

Banks v Colaciuri

2010 NY Slip Op 31573(U)

June 17, 2010

Supreme Court, Nassau County

Docket Number: 17000/01

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 20

WILLIAM STEPHEN BANKS III, X

Plaintiff,

Index No.: 17000/01
Motion Sequence...03, 04
Motion Date...3/10/10

-against-

FRANK COLACIURI, VINNY PETULLA,
VINNY PETULLA d/b/a VINNY PETULLA
CONTRACTING & VINNY PETULLA
CONTRACTING,

Defendants.

X

Papers Submitted:

- Defendant COLACIURI's Order to Show Cause.....X
- Defendant PETULLA's Order to Show Cause.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

The Defendant, FRANK COLACIURI ("COLACIURI") moves by Order to Show Cause (Mot. Seq. 3), for an order compelling production of authorizations for a complete set of the Plaintiff's medical records; and/or compelling a deposition of the Plaintiff's treating physician, Dr. Kurzweil; and/or compelling a further deposition of the Plaintiff. The Defendant, VINNY PETULLA d/b/a VINNY PETULLA CONTRACTING ("PETULLA") moves by Order to Show Cause (Mot. Seq. 4), for an order granting

reargument of a prior order of this Court (J. Dunne, 6/29/04), and upon reargument, directing the Plaintiff to furnish to the Defendants authorizations to obtain records from North Shore University Hospital and Dr. Kurzweil; compelling a further deposition of the Plaintiff; compelling a further medical examination of the Plaintiff; compelling the depositions of two non-party witnesses recently exchanged by the Plaintiff; and striking the Plaintiff's CPLR § 3101 exchange. The Plaintiff opposes the Orders to Show Cause. The Defendants' Orders to Show Cause are decided as provided herein.

Background

On or about November 8, 2001, the Plaintiff commenced this action by the filing of a Summons and Complaint seeking damages for personal injuries allegedly incurred by the negligent and careless construction of a staircase and also alleging that said staircase was allowed to remain in a defective and dangerous condition. On or about August 12, 2002, the Plaintiff filed an Amended Summons and Complaint. The Plaintiff, a tenant in a building owned by the Defendant, COLACIURI, alleged in his Amended Complaint that on August 25, 2001, he was caused to fall approximately twelve feet from an exterior landing down a flight of stairs he alleges was negligently constructed and maintained by the Defendants. The co-Defendant, PETULLA, was hired to reconstruct the rear of COLACIURI's home, which included the installation of a staircase used by the Plaintiff. The Defendants claim that the fall was not caused by the negligent and careless construction of the staircase, but rather, the Plaintiff's consumption of several alcoholic beverages on the night of the accident.

The Parties engaged in discovery and the case was certified for trial on February 10, 2003. Although discovery was not completed, the Note of Issue was filed on September 26, 2003. During discovery, the Plaintiff furnished medical authorizations to the Defendants for the release of medical records from North Shore University Hospital at Glen Cove, Dr. Kurzweil and other related rehabilitation facilities. After discovery was completed and prior to trial, the Defendant, due to an amendment in the CPLR requiring that HIPAA compliant authorizations be included with a subpoena when served, sought additional authorizations for purposes of trial. At a post-Note of Issue deposition of the Plaintiff, the Plaintiff refused to provide the Defendants with the additional authorizations.

On March 30, 2004, as a result of the Plaintiff's refusal, the Defendant, PETULLA filed an Order to Show Cause seeking an order compelling the Plaintiff to provide the Defendant with appropriate HIPAA compliant authorizations allowing the Defendant to subpoena all relevant records from North Shore University Hospital at Glen Cove, as well as all related rehabilitation facilities (Mot. Seq. 01). In support thereof, the Defendant, PETULLA alleged that all records of the Plaintiff's prior hospitalizations were necessary to be obtained in order to ensure a fair trial as the records would establish the Plaintiff's prior history and diagnosis of chronic alcoholism, alcohol polyneuropathy, delirium tremens, blackouts and falls, which would be relevant to the issues of the Plaintiff's comparative negligence and assumption of risk.

On April 13, 2004, the Plaintiff submitted an Order to Show Cause for a

protective order pursuant to CPLR § 3103 seeking to suppress disclosure and precluding, at trial, all evidence relating to the Plaintiff's treatment for substance abuse, including, but not limited to, hospital records and the records of treatment facilities. The Plaintiff alleged that the treatment he received for alcohol abuse was not relevant to his claims and that the introduction of such evidence would be extremely prejudicial to the Plaintiff. In support of his argument, the Plaintiff alleged that the information sought by the Defendant was protected by the doctor/patient privilege and certain provisions of New York's Mental Hygiene Law.

