

Quilliams v Half Hollow Hills School Dist.

2008 NY Slip Op 31124(U)

April 16, 2008

Supreme Court, Suffolk County

Docket Number: 0007646/2004

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 001MG
Adj. Date: 3-6-08
Return Date: 5-29-07

Present:
Hon. SANDRA L. SGROI

JAMES QUILLIAMS,
Plaintiff,

SACKS AND SACKS, LLP
Attorney for Plaintiff
150 Broadway, 4th Floor
New York, New York 10038

-against-

HALF HOLLOW HILLS SCHOOL DISTRICT
(CANDLEWOOD SCHOOL) and E.W. HOWELL
CONSTRUCTION,
Defendants

FABIANI COHEN & HALL, LLP
Attorneys for Half Hollow Hills School District
(Candlewood School) and E.W. Howell Construction
570 Lexington Avenue, 4th Floor
New York, New York 10022

HALF HOLLOW HILLS SCHOOL DISTRICT
CSD and E.W. HOWELL CONSTRUCTION,
Third Party Plaintiffs,

GARTNER & BLOOM, PC
Attorney for Third Party Defendant Maryland Fabricators,
Inc.
885 Second Avenue
New York, New York 10017

-against-

MARYLAND FABRICATIONS, INC.
Third Party Defendant.

Upon the following papers numbered 1 to 10 read on this Motion: Notice of Motion and supporting papers 1-4; Affirmation in opposition and supporting papers 5-8; Affirmation in Reply and supporting papers 9-10; it is,

ORDERED that the motion of the Defendants, Half Hollow Hills School District (Candlewood School)

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and E.W. Howell Construction, is granted to the extent that:

1. a functional capacities examination by a professional designated by the Defendants shall be scheduled within sixty days of service of a copy of this order;
2. a further examination by Dr. Edward Crane shall be scheduled within sixty days of service of a copy of this order;
3. the Plaintiff is directed to provide authorizations within ten (10) days from the date of service of this order and the Defendants are directed to immediately process these authorizations to obtain the records;
4. the Defendants are directed to schedule and the Plaintiff is directed to submit to a psychological examination on an expedited basis after the Defendants receive the necessary medical records; and
5. the Defendants may renew their application for a further deposition after the above directives have been complied with, if the need for that further deposition is demonstrated and the Plaintiff refuses to consent to the deposition.

and it is further

ORDERED that all other reliefs requested by the Defendants are denied.

The Plaintiff, James Quilliams, alleges that he was injured during the course of his employment on June 6, 2003. On that date he was employed by the third party Defendant Maryland Fabricators as an ironworker and he was connecting steel columns and beams together during the construction of the Candlewood Middle School located in Dix Hills, New York. As a result of the alleged injuries that he suffered on that day, the Plaintiff alleges that he is unable to work and that he will be unable to work in the future. He seeks to recover past and future lost earnings in excess of \$9 million dollars.

The Defendants have moved to compel certain discovery and the Plaintiff has opposed that motion. The Court will address the disclosure issues ad seriatim.

The first issue raised by the motion to compel discovery concerns the request of the defendants that the Plaintiff be compelled to submit to a functional capacity examination or a vocational assessment examination, as it is sometimes denominated.

The interplay of *CPLR Article* 31 discovery and an expert examining a Plaintiff to determine his ability to be employed after an injury was addressed by the Court of Appeals in *Kavanagh v. Ogden Allied Maintenance Corp.*, (92 N.Y.2d 952, 683 N.Y.S.2d 156, 705 N.E.2d 1197). The Court of Appeals stated that:

As a general proposition, in personal injury litigation, requiring the plaintiff to submit to extensive vocational assessment procedures might well be unduly burdensome. Here, however, to establish damages for plaintiff Kavanagh's personal injuries, plaintiffs retained a nonphysician vocational rehabilitation expert who was prepared to testify that examination and testing established her present lack of capacity to perform in the

workforce. Plaintiffs thereby overtly made vocational rehabilitation assessment procedures “material and necessary in the * * * defense” for the purposes of rebuttal (see, *CPLR* 3101[a]; see also, *Hoening v. Westphal*, supra, 52 N.Y.2d, at 610, 439 N.Y.S.2d 831, 422 N.E.2d 491). The opportunity to present a competing assessment of Kavanaugh's vocational abilities by an expert thus became imperative to the goal underlying our discovery rules of “ensur[ing] that both plaintiff[s] and defendants receive a fair trial” (*DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d, at 198, 590 N.Y.S.2d 1, 604 N.E.2d 63, supra). Under these circumstances, it cannot be said that the trial court abused its discretion in finding that the need for the discovery outweighed the burden on the protesting party, and, as a result, in compelling the discovery.

While the language in *Kavanagh v. Ogden Allied Maintenance Corp.* (supra) could be construed as permitting examination by Defendant's vocational expert only when the Plaintiff intends to offer the testimony of a vocational expert, the Appellate Division, First Department addressed the issue of reciprocity in *Freni v. Eastbridge Landing Associates LP*, (309 A.D.2d 700, 767 N.Y.S.2d) and specifically stated that it was not a prerequisite for the Plaintiff to have first hired a vocational assessment expert for the Defendant to be permitted to examine and evaluate the Plaintiff by such an expert. The Appellate Division, Fourth Department in *Smith v. Manning*, (277 A.D.2d 1004, 716 N.Y.S.2d 844, 845,) has also allowed the Defendant to conduct an examination by a vocational expert as part of the discovery process without the Plaintiff first hiring its own vocational assessment expert.

The Appellate Division, Second Department in *Scotto v. M.D. Carlisle Const. Corp.*, (18 A.D.3d 459, 797 N.Y.S.2d 96) stated that where an examination by “***a vocational rehabilitation expert will yield information that is material and necessary to the defense of the action” and the Plaintiff will not be “prejudiced or burdened by the examination,” it should be permitted.

The Plaintiff herein is alleging that he is unable to return to his previous occupation because of the injuries he received in his fall. It is clear from these allegations that an examination by a vocational expert will yield information germane to the alleged damages sustained by the Plaintiff. There is no showing that such an examination would be unduly burdensome to the Plaintiff and therefore the Court will grant the motion of the Defendant and order that such an examination be scheduled within sixty (60) days of service of a copy of this order.

In addition the Court directs that the Plaintiff appear for a further examination by Dr. Crane because he has had additional surgery and presumably some possible improvement to some aspects of his physical condition since the last examination. Additionally, the Plaintiff has alleged that he will need additional surgery for his injuries to his shoulder, thus raising additional medical concerns that have arisen since the prior examination by Defendants' medical expert.

Finally, the Defendants request that the Plaintiff submit to a psychiatric examination after the Defendant has received the necessary authorizations and the Plaintiffs have had the opportunity to obtain the Plaintiff's records. Since the Plaintiff has alleged that he has sustained psychological injuries as a result of the accident, the Plaintiff's records of psychiatric and psychological treatment are potentially relevant and the Court will direct that the Plaintiff provide said authorizations within ten (10) days from the date

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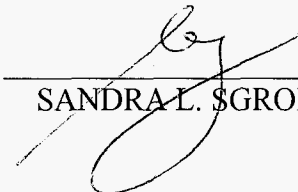
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of service of this order and that the Defendants immediately process these authorizations to obtain the records. Thereafter, the Defendants are directed to schedule and the Plaintiff is directed to submit to a psychological examination on an expedited basis.

The other authorizations requested from the Plaintiff are directed to be provided within ten (10) days of service of this order.

Dated:

4/16/08


SANDRA L. SGROI, J. S. C.