Tuebner v Cardinal Health 414, Inc.
2010 NY Slip Op 32157(U)
July 29, 2010
Supreme Court, Nassau County
Docket Number: 12315/05
Judge: Roy S. Mahon
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

MELISSA TUEBNER, as Administratrix of the Estate of GLENN TUEBNER, deceased; and MELISSA TUEBNER, individually,

Plaintiff(s),

- against -

CARDINAL HEALTH 414, INC.; AUTOMOTIVE RENTALS, INC.; NY SPINAL SPECIALISTS; ANTHONY W. GRANT; SEBASTIAN LATTUGA, MD., MICHAEL BRESNAHAN, P.A., and MERCY MEDICAL CENTER,

Defendant(s).

CARDINAL HEALTH 414, INC., AUTOMOTIVE RENTALS, INC.,and ANTHONY W. GRANT,

Third-Party Plaintiffs,

- against -

SEBASTIAN LATTUGA, MD, MICHAEL BRESNAHAN, PA, JOHN DOES 1-10, JAMES DOES 1-10, and JEFF DOES 1-10,

Third-Party Defendants.

TRIAL/IAS PART 7

INDEX NO. 12315/05

MOTION SEQUENCE NO. 6 & 7 & 8 & 9

MOTION SUBMISSION DATE: May 10, 2010

The following papers read on this motion:

Notice of Motion	XXX
Notice of Cross Motion	X
Affirmation in Opposition	XX
Reply Affirmation	XXXX
Affirmation in Partial Support	X
Affirmation in Reply	X
Affidavit in Partial Support	X

Upon the foregoing papers, the motion by the defendant Cardinal Health 414, Inc., Automotive Rentals, Inc. and Anthony W. Grant (*hereinafter referred to as Cardinal Health*) brought by Order to Show

Cause for an Order pursuant to CPLR §3108 and CPLR §3117(a)3(ii), granting an open commission to conduct the oral deposition of Pauline Lattuga in the State of Florida; pursuant to CPLR §3111, ordering Pauline Lattuga to produce at the time of the open commission any and all documentation, billing records, bills, invoices, call logs or communications between the residence at 8 Copperfield Avenue in Brookville, New York and Mercy Medical Center on June 8 and 9, 2004; the cross motion by the defendant Sebastian Lattuga, MD for an Order pursuant to CPLR 3103 issuing a Protective Order barring the taking of the deposition of non-party witness Pauline Lattuga and pursuant to CPLR 603, 4011 and 22 NYCRR 202.42(a), bifurcating the motor vehicle accident and medical malpractice claims of this lawsuit; the motion by the plaintiff for an Order granting summary judgment against the defendants Cardinal Health 414, Inc. Automotive Rentals, Inc. and Anthony W. Grant, on the issue of liability and the motion by the defendant Michael Bresnahan, P.A. and Mercy Medical Center for an Order granting the defendants, Michael Bresnahan, P.A. and Mercy Medical Center, a Protective Order, pursuant to CPLR §3103(b) for documents demanded pursuant to defendants'/third-party plaintiffs' Notice for Discovery and Inspection dated February 22, 2010, are all determined as hereinafter provided:

This personal injury action arises out of a rear end motor vehicle accident that occurred on July 22, 2003 at approximately 8:10 pm at the intersection of Franklin Avenue and Garvin Blvd., Franklin Square, New York. At the time, a car driven by the defendant Anthony W. Grant, owned by the defendant Automotive Rentals Inc. and operated by the defendant Anthony W. Grant for the defendant Cardinal Health struck the vehicle driven by Glenn Tuebner in which the plaintiff Melissa Tuebner was a passenger. As a result of the alleged injuries received in the July 22, 2003 accident, Glenn Tuebner underwent an anterior cervical laminectomy and fusion of the cervical discs 5-6-7 at the defendant Mercy Medical Center on June 8, 2004 by the defendant Sebastian Lattuga . Subsequent to the surgery, Glen Tuebner developed certain medical conditions and complications resulting in Mr. Tuebner's death on June 9, 2004.