On May 3, 2004, Justice Cozzens stayed the trial of this matter pending the determination of the parties' respective motions.

The medical records that were the subject of Motion Sequences 1 and 2 were as follows: the Plaintiff's admissions to North Shore University Hospital at Glen Cove and related medical records on:

- April 4, 1993
- August 19, 1996
- July 1, 1998
- March 2, 1999
- July 3, 1999
- May 28, 2000
- November 9, 2001
- September 16, 2003

After an *in camera* inspection of the above referenced medical records, on June 29, 2004, Justice Dunne ruled that the admissions on July 3, 1999 and May 28, 2000 were discoverable as the injuries treated during those hospitalizations were directly related to the

injuries claimed as a result of the accident on August 29, 2001. Justice Dunne also ruled that all medical records relating to hospitalizations subsequent to the accident (November 9, 2001 and September 16, 2003) were discoverable.

The Court held that the following hospitalizations were not discoverable: August 19, 1996; July 1, 1998; March 2, 1999; and April 4, 1993. However, in dicta, the Court noted that these records “may be discoverable as records of the treating physician and expert witness of Plaintiff, Dr. Kurzweil.”

After the issuance of the June 29, 2004 order of this Court, neither the Plaintiff nor the Defendants took any action to restore this case to the trial calendar. While the parties blame one another for the case being stagnant for more than five (5) years, this Court finds that both the Plaintiff and the Defendants are responsible for the unexplained passage of time. Notably, no party has provided the Court with an explanation as to why the Plaintiff and the Defendants waited more than five (5) years to take any action. Additionally, the documentation presented is devoid of any information regarding the date on which the prior order of this Court was entered and served, if at all, with a Notice of Entry.

A review of the County Clerk’s file indicates that the prior order was entered on July 7, 2004. There is no Notice of Entry in the Clerk’s file or submitted with the moving papers or opposition thereto. The County Clerk’s file also indicates that by letter dated November 4, 2009, the Plaintiff requested that this case be reassigned to another Judge in light of Justice Dunne’s retirement during the stayed period and that a compliance conference

be scheduled. This case was reassigned to this Court on January 11, 2010, upon the signing of the Defendant, COLACIURI's Order to Show Cause (Mot. Seq. 03).

The Defendant, PETULLA now moves, by Order to Show Cause, seeking reargument of Justice Dunne's, 6/29/04 decision and order, and upon reargument, compelling the Plaintiff to provide duly executed HIPAA compliant medical authorizations; a further deposition of the Plaintiff; a further physical exam of the Plaintiff; depositions of two (2) non-party witnesses recently exchanged by the Plaintiff; and to strike the Plaintiff's CPLR § 3101 (d) exchange as untimely and not in compliance with the CPLR. The Defendant, PETULLA argues in support of the relief sought, that Justice Dunne incorrectly characterized the prior motion as one for discovery. The Defendant also argues that Justice Dunne failed to consider that authorizations were previously furnished during discovery.

With respect to the Defendant's request that this Court strike the Plaintiff's CPLR § 3101 (d) exchange, the Defendant claims that the Plaintiff's expert inspected the property in contravention of CPLR § 3120. The Defendant states that the Plaintiff's expert went to the subject premises without any notice to counsel, rang the doorbell and conversed with the Defendant COLACIURI, a represented party, and proceeded to undergo an inspection of the premises.

The Defendant, COLACIURI moves for similar relief as does the co-Defendant PETULLA, seeking to compel the Plaintiff to provide HIPAA compliant medical authorizations; seeking a deposition of Dr. Kurzweil; and seeking a further deposition of the

Plaintiff.

In opposition, the Plaintiff avers that there is no basis for reargument of the June 29, 2004 order of Justice Dunne. The Plaintiff claims that the Defendant, PETULLA's application seeking reargument is untimely as the application is being made almost six (6) years after the decision was rendered. In his opposition, the Plaintiff states that the decision, although not served with Notice of Entry, cannot now be reargued. The Plaintiff also opposes the Defendant's request for a further physical exam as no new injuries are being claimed. Lastly, the Plaintiff argues that since the expert was granted express permission by the Defendant, COLACIURI to inspect the property, that the Defendant, PETULLA has not been prejudiced by the expert exchange. All other arguments presented by the Plaintiff with respect to the medical records were previously argued before the Court (Mot. Seq. 02).

Discussion

A motion to reargue is addressed to the discretion of the Court and may be granted upon a showing that the Court overlooked or misapprehended the facts or misapplied the law or for some other reason improperly decided the prior motion. CPLR § 2221 (d) (2); *Foley v. Roche*, 68 A.D.2d 558 (1st Dept. 1979); *Collins v. Stone*, 8 A.D.3d 321 (2d Dept. 2004). It is not to be used by the unsuccessful party to obtain successive opportunities to argue issues previously decided or to present new arguments different from those originally presented. *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374 (2d Dept. 2004); *McGill v. Goldman*, 261 A.D.2d 593 (2d Dept. 1999). Further, pursuant to CPLR § 2221 (d) (3), "a

motion for leave to reargue ... shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry". Pursuant to CPLR § 5513, the time to appeal starts from the prevailing party's service of a copy of the judgment or order with notice of the entry.

At the outset, the Defendant, PETULLA's application to reargue this Court's prior determination is untimely. Although not stated by the Plaintiff or the Defendants, a review of the County Clerk file indicates that Justice Dunne's decision of June 29, 2004 was entered on July 7, 2004. The moving papers, as well as the opposition, do not contain a copy of the Notice of Entry served by any Party.

The Defendant, PETULLA's counsel argues that it took the Plaintiff five years to comply with the prior order. However, the order is not enforceable until such time as it is entered. If the Defendant sought the enforcement of the order and/or sought to appeal the prior order, then the Defendant should have served the Order with Notice of Entry. The entry of an order or judgment marks the moment from which the order or judgment may be enforced, as well as the moment when the order or judgment may be appealed. CPLR § 2220 (see Supplementary Practice Commentaries, 2220:1). The Defendant failed to enter and serve the order and now, after a significant length of time, seeks to enforce the relief granted therein.

Notwithstanding the untimeliness of the Defendant, PETULLA's motion, he has failed to establish that the Court overlooked or misapprehended the facts or misapplied

the law in its prior determination. The Defendant, PETULLA simply disagrees with the decision rendered by the Court and waited more than five (5) years to contest the decision. Justice Dunne conducted an *in camera* inspection of the medical records and after such inspection, held that certain documents were discoverable while finding that others were not. In so finding, the Court ultimately granted the Defendant's prior motion in part, as the Plaintiff was required to provide the Defendant with HIPAA compliant authorizations for the documents outlined in the decision. The Court also denied the Plaintiff's motion for a protective order. Based upon the foregoing, the Defendant, PETULLA's Order to Show Cause for leave to reargue is **DENIED**.

The Court hereby denies the Defendant, PETULLA's application to reargue and adheres to the original decision (J. Dunne, 6/29/04). The Defendant has failed to assert any facts or issues of law which the court overlooked or misapprehended in its original determination. The Plaintiff is directed to provide the Defendant, PETULLA with HIPAA compliant duly executed medical authorizations for the medical records referenced as discoverable in the Court's prior order dated June 29, 2004, for services rendered on the following dates: July 3, 1999; May 28, 2000; November 9, 2001; and September 16, 2003. The time for the Defendant, PETULLA to have sought any further discovery, beyond that which was permitted in Justice Dunne's order, has long passed. The Defendant, PETULLA's application for a further deposition of the Plaintiff, a further medical examination of the Plaintiff, depositions of two (2) non-party witnesses recently exchanged by the Plaintiff is

DENIED (Mot. Seq. 4).

However, the branch of the Defendant, PETULLA's motion which seeks to strike the Plaintiff's CPLR § 3101 (d) expert exchange is **GRANTED** (Mot. Seq. 4). The Plaintiff failed to comply with CPLR § 3120 by failing to notify the Defendants' respective counsel regarding his intent to have an expert inspect the premises and affording the Defendants an opportunity to be present to inspect same.

For the same reasons set forth herein above, the Defendant, PETULLA's Order to Show Cause (Mot. Seq. 4) and the Defendant COLACIURI's Order to Show Cause (Mot. Seq. 3) seeking further discovery at this time are **DENIED**.

Any matters not decided herein are hereby **DENIED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
June 17, 2010



Hon. Randy Sue Marber, J.S.C.

ENTERED
JUN 21 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE