

**Marx v Reckson Assoc. Realty Corp.**

2010 NY Slip Op 32489(U)

June 1, 2010

Supreme Court, Suffolk County

Docket Number: 26012/2004

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

**PRESENT:****HON. PAUL J. BAISLEY, JR., J.S.C.**-----X  
KATHY MARX,

Plaintiff,

-against-

RECKSON ASSOCIATES REALTY CORP. and  
APOLLO H.V.A.C. CORPORATION,Defendants.  
-----X

50417

INDEX NO.: 26012/2004  
CALENDAR NO.: 2007023550T  
MOTION DATE: 7/1/2009  
MOTION SEQ. NO.: 003 MOT D  
004 MOT D  
005 MD

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Upon the following papers numbered 1 to 67 read on this motion to quash subpoena, cross-motion to preclude and cross-motion to dismiss claim; Notice of Motion/ Order to Show Cause and supporting papers 1-40; Notice of Cross Motion and supporting papers 41-56; 57-59; Answering Affidavits and supporting papers 60-64; Replying Affidavits and supporting papers 65-67; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by plaintiff for an order, inter alia, quashing subpoenas issued to nonparty Arrow Electronics is granted to the extent set forth herein, and is otherwise denied; and it is

**ORDERED** that the cross motion by defendant Apollo H.V.A.C. Corporation for an order, inter alia, striking plaintiff's expert witness disclosure as to Alan Leiken, Ph.D., and precluding his direct testimony at trial is granted to the limited extent set forth herein, and is otherwise denied; and it is further

**ORDERED** that the cross motion by defendant Reckson Operating Partnership, LP for an order, inter alia, dismissing plaintiff's claim for lost wages is denied.

Plaintiff Kathy Marx commenced this action in November 2004 to recover damages for personal injuries she allegedly sustained while exiting a building owned by defendant Reckson Operating Partnership, LP, s/h/a Reckson Associates Realty Corp. (hereinafter Reckson), when a linear diffuser fell from the ceiling and struck her body. The linear diffuser allegedly was installed in the building by defendant Apollo H.V.A.C. Corporation (hereinafter Apollo). In April and May 2005, plaintiff served bills of particulars on Reckson and Apollo, which did not assert a claim for lost earnings. The following year, this Court (Pines, J) so-ordered a stipulation setting forth the parties' respective obligations with respect to certain outstanding discovery demands. In September

2006, plaintiff provided defendants with authorizations to obtain attendance, payroll and W-2 records from her former employer, Arrow Electronics. She also provided them with authorizations to obtain records from health care providers, insurance companies and other business entities.

Subsequently, in November 2006, plaintiffs served an amended bill of particulars on both Reckson and Apollo. The amended bill of particulars states, in relevant part, that the injuries allegedly sustained by plaintiff "have and will diminish plaintiff's future earning capacity, will deprive plaintiff of future earning capacity, further earning opportunities, business opportunities, raises . . . training and experience which could benefit plaintiff in retaining and obtaining future positions with her employer and other employers or business operations," and claimed lost earnings of "approx. \$48,000 and continuing." On January 25, 2007, Justice Pines issued an order directing defendants to respond to certain outstanding disclosure demands, and directing plaintiff to provide authorizations "for payroll and attendance records and W-2 statements for the period of 2 years immediately preceding [the] accident" and for W-2 records from the Internal Revenue Service for the period from September 2001 to the present. By correspondence dated March 6, 2007, plaintiff's counsel forwarded to defense counsel executed authorizations for plaintiff's payroll, attendance and W-2 records with Arrow Electronics and for plaintiff's W-2 records from the Internal Revenue Service for the period from December 31, 2001 to December 31, 2006. On September 6, 2007, counsel for the parties appeared at a compliance conference and certified that the disclosure process was complete. Based upon such certification, the Court issued a compliance conference order that same date directing that the note of issue be filed. On October 16, 2007, plaintiff filed a note of issue and certificate of readiness with the Court.

Thereafter, plaintiff served an expert witness disclosure statement on defendants on February 6, 2009. The statement indicates, in part, that plaintiff intends to call Alan Leiken, Ph.D., on the issue of plaintiff's loss of earnings claim, and that this expert will testify plaintiff suffered a loss of income in the amount of \$1,765,337 as a result of the injuries she sustained in the subject accident. By correspondence dated March 18, 2009, counsel for Reckson requested that plaintiff provide the following documents: (1) plaintiff's W-2s for the period beginning one year prior to the accident to the present; (2) an authorization permitting Reckson to obtain plaintiff's employment records from her current employer, South Huntington School District; (3) documentation related to contributions made to any retirement and 401K plan during plaintiff's employment with Arrow Electronics; (4) documentation showing payments made by plaintiff "to any health insurance plan as well as contributions made by Arrow" during her employment; and (5) authorizations "permitting defendants to obtain more recent Workers' Compensation board and carrier records." The letter further states, "I am also reserving my right to conduct a further deposition of your client due to the lack of information and documentation exchanged by your office to date." By correspondence dated March 27, 2009, counsel for Apollo requested the same documentation and joined in the request for a further deposition of plaintiff. By correspondence dated March 31, 2009, plaintiff's counsel sent an executed authorization to obtain plaintiff's payroll and attendance records from South Huntington School District, where she presently is employed as an aide. Sometime in the beginning of May 2009, Apollo served Arrow Electronics with a notice of deposition, a subpoena seeking production of plaintiff's "employment file," and a subpoena to appear for deposition on May 28, 2009. On May 12, 2009, a copy of plaintiff's employment file was sent by Arrow Electronics to the offices of Apollo's defense counsel. A copy of plaintiff's employment records with South Huntington School District was sent directly to Apollo's defense counsel the previous day. The Court notes that Apollo's counsel denies plaintiff's allegation that similar subpoenas were served on South

Huntington School District, and alleges that such records were received in response to the authorization previously given by plaintiff. It also notes that defense counsel do not dispute plaintiff's allegation that they have engaged in conversations with Risk Specialty Services, a third-party administrator, regarding her workers' compensation claim, despite the fact that the authorization given by plaintiff only permitted the release of existing records related to an incident in September 2003. On May 21, 2009, plaintiff's counsel received copies of the notice of deposition and subpoenas served on Arrow Electronics. The next day, via facsimile transmission, plaintiff's counsel sent a letter to defense counsel demanding that the notice and subpoenas be withdrawn.

Plaintiff now moves for an order quashing the non-party subpoenas served by Apollo's counsel. Plaintiff also seeks a protective order prohibiting the depositions of Arrow Electronics and South Huntington School District, and suppressing "information improperly obtained" from Arrow Electronics and South Huntington School District. In addition, plaintiff seeks an order directing defendants to provide copies of all documents obtained from Arrow Electronics and South Huntington School District, and restraining defendants from serving any further subpoenas or conducting any further discovery in this act on. Plaintiff's submissions in support of the motion include copies of the pleadings and the bills of particulars; copies of the preliminary conference order, the so-ordered stipulation dated July 5, 2006, and the disclosure order dated January 25, 2007; copies of the notice of deposition and subpoenas served on Arrow Electronics by Apollo; and a copy of the letter sent by plaintiff's counsel to Apollo's counsel demanding the nonparty subpoenas be withdrawn.

Apollo opposes plaintiff's motion and cross-moves for, among other things, an order striking the expert disclosure notice and precluding Dr. Leiken from testifying at trial. Apollo argues, among other things, that as the disclosure notice shows plaintiff's expert will be relying on such information as contributions to plaintiff's retirement savings and plaintiff's health insurance information, and the authorizations previously provided by plaintiff did not include information regarding such employment benefits, it is entitled to obtain the documentary information sought in the subpoena duces tecum served on Arrow Electronics. It also alleges that a further deposition of plaintiff is warranted, as the documents it received from Arrow Electronics and South Huntington School District raised issues about such things as "her intentions regarding her leave of absence two years after the subject accident" and her "interest in pursuing a career change." However, in an affirmation in support of the cross motion, counsel for Apollo states, "It is conceded that the subpoenas which were served on Arrow Electronics by Apollo did not give adequate notice to opposing counsel and did not direct the documents to be forwarded to the County Clerk's office. As such, these subpoenas are withdrawn." Attached to Apollo's moving papers are excerpts of plaintiff's deposition testimony; an application for No Fault benefits allegedly submitted by plaintiff in 2005; a copy of plaintiff's expert disclosure notice; a copy of the March 2009 letter sent by Reckson's attorney to plaintiff's attorney; copies of various authorizations executed by plaintiff; copies of the records allegedly received by Apollo from Arrow Electronics and South Huntington School District; and various letters pertaining to disclosure. Reckson also opposes plaintiff's motion and cross-moves for, inter alia, an order dismissing plaintiff's economic damages claim based on her alleged failure to update information provided during the disclosure process. The affirmation of Reckson's counsel in support of the motion states that Reckson "in the interests of judicial economy . . . adopts each and every factual statement and argument espoused Apollo in their motion papers."

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This

provision has been liberally construed to require disclosure “of any facts bearing on the controversy which will assist [the parties’] preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). Litigants, however, do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733, 830 NYS2d 203 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628, 818 NYS2d 603 [2d Dept 2006]; *Vyas v Campbell*, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]), and a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g. Astudillo v St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469, 784 NYS2d 645 [2d Dept 2004]; *Bettan v Geico Gen. Ins. Co.*, 296 AD2d 469, 745 NYS2d 545 [2d Dept], *lv dismissed* 99 NY2d 552, 754 NYS2d 204 [2002]; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 541 NYS2d 30 [2d Dept 1989]).

Further, a party generally is free to select the discovery devices he or she wishes to use and the order in which to use them (*Edwards-Pitt v Doe*, 294 AD2d 395, 396, 741 NYS2d 909 [2d Dept 2002]; *see Samide v Roman Catholic Diocese of Brooklyn*, 16 AD3d 482, 791 NYS2d 643 [2d Dept], *lv dismissed* 5 NY2d 746, 800 NYS2d 375 [2005]; *Falk v Inzinna*, 299 AD2d 120, 749 NYS2d 259 [2d Dept 2002]). A party’s freedom of choice with respect to the available disclosure devices, however, is subject to judicial intervention by way of a protective order if the discovery request may cause “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103 [a]; *see Kooper v Kooper*, \_\_ AD3d \_\_, 2010 NY Slip Op 04147 [2d Dept 2010]; *Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 429 NYS2d 33 [2d Dept 1980]; *cf. Samide v Roman Catholic Diocese of Brooklyn*, 16 AD3d 482, 791 NYS2d 643). “When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper” (*Barouh Eaton Allen Corp. v International Bus. Machs. Corp.*, 76 AD2d 873, 874, 429 NYS2d 33).

The branch of plaintiff’s motion seeking to quash the subpoenas and the notice of deposition served on Arrow Electronics is denied, as moot, as Arrow Electronics already provided Apollo’s counsel with copies of the records sought in the subpoena duces tecum, and Apollo’s counsel, conceding the subpoenas were not served in accordance with article 31 of the CPLR, has represented to the Court that they have been withdrawn. The branch of the motion seeking to quash a notice of deposition and subpoenas allegedly served on South Huntington School District is denied, as plaintiff does not controvert Apollo’s claim that it obtained her employment records from South Huntington School District under the authorization she executed in March 2009, not by way of a subpoena duces tecum. Based on such representation by defense counsel, plaintiff’s application for a protective order prohibiting the depositions of Arrow Electronics and South Huntington School District is denied, as moot. However, plaintiff’s application for an order compelling Apollo to turn over copies of documents it received from Arrow Electronics and South Huntington School District is granted to the extent that Apollo shall, within five days after service of a copy of this order with notice of its entry, provide plaintiff’s counsel with copies of all records that it obtained from Arrow Electronics, as well as with a written list of the documents received. An affirmation of Apollo’s counsel attesting that all copies received under the subpoena have been provided to plaintiff’s counsel shall be delivered to plaintiff’s counsel within the same five-day period. Further, the branch of plaintiff’s motion for an order suppressing the materials obtained from Arrow Electronics is denied at this time, without prejudice, absent a showing that Apollo obtained privileged or confidential records to which it was not entitled (*see Levy v Grandone*, 8 AD3d 630, 779 NYS2d 558

[2d Dept 2004], *lv dismissed* 5 NY3d 746, 800 NYS2d 376 [2005]; *Gutierrez v Dudock*, 276 AD2d 746, 715 NYS2d 333 [2d Dept 2000]; *Di Marco v Sparks*, 212 AD2d 965, 624 NYS2d 692 [2d Dept 1995]; *cf. Matter of Beiny*, 129 AD2d 126, 517 NYS2d 474, *reargument denied* 132 AD2d 190, 522 NYS2d 511 [1st Dept 1987], *lv dismissed* 71 NY2d 994, 529 NYS2d 277 [1988]).

The branch of Apollo's cross motion for an order striking the expert disclosure notice and precluding the testimony of plaintiff's expert, Alan Leiken, PhD, is denied. CPLR 3101 (d)(1)(i) states "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." The statute does not obligate a party to retain an expert by a specific time or mandate that a party be precluded from offering expert testimony at trial based on noncompliance with such statute "unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (*Aversa v Taubes*, 194 AD2d 580, 582, 598 NYS2d 801 [2d Dept 1993]; *see Ocampo v Pagan*, 68 AD3d 1077, 892 NYS2d 452 [2d Dept 2009]; *Rowan v Cross Country Ski & Skate, Inc.*, 42 AD3d 563, 840 NYS2d 414 [2d Dept 2007]). Moreover, if a party has not served a request for expert disclosure pursuant to CPLR 3101 (d), the opposing party has no duty to supply such party with either the identity of its expert or the subject matter of the expert's testimony (*see Collins v Greater New York Sav. Bank*, 194 AD2d 514, 598 NYS2d 544 [2d Dept 1993]). Here, there is no evidence in the record that Apollo made a request under CPLR 3101 (d) for expert disclosure.

The branch of Apollo's motion for an order compelling a further deposition of plaintiff is denied, as are the branches seeking new authorizations and leave to conduct depositions of Arrow Electronics and South Huntington School District. A party who seeks discovery after the filing of the note of issue must move to vacate the note within 20 days after service of the note of issue and submit an affidavit demonstrating that the case is not ready for trial (22 NYCRR 202.21[e]). However, a party seeking additional discovery after expiration of the 20-day period provided in 22 NYCRR 202.21(d) must show "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (22 NYCRR 202.21[d]; *see Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Here, the amended bill of particulars was served on defendants in November 2006, and no allegation has been made that at the time of the compliance conference plaintiff had not complied with Apollo's written demands for disclosure. Contrary to the conclusory assertions by its counsel, neither the fact that Apollo was notified an expert will testify to an amount of lost earnings significantly higher than the amount alleged in the amended bill of particulars, nor the fact that, after the filing of the note of issue, it obtained documentary evidence from plaintiff's employers that may create a questions of fact as to her ability to work and her termination from Arrow Electronics, demonstrates unusual or unanticipated circumstances warranting further disclosure (*see Schroeder v IESI NY Corp.*, 24 AD3d 180, 805 NYS2d 79 [1st Dept 2005]; *Rodriguez v Sau Wo Lau*, 298 AD2d 376, 751 NYS2d 231 [2d Dept 2002]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137; *cf. Karakostas v Avis Rent A Car Sys.*, 306 AD2d 381, 761 NYS2d 283 [2d Dept 2003]). "A lack of due diligence in seeking disclosure does not constitute unusual or unanticipated

circumstances warranting post-note of issue disclosure” (*Tirado v Miller*, \_\_ AD3d \_\_, 2010 NY Slip Op 04364 [2d Dept 2010]). Further, having already obtained plaintiff’s employment records from Arrow Electronics and South Huntington School District, Apollo failed to demonstrate it will be substantially prejudiced if not permitted to conduct a further examination of plaintiff about her loss of earnings claim. Apollo, however, may serve new subpoenas on Arrow Electronics and South Huntington School District directing them to deliver plaintiff’s employment records to the Clerk of the Court for use at trial.

As to Reckson’s cross motion for further disclosure, the Uniform Rules for Trial Courts (22 NYCRR) §202.7 (c) provides that a motion relating to disclosure must be supported by an affirmation that counsel “has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” An affirmation of good-faith effort “shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held” (Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]). Reckson failed to include an affirmation of a good faith effort to resolve its disclosure dispute with plaintiff with its moving papers. In any event, an application for sanctions under CPLR 3126 is inappropriate at this time, as the note of issue was filed by plaintiff more than 2½ years ago and no application to vacate the note of issue is pending. Further, while Reckson’s counsel argues additional disclosure, including a further deposition of plaintiff, is warranted based on plaintiff’s alleged failure to provide updated information, particularly about her position with South Huntington School District, CPLR 3101 (h) requires