By prior Order of the Court dated July 9, 2009, the Court set forth:

> "Upon the foregoing papers, the motion by plaintiffs for an Order to compel production of defendant Dr. Sebastian Lattuga's home and cellular phone records for June 8-9, 2004 and to compel production of the defendant Dr. Lattuga's on-call service records for June 8-9, 2004, is determined as hereinafter provided:
>
> This wrongful death/medical malpractice action arises out of, amongst other things, an anterior cervical laminectomy and fusion of the cervical disks 5-6-7 of the deceased plaintiff Glenn Tuebner at the defendant Mercy Medical Center by the Defendant/Third Party Defendant Sebastian Lattuga, MD on June 8, 2004 at approximately 1:00 pm.
>
> Subsequent to the surgery, Glenn Tuebner developed certain medical conditions that necessitated certain phone calls from various staff members of the Defendant/Third Party Defendant Mercy Medical Center to the defendant Sebastian Lattuga, MD, relative to the care and treatment to be rendered to Glenn Tuebner. The Court notes that Dr. Lattuga at his deposition testified that he acknowledged that he received certain phone calls from the staff at the defendant Mercy Medical Center but he did not have a specific recollection as to where he was at the time that he received the phone calls (*see deposition transcript of Sebastian Lattuga at pgs 106-109).* The plaintiff Glenn Tuebner's condition allegedly deteriorated and on

and on July 9, 2004 Glenn Tuebner died.

By this application, the plaintiffs seek the redacted home and cellular phone records of Dr. Lattuga for June 8-9, 2004 and Dr. Lattuga's on call service numbers/telephone records for the period June 8-9, 2004 as set forth in the plaintiffs' Notice of Discovery and Inspection dated March 1, 2007 and Notice of Discovery and Inspection dated March 23, 2007. In light of the circumstances of this case which involve the issue of communications to and with Dr. Lattuga relative to the decedent Glenn Tuebner, said telephone records are material and necessary to the facts in litigation (see, **Allen v Crowell-Collier Publishing Company**, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430). As such, the defendant Sebastian Lattuga, MD shall provide the requested discovery as to telephone records with the name of the entity redacted only within 30 days of the date of this Order."

The defendants Cardinal Health contend in support of that branch of said defendants' application which seeks an open commission to conduct an oral deposition of the non-party Pauline Lattuga that special circumstances exist for said commission. In examining this issue, the Court in **Kooper v Kooper**, 74 AD3d 6, 901 NYS2d 312 (Second Dept., 2010) stated:

"10. Subsequent to Dioguardi, many of our cases involving nonparty discovery continued to hold that "special circumstances" must be shown (*see e.g. Katz v Katz, 55 AD3d 680, 683, 867 NYS2d 100; Moran v McCarthy, Safrath & Carbone, PC, 31 AD3d 725, 726, 819 NYS2d 538; Attinelo v DeFilippis, 22 AD3d 514, 515, 801 NYS2d 773; Tannenbaum v Tenenbaum, 8 AD3d 360, 777 NYS2d 769; Lanzello v Lakritz, 287 AD2d 601, 731 NYS2d 763; Bostrom v William Pen Life Ins. Co. of NY, 285 AD2d 482, 483, 727 NYS2d 160; Tsachalis v City of Mount Vernon, 262 AD2d 399, 401, 690 NYS2d 746; Mikinberg v Bronsther, 256 AD2d 501, 502, 682 NYS2d 416; Matter of Validation Review Assoc. [Beckun-Schimel], 237 AD2d 615, 655 NYS2d 1005; Wurtzel v Wurtzel, 227 AD2d 548, 549, 642 NYS2d 967)*, while many of our most recent cases have avoided the "special circumstances" rubric (*see e.g. Cespedes v Kraja, 70 AD2d 622, 892 NYS2d 884; Step-Murphy, LLC v B & B Bros. Real Estate Corp., 60 AD3d 841, 843-844, 875 NYS2d 535; Tenore v Tenore, 45 AD3d 571, 571-572. 844 MUS2d 704; Smith v Moore, 31 AD3d 628, 629, 818 NYS2d 603; Matter of Lutz v Goldstone, 31 AD3d 449, 4450-451, 809 NYS2d 66; Thorson v New York City Tr. Auth., 305 AD2d 666, 759 NYS2d 880)*. In light of it elimination from CPLR 3101(a)(4), we disapprove further application of the special circumstances" standard in our cases, except with respect to the limited area in which int remains in the statutory language, i.e., with regard to certain discovery from expert witnesses (*see CPLR 3101[d][1][iii])*. On a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be "special circumstances."

[11][12] Whether or not our cases have applied the "special circumstances" standard, however, they contain underlying considerations which the courts

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may appropriately weigh in determining whether discovery from a nonparty is warranted. We look, then, to the reasoning in our cases to find guidance with respect to the circumstances and reasons which we have considered relevant to the inquiry with respect to discovery from a nonparty. Since Dioguardi, this Court has deemed a party's inability to obtain the requested disclosure from his or her adversary or from independent sources to be a significant factor in determining the propriety of discovery from a nonparty. A motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the non-party (*see Moran v McCarthy, Safrath & Carbone, P.C., 31 AD3d at 726, 819 NYS2d 538; Tannenbaum v Eenebaum, 8 AD3d at 360, 777 NYS2d 769; Lanzello v Lakritz, 287 AD2d at 601, 731 NYS2d 763; Tsachalis v City of Mount Vernon, 262 AD2d at 401, 690 NYS2d 746; Matter of Validation Review Assoc [Berkun-Schimel], 237 AD2d at 615, 655 NYS2d 1005*), and properly denied when the party has shown that the evidence cannot be obtained from other sources (*see Cespedes v Kraja, 70 AD3d at 622, 892 NYS2d 884; Tenore v Tenore, 45 AD3d at 571- 572, 844, NYS2d 704; Thorson v New York City Tr. Auth., 305 AD2d at 666, 759 NYS2d 880; Bostrom b William Penn Life Ins. Co. of NY 285 AD2d at 483, 727 NYS2d 160).* Our cases have not exclusively relied on this consideration, however, and have weighed other circumstances which may be relevant in the context of the particular case in determining whether discovery from a nonparty is warranted (*see Abbadessa v Sprint, 291 AD2d 363, 736 NYS2d 881 [conflict in statements between the plaintiff and non-arty witness]; Mlkinberg v Bronsther, 256 AD2d at 502, 682 NYS2d 416 [unexplained discontinuance of the action against the witness, formerly a party]; Paterson v St. Francis Ctr. at Knolls, 249 AD2d 457, 671 NYS2d 532 [previous inconsistencies in the nonparty's statements]).*

[13][14][15] We decline, here, to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case. Circumstances necessarily vary from case to case. The supervision of discovery, the setting of reasonable terms and conditions for disclosure, and the determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests (*see Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954, 683 NYS2d 156, 705 NE2d 1197; Wander v St. John's Univ. 67 AD3d 904, 905, 888 NYS2d 412; Downing v Moskovits, 58 AD3d 671, 873 NYS2d 320; Young v Tierney, 271 AD2d 603, 706 NYS2d 170).* On appeal, this Court has the authority to review a discovery order to determine whether the trial court has abused its discretion as a matter of law, or in the absence of abuse, has exercised its discretion improvidently (*see Brady v Ottaway Newspapers, 63 NY2d 1031, 1032, 484 NYS2d 798, 473 NE2d 1172; Wander v St. John's Univ., 67 AD3d at 905, 888 NYS2d 412).* The particular circumstances of each case must always weigh in the trial court's consideration of a discovery request and in our review of the trial court's exercise of its discretion.

[16][17] We emphasize, however, that our cases have consistently adhered to the principle that "[m]ore than mere relevance and materiality is necessary

> to warrant disclosure from a nonparty" (*Dioguardi v St. John's Riverside Hosp., 144 AD2d at 334-335, 533 NYS2d 915; accord Tannenbaum v Tenenbaum, 8 AD3d at 360, 777 NYS2d 769; Lanzelo v Lakritz, 287 AD2d at 601, 731 NYS2d 763).* The Third Department agrees with this principle (*see Fraser v Park Newspapers of St. Lawrence, 257 AD2d 961, 962, 684 NYS2d 332).* Although the First Department in *Velez* apparently deemed a showing of "need" and relevance sufficient to authorize discovery from a nonparty (*Velez v Hunts Point Multi-Serv. Ctr., Inc., 29 AD3d at 111, 811 NYS2d 5),* our reading of CPLR 3101 includes the concepts of need and relevance within the threshold "material and necessary" standard which all discovery must preliminarily meet. The Legislature would not have included a separate subsection of the statute for non parties if discovery from parties and non-parties were subject to identical considerations. Inclusion of the language "circumstances or reasons such disclosure is sought or required" from a nonparty (CPLR 3101[a][4]) indicates that something more than mere relevance is required if the discovery request is challenged (*see Connors, Practice Commentaries McKinney's Cons. Laws of NY, Book 7B,C3101:19).* As a matter of policy, non parties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement."
>
> **Kooper v Kooper, supra at 321-323**

While the defendants Cardinal Health argues that the defendants should be "...permitted to explore alternative reasons for his [Dr. lattuga's] decision not to return to the hospital" and that the deposition of the non party is material and necessary to the issue of communications with the defendant Dr. Lattuga, the Court finds that the deposition of said defendant's wife, with whom the defendant is involved in a matrimonial proceeding is not material and necessary to the facts in litigation relative to communications with the defendant Mercy Medical Center and/or the defendant's location and does not rise to the level set by the Court in *Kooper v Kooper (supra)* as to discovery from a non party. As such, the defendants Cardinal Health's application for an Order pursuant to CPLR §3108 and CPLR §3117(a)3(ii), granting an open commission to conduct the oral deposition of Pauline Lattuga in the State of Florida; pursuant to CPLR §3111, ordering Pauline Lattuga to produce at the time of the open commission any and all documentation, billing records, bills, invoices, call logs or communications between the residence at 8 Copperfield Avenue in Brookville, New York and Mercy Medical Center on June 8 and 9, 2004, is **denied**.

Based upon the foregoing, that branch of the Defendant/Third Party Defendant Sebastian Lattuga, MD's application for an Order pursuant to CPLR 3103 issuing a Protective Order barring the taking of the deposition of non-party witness Pauline Lattuga, is **denied as moot**.

The Court notes that the instant action was originally certified as ready for trial by Order of the Court dated February 21, 2008. Thereafter by Order of the Hon. Joseph P. Spinola dated August 11, 2009, the Note of Issue in the action was vacated. By Order of the Hon. R. Bruce Cozzens, Jr. dated January 14, 2010, the action was again certified and the plaintiff directed to file a Note of Issue within 90 days. A Note of Issue pursuant to the Court's records was timely filed on April 13, 2010. As such, to the extent that the defendants Cardinal Health contend that the plaintiffs' summary judgment application served on February 18, 2010 subsequent to Judge Cozzens Certification Order and prior to the Note of Issue's filing on April 13, 2010 and prior to the expiration of the 120 day period set forth in CPLR §3212(a), said contention is without merit.

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In examining the issue of a rear end collision, the Court in **DeLouise v S.K.I. Whilesale Beer Corp.,** ___AD3d___, ___MYS2d___ 2010 WL 2674538 (Second Dept., 2010) stated:

> "As a general rule, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause (*see Klopchin v Masri, 45 AD3d 737, 737; Leal v Wolff, 224 AD2d 392, 293).*"
>
> **DeLouise v S.K.I. Whilesale Beer Corp., supra**

The defendant Anthony Grant sets forth at said defendant's deposition:

> "Q. How was traffic at this time; light, medium, heavy or something else?
> A. Medium I guess, people going to work.
> Q. Do you know approximately what time your accident took place?
> A. No.
> Q. Immediately before your accident occurred, which lane were you in, the right lane or the left lane?
> A. The left lane.
> Q. For how long a period of time, approximately in terms of blocks, had you been traveling in that left lane?
> A. About seven, eight blocks.
> Q. For approximately seven or eight blocks you had been traveling continuously in the left lane?
> A. Correct.
> Q. During the approximately seven or eight blocks that you had been traveling in the left lane, do you recall if you were following the same vehicle or whether or not any other vehicles had moved in front of you during that time?
> A. Cars were in and out.
> Q. Do you know what the highest rate of speed that you had reached while traveling that approximately seven or eight blocks in the left lane on Franklin Avenue was?
> A. Twenty miles an hour approximately.
> Q. Do you know what the speed limit is on Franklin Avenue in that location?
> A. Yes.
> Q. What is it?
> A. Thirty.
> Q. Do you know that because you had seen a sign or based upon some other reason?
> A. Based upon some other reason.
> Q. What reason is that?
> A. City, in the city streets, it's thirty miles an hour.
> Q. Did the accident take place at or near a street that intersected with Franklin Avenue, meaning had the accident not occurred what intersecting street was ahead of you?
> A. I don't know.

Q. Did the accident happen near an intersection?
A. Yes
Q. Was there a traffic light at that intersection?
A. I believe so.
Q. Prior to the accident taking place what was the color of that traffic light?
A. I don't remember.
Q. Do you recall at any time as you proceeded toward this intersection before this accident occurred seeing the color of the traffic light at that intersection?
A. Yes.
Q. Do you recall what color it was the first time that you saw it?
A. Green.
Q. Had the accident not happened, was it your intention to continue going straight through the intersection or making a turn?
A. Go straight.
Q. Do you know whether or not the light at that intersection has any left turn arrow indication?
A. I don't know.
Q. You don't know?
A. I don't remember.
Q. Do you know whether or not the left lane in that location has any type of arrows indicating that vehicles can go straight or turn or something else?
A. Say that again.
Q. Did that lane have any type of arrows?
A. The left?
Q. Yes, that left lane, does it have any type of arrows painted there that you had observed.
A. No
Q. No, it does not?
A. No, it does not.
Q. When you first observed the light was green at the intersection beyond which the accident occurred, was there a vehicle in front of your vehicle?
A. No.
Q. The left lane as far as you can see was entirely clear?
A. Yes.
Q. At some point after you observed that that light was green and was proceeding toward the intersection did any vehicle come in front of you in that left lane?
A. No.
Q. At some point prior to reaching that intersection, was your vehicle involved in the accident?
A. Say that again.
Q. At some point prior to reaching the intersection, did your vehicle have an accident?
A. You are talking about the intersection where the accident happened?
Q. Yes. Did your accident happen in front of an intersection?
A. Before?
A. Yes, right?
A. Yes.
Q. How far from the intersection did the accident occur, car lengths, feet or something else?

A. Approximately four car lengths, about three car lengths I believe.
Q. From the intersection?
A. Right
Q. What lane did your accident happen?
A. I was in the left lane.
Q. What part of your vehicle came into contact with the other vehicle?
A. The driver's front fender.
Q. Of you vehicle?
A. Of my vehicle. The driver's front quarter panel they call it.
Q. Came into contact with what portion of some other vehicle?
A. The right bumper of the vehicle making a left.
Q. You say right bumper, do you mean rear bumper?
A. Yes, rear bumper.
Q. When you say a vehicle making a left can you tell me what you mean?
A. That vehicle that I hit was in the lane making a left turn. There is a left turn lane besides. Thee are tow lanes, a right lane, left lane and then a turning lane to make a left turn.
Q. So there are three lanes of traffic in the direction that you were going?
A. It was two lanes and a turning lane.
Q. So three lanes?
A. I guess so, if you call it that.
Q. Did the impact take place in the left lane or the left turning lane?
A. It as like on the line.
Q. How long before the impact was it that you first observed this other vehicle?

MR. CARROLL: Which vehicle?

Q. The vehicle that you came in contact with.
A. How long? I known it was there, I seen it.
Q. How long before the impact was it that you saw it?
A. Time?
Q. Yes.
A. Two, three, four minutes. I seen it. I don't want to guess.

MR. CARROLL: Don't guess.

THE WITNESS: I don't know.

Q. The vehicle that you came into contact with, where was it when you saw it for the first time?
A. In the left turning lane.
Q. Was it moving or was it stopped?
A. Stopped.
Q. How far from the intersection was it, meaning in car lengths?
A. It was at the light.
Q. So it as the first car?
A. First car.
Q. At any time prior to the contact taking place between the front of your vehicle and the rear of the other vehicle, did that vehicle ever begin to move?
A. No.
Q. When you saw that vehicle for the first time was the entire portion of that vehicle within the left turning lane?
A. I would not say entirely. The back might have been. It was in the left lane, yes. I am guessing.

MR. CARROLL: Left turning lane?
THE WITNESS: It was in left lane.

Q. So I am clear, from the point when you first saw the vehicle that you had the accident with up until the time that you came into contact with that vehicle, the entire portion of that vehicle was in the left turning lane?
A. Yes.
Q. At no time prior to the impact taking place did that vehicle move?
A. No.
Q. When you say no, it did not move?
A. It never moved."

see deposition of Anthony Grand at pgs 27-36

In opposition to the plaintiffs' requested relief, the defendant Anthony Grant does not offer a non-negligent explanation for the rear end collision in issue. While the Court notes that the non party Jean Raoul Gaillard testified at said non party's deposition as to the traffic conditions in the right hand lane of traffic, the defendant Anthony Grant clearly testified that the plaintiff's entire vehicle was in the left hand turning lane stopped and did not move prior to being struck by the vehicle driven by the defendant Anthony Grant (supra). As such, the plaintiff's application for an Order granting summary judgment against the defendants Cardinal Health 414, Inc. Automotive Rentals, Inc. and Anthony W. Grant, on the issue of liability, is **granted**.

Based upon the cross-claims asserted herein, the third party action asserted herein; the granting of the plaintiff's application for summary judgment on the issue of liability and in light of the fact that the damages claimed in the unified medical malpractice trial are intertwined with the damages in the motor vehicle action, that branch of the of the Defendant/Third Party II Sebastian lattuga MD's application which seeks an Order pursuant to CPLR 603, 4011 and 22 NYCRR 202.42(a), bifurcating the motor vehicle accident and medical malpractice claims of this lawsuit, is **denied**.

Based upon the Certification Order of the Hon. R. Bruce Cozzens, Jr. dated January 14, 2010 signed by counsel for the respective parties, the defendants Michael Bresnahan PA and Mercy Medical Center's application for an Order granting the defendants, Michael Bresnahan, P.A. and Mercy Medical Center, a Protective Order, pursuant to CPLR §3103(b) for documents demanded pursuant to defendants'/third-party plaintiffs' Notice for Discovery and Inspection dated February 22, 2010, is **denied**.

SO ORDERED.

DATED: 7/29/2010

Roy S. Mahon
J.S.C.

ENTERED
AUG 05 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE