

Richman v Ilan Props., Inc.
2009 NY Slip Op 31059(U)
May 7, 2009
Supreme Court, New York County
Docket Number: 105380/2008
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

Index Number : 105380/2008
RICHMAN, PAULA
vs.
ILAN PROPERTIES, INC.
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 105380/08

MOTION DATE 4/16/09

MOTION SEQ. NO. 003

MOTION CAL. NO. 6

The following papers, numbered 1 to 6 were read on this motion to vacate a conference ruling; cross motion for sanctions

	PAPERS NUMBERED
Amended Notice of Motion— Affirmation— Exhibits A-L	<u>1-2</u>
Notice of Cross Motion—Answering Affidavits — Exhibits	<u>3-5</u>
Replying Affirmation — Exhibits A-D	<u>6</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the annexed memorandum decision and order.

FILED
MAY 14 2009
COUNTY CLERKS OFFICE
NEW YORK
HON. MICHAEL D. STALLMAN

Dated: 5/7/09
New York, New York

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
PAUL RICHMAN,

Plaintiff,

Index No. 105380/2008

- against -

ILAN PROPERTIES, INC., SPRING SCAFFOLDING, INC.
and OUTDOOR INSTALLATIONS, LLC,

Decision and Order

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

FILED
MAY 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

In action, plaintiff alleges that, on August 11, 2008, she tripped and fell on stairs outside the entrance of a building allegedly owned, operated, controlled, managed by defendant Ilan Properties, Inc. According to the verified bill of particulars, plaintiff stated that she tripped/slipped on the top of the exterior stairway leading to the entrance to the building and fell down on uneven stairs, suffering injury. With respect to response no. 8 of the bill of particulars, plaintiff set forth specific sections of the building code and multiple dwelling law that Ilan Properties, Inc. violated, but added that the provisions, "include, but are not limited to" the specific sections, and that "plaintiff reserves her right to supplement / amend this response. . . ." Hurzeler Affirm., Ex C. With respect to responses nos. 27 and 28, which demanded particulars as to notice, plaintiff responded, "Objection, actual and constructive notice are not elements that need to be provided in this action, given that defendants . . . created the conditions complained of." Ibid. Plaintiff also alleged that defendants may have had actual notice contained in their files, and constructive notice.

A preliminary conference in this case was held on October 24, 2008. At the conference, the Court ruled that plaintiff's responses in the bill of particulars, including in item no. 8, "are adequate

and comply with CPLR 3043. As to items # 27 & 28 of the bill of particulars, the Court directs plaintiff to supplement her responses within 30 days after the completion of all EBTs." Hurzeler Affirm., Ex F.

Ilan Properties, Inc. moves to vacate the Court's rulings as to the adequacy of the plaintiff's responses in item nos. 8, 27 & 28 of her bill of particulars. Ilan Properties Inc. also seeks an order compelling plaintiff to produce medical authorizations for plaintiff's mental health records, because plaintiff claimed in her bill of particulars that she suffered "anxiety and mental anguish." According to Ilan Properties, it has been unable to obtain any medical records for plaintiff without a specific authorization for mental health records. Ilan Properties also contends that plaintiff did not provide information as to witnesses.

Plaintiff cross-moves for sanctions against Ilan Properties, Inc. for delaying the action by bringing this motion. Plaintiff's counsel argues that plaintiff has not placed her mental health in issue, but rather that all of plaintiff's physical injuries have a component of mental anguish, i.e., pain and suffering.

DISCUSSION

Ilan Properties, Inc. seeks a conditional order dismissing the action because plaintiff allegedly failed to identify witnesses and did not provide unrestricted authorizations for medical records.

Plaintiff's response for witness information is adequate. Plaintiff supplied the name of one witness, and stated that she "was otherwise unaware of any witnesses, other than the parties to the action and those listed in official reports. . . ." This complied with plaintiff's obligation to provide the identities of any witnesses known to plaintiff who witnessed the event at issue. Hunter v Tryzbinski, 278 AD2d 844 (4th Dept 2000).

“[N]othing in CPLR article 31 requires a party to generate a witness list per se. As with any other disclosure obligation, a party’s compliance or noncompliance must be gauged with reference to the purposes of disclosure, which are to sharpen factual issues, advance the truth-finding process, accelerate the disposition of suits, and prevent gamesmanship and unfair surprise at trial.”

Id. at 845. Thus, the Court disagrees with Ilan Properties, Inc.’s argument that the response is inadequate because plaintiff also stated that she may call doctors, friends, and/or members of her family to testify at trial, but did not provide their names and addresses. Plaintiff is not claiming that these persons (whom she did not specifically identify) are eyewitnesses to plaintiff’s trip and fall.

The Court does not find that the record supports that plaintiff has placed her mental condition at issue in this case. Allegations of pain and suffering are not sufficient to place the plaintiff’s mental condition in controversy. See Bozek v Derkatz, 55 AD3d 1311, 1312 (4th Dept 2008)(In action where plaintiff alleged, among other things, loss of enjoyment of life and pain and suffering, Supreme Court abused its discretion in granting defendants’ motion to compel plaintiff to provide authorizations for physicians and mental health providers). The allegations of anxiety and mental anguish must be understood in the context of consistent representations by plaintiff’s counsel that plaintiff is claiming pain and suffering resulting from physical injuries, not emotional injuries separate from pain and suffering. “The term ‘pain and suffering’ encompasses all items of general, non-economic damages. . . .” 1 NY PJ3d 2:280, at 1538 (2009). Thus, “pain and suffering” includes mental suffering (Lamot v Gondek, 163 AD2d 678, 679 [3d Dept 1990]) and shock and fright. Cf. Eaton v Comprehensive Care Am., 233 AD2d 875 (4th Dept 1996) (court erred in awarding shock and fright as a category of damages separate from past pain and suffering). Plaintiff’s alleged severe headaches, migraines, dizziness, and vertigo are not mental health injuries. Ilan Properties, Inc. apparently believes, erroneously, that a neurological condition or physical impairments resulting

[* 5]

from neurological injuries is synonymous with a mental condition.

