

Bianco v City of New York

2009 NY Slip Op 32324(U)

October 2, 2009

Supreme Court, New York County

Docket Number: 108893/07

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**
Justice

PART 5

Bianco, Phyllis

INDEX NO. 108893/07

MOTION DATE _____

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

- v -

City of New York, et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/2/09


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

PHYLLIS BIANCO,

Plaintiff,

Index No.
108893/07

- against -

**DECISION
and ORDER**

THE CITY OF NEW YORK, EMPIRE CITY SUBWAY
COMPANY (LIMITED); SLATTERY/GOTTLIEB JV
AND VERIZON NEW YORK,

Mot. Seq.: 009

Defendants.

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell in front of "Brooks Brothers a/k/a the building 100 Liberty Plaza" in the County and State of New York on April 4, 2007. Defendants Empire City Subway Company (Limited) and Verizon New York, Inc. ("ECS") move for an order (1) pursuant to CPLR 3126, striking plaintiff's complaint for failing to provide discovery relating to pre-accident medical treatment and injuries; or (2) precluding plaintiff from offering evidence at trial on the issue of damages; or (3) pursuant to CPLR 3124, compelling plaintiff to respond to its discovery demand dated September 19, 2008 and to provide all authorizations to obtain medical records related to plaintiff's prior knee injury and pre-existing polio. Plaintiff opposes. Defendant the City of New York ("City") submits an affirmation in support of ECS' motion. The action as against defendant Slattery/Gottlieb JV has been discontinued.

ECS argues that plaintiff's EBT testimony revealed several prior medical issues that have bearing on the damages that she seeks in the instant action. Specifically, plaintiff testified that she had sustained a meniscal tear to her right leg which required corrective surgery. After the deposition, ECS served plaintiff with a Supplemental

Notice for Discovery and Inspection, dated September 18, 2008. Plaintiff responded to the demand and objected to providing authorizations to obtain records from the following: (1) Dr. D'Angelo relating to her prior right knee surgery; (2) all records and treating providers related to her right knee surgery; and (3) all hospital records related to her right knee surgery. Plaintiff also objected to the disclosure of the last known name and address of Heather Orefici, Plaintiff niece who allegedly came to the scene after the accident. Plaintiff, in opposition, claims that she has properly responded to all discovery demands.

By way of reply, ECS asserts that, in reviewing all of plaintiff's responses, it has determined that plaintiff has specifically failed to respond to items 10-13 of its September 28, 2009 D&I. Those demands are as follows:

10. Set forth the name and complete address of the hospital at which Plaintiff had her orthopedic surgery in 2004.

11. Set forth duly executed and acknowledged written HIPAA compliant authorization addressed to and directed to the hospital at which plaintiff was examined and/or treated with respect to her orthopedic surgery in 2004 so as to permit undersigned to secure a copy of the entire hospital record or records including x-rays and technicians reports.

12. Set forth the names and complete addresses of every doctor, health care practitioner, including physical therapist who examined and/or treated plaintiff with respect to her orthopedic surgery in 2004.

13. Set forth duly executed and acknowledged written HIPAA compliant authorizations addressed to and directed to every doctor, health care practitioner, including physical therapist who examined and/or treated plaintiff with respect to her orthopedic surgery in 2004 so as to permit the undersigned to secure a copy of the entire records including x-rays and technicians' reports.

ECS narrows its requests down to: (1) a new authorization from Dr. D'Angelo to obtain pre-2004 treatment; (2) an authorization from Cabrini Medical Center to obtain all records; (3) an authorization for Dr. Kaplan to obtain his complete file; (4) an authorization from Regional Radiology to obtain pre-2007 records; and (5) an

authorization from Dr. Santiamo to obtain pre-2007 records. ECS also points out that, because plaintiff admits to a prior injury, but cannot recall the exact details of her treatment for that injury, ECS is entitled to obtain information from plaintiff's insurer to determine precisely what medical care was given at that time.

Pursuant to CPLR §3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. The sanctions imposed by §3126 are warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). The moving party must show "conclusively that failure to disclose was willful, contumacious or due to bad faith." (*Dauria v. City of New York*, 127 AD2d 416 [1st Dept. 1987]).

CPLR §3124 states:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

While plaintiff's conduct does not rise to the level required to impose sanctions pursuant to CPLR §3126, ECS is nonetheless entitled to the requested discovery. Plaintiff testifies at her deposition that she had a meniscal tear on her right leg which required surgery in 2004. Plaintiff does not remember where the surgery was performed and cannot recall many details surrounding the prior injury and/or surgery. Such details are highly relevant given that plaintiff is now claiming damages relating to losses that she claims are solely as a result of the present accident.

Wherefore it is hereby

ORDERED that defendants Empire City Subway Company (Limited) and Verizon New York, Inc's motion is granted to the extent that plaintiff shall provide defendants with the following: (1) a new authorization from Dr. D'Angelo to obtain pre-2004 treatment; (2) an authorization from Cabrini Medical Center to obtain all records; (3) an authorization for Dr. Kaplan to obtain his complete file; (4) an authorization from Regional Radiology to obtain pre-2007 records; (5) an authorization from Dr. Santiamo to obtain pre-2007 records; and (6) the name of

plaintiff's insurance company from 2000-2007, along with authorizations giving defendants access to plaintiff's insurance records.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: October 2, 2009



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

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Plaintiff(s),

- v -

3M Company

Defendant(s).

INDEX NO.

190094/08

MOTION DATE

MOTION SEQ. NO.

18

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: [] Yes [X] No

It is hereby

ORDERED that this motion by Spirax Sacco

for summary judgment is granted without opposition and the claims and cross-claims against movant(s) are severed from the remaining claims and dismissed; and It is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the order of the Court.

FILED
OCT 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-5-09

[Signature]
SHERRY KLEIN HEITLER, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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