts he is not claiming any increased injuries or worsening conditions, but rather only continuing lost earnings. Defendant has not shown any prejudice to the application to amend the complaint. *See Edenwalk Const. Co. v City of New York*, 60 NY2d 957 (1983); *Volpe v Good Samaritan Hospital*, 213 AD2d 398 (2d Dept 1995). Defendant is not precluded from serving a demand pursuant to CPLR §3017(c) which govern service of demands in wrongful death and personal injury action.

Plaintiff seeks to further amend the bill of particulars to particularize the claim for "dental injuries" as follows: "Damage to upper left second molar (#15) requiring a core build-up and a

porcelain infused to gold crown" and "fractures to upper anterior central incisors (#8 and #9) requiring porcelain veneers." For the same reasons stated hereinbefore, Plaintiff's application to amend the second amended bill of particulars and directing the Defendant to accept Plaintiff's supplemental/third amended verified bill of particulars regarding "dental injuries" is ***granted***. *See* CPLR §3025(b); *Edenwalk Const. Co. v City of New York, supra*; *Volpe v Good Samaritan Hospital, supra.* Leave is also ***granted*** to the Defendant to conduct an independent dental examination of the Plaintiff within 30 days of service of a copy of this Order.

The attorneys for the Defendant seek to conduct examinations before trial of the following non-party witnesses: Dr. Jeffrey A. Miller of Shaws Cove Orthopedics, New London, Connecticut; and Dr. Barry M. Cohen of Associates in Cardiovascular Disease, LLC, Springfield, New Jersey. The Defendant asks this court to issue an order requesting the courts of New Jersey and Connecticut to issue subpoenas and subpoenas duces tecum to Drs. Miller and Cohen to appear for and submit to depositions. The Defendants claim "that most, if not all, of the injuries Plaintiff alleges to have sustained are not causally related to the subject incident, but are in fact longstanding chronic problems. In order to definitively establish that there is no causal link between the August 27, 2003 accident and the injuries as alleged by Plaintiff, it is necessary to depose Drs. Barry Cohen and Jeffrey Miller, whose records reveal, among other things, that at various times prior to the subject accident, Plaintiff was advised by his physicians to stop working due to his deteriorating physical condition. Defendant further claims that the testimony of these physicians as to the information contained in their respective records is absolutely material and necessary in order for the Defendant to put forth an adequate defense on the damages aspect of this case. (Shay Reply Affirmation ¶ 4). Were it not for the fact that both witnesses reside outside

of New York State, subpoenas would already have been served to compel their deposition testimony." At the outset, the Defendant has not shown the "required special circumstances" that the information sought through deposition cannot be obtained from the medical records already in the possession of Defendant's counsel. There is no basis in law or fact to subject the doctors to a time-consuming examination before trial. *See* CPLR §3101(a)(4); *Dioguardi v St. John's Riverside Hospital*, 144 AD2d 333 (2d Dept 1998). As such, the application is **denied**.

A litigant is "deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue" (*Dillenbeck v Hess*, 73 NY2d 278, 287 (1989), citing *Koump v Smith*, 25 NY2d 287, 294 (1969) [physician-patient privilege waived by commencement of personal injury lawsuit]). This waiver is called for as a matter of basic fairness: "[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim." *Dillenbeck v Hess, supra.*

However, counsel for the Defendant fails to address authorizations compliant with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996), codified as amended in scattered sections of 18, 26, 29 and 42 U.S.C.S. HIPAA provides that a doctor may not disclose health information to third parties without a valid authorization. A treating physician is entirely free to decide whether or not to cooperate with defense counsel. HIPAA-compliant authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and

the Privacy Rule as is required before any use of disclosure of protected health information may take place. *See Arons Co., et al. v Jutkowitz, et al.*, 9 NY3d 393, New York Court of Appeals, November 27, 2007.

Based on the foregoing, the Defendant's application to compel non-party witnesses, Dr. Miller and Dr. Cohen to appear for examinations before trial is **denied**.

The parties are directed to appear on March 7, 2008 at 9:30 a.m. for a Certification Conference.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: February 11, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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