Should plaintiff amend her claims to assert claims for emotional or psychiatric/psychological injuries, then defendant Ilan Properties, inc. would be entitled to see plaintiff's mental health records.

The fact that hospitals allegedly refused to process the authorizations without a specific authorization for mental health records is not a reason to compel plaintiff to provide authorizations on matters for which she has not waived her physician-patient privilege. Neither has plaintiff placed her mental condition at issue when she allegedly "co-mingled" her mental health records with her accident-related records. Nothing in the moving papers indicates that plaintiff suffers from specific mental conditions that could exacerbate plaintiff's pain and suffering, or that plaintiff's pain and suffering has a psychological etiology. See Njie v Thompson, 2009 WL 1046203 (1st Dept, Apr 21, 2009).

Therefore, the Court denies the branch of Ilan Properties, Inc.'s motion for a conditional order of dismissal of this action. The Court does not address here Ilan Properties, Inc.'s request for an order compelling plaintiff to serve authorizations for other medical records and diagnostic films, which was raised for the first time in reply. Reply Affirm. at 4 n 2. There is no indication that defendant attempt to resolve in good faith this specific issue prior to seeking the relief. 22 NYCRR 202.7 (a).

The branch of Ilan Properties, Inc.'s motion to vacate the ruling of the preliminary conference order as to response no. 8 of plaintiff's bill of particulars is granted. In response to the demand for all laws, rules, regulations, and ordinances that plaintiff claimed each defendant had violated, plaintiff set forth specific statutes with the reservation, "these include, but are not limited to. . . ." Hurzeler Affirm., Ex C. As Ilan Properties, Inc. points out, the qualified language "including but

not limited to” fails to satisfy the purpose of a bill of particulars. Alvarado v New York City Hous. Auth., 302 AD2d 264, 265 (1st Dept 2003). Accordingly, plaintiff must serve a supplemental bill of particulars without reservation within 20 days, without prejudice to supplementing the bill of particulars as to additional rules, laws, or ordinances violated after completion of discovery. If plaintiff is unable to supplement the bill of particulars without reservation, then the reservation, “including but not limited to” will be deemed stricken. Ibid.

As to responses nos. 27 and 28 of plaintiff's bill of particulars, which sought particulars as to whether actual or constructive notice is alleged, plaintiff responded, “Objection, actual and constructive notice are not elements that need to be proved in this action, given that defendants . . . created the condition complained of. However, without waiving any objections, information as to actual notice is believed to be contained in the files of the answering defendants. . . .” Hurzeler Affirm., Ex C. Thus, it was apparent from these responses that plaintiff lacked knowledge of actual or constructive notice to this defendant of the condition of the stairs. For this reason, the Court directed plaintiff to supplement her response after the completion of the parties' EBTs.

However, plaintiff should have explicitly stated that she currently lacked knowledge of the exact identities of the agents, servants or employees which were given actual notice of the dangerous condition, and the place(s) and date(s) when notice was allegedly given. Jaiman v Hock, 178 AD2d 508, 509, 577 (2 Dept 1991); Major v General Motors Corp., 126 Ad2d 521 (2d Dept 1987). These specifics can be alleged in a supplemental bill if, after discovery, the plaintiff acquires the information. Ibid.

In light of the additional supplemental bill of particulars to be served, the scheduling of depositions will be addressed at the next compliance conference on June 4, 2009.

Plaintiff's cross motion for sanctions is denied. Ilan Properties, Inc. properly exercised its right to move to vacate a conference ruling to obtain a decision appealable as of right. Serradilla v Lords Corp., 12 AD3d 279, 280 (1st Dept 2004); see also Sholes v Meagher, 100 NY2d 333, 335-336 (2003). The Court cannot say that Ilan Properties, Inc.'s argument that plaintiff placed her mental condition at issue was utterly lacking in merit, either in fact or in law.

Pursuant to CPLR 325 (d), this action is hereby transferred to the Civil Court of the City of New York. A separate order has been signed herewith.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant Ilan Properties, Inc.'s motion to vacate the Court's ruling in the preliminary conference order dated October 24, 2008 and for other relief is granted to the extent that plaintiff is directed to serve a supplemental bill of particulars within 20 days as to response no. 8, which must be without reservation, and as to responses no. 27 and 28, and the motion is otherwise denied ; and it is further

ORDERED that plaintiff's cross motion for sanctions against defendant Ilan Properties Inc. is denied.

Copies to counsel.

Dated: May 7, 2009
New York, New York

ENTER:

J.S.C.

FILED
MAY 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
PAUL RICHMAN,

Plaintiff,

Index No. 105380/2008

-against-

Transfer Order to Civil Court

ILAN PROPERTIES, INC., SPRING SCAFFOLDING,
INC. and OUTDOOR INSTALLATIONS, LLC,

Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is


ORDERED, that this cause bearing Index Number 105380/2008 be, and it hereby is, removed from this Court and transferred to the Civil Court of the City of New York, County of New York, and it is further

ORDERED, that the clerk of the New York County shall transfer to the clerk of the Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall issue to this action a Civil Court Index Number without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

Dated: 5/7/09

FILED
MAY 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

ENTER: 
MICHAEL D. STALLMAN, J.S.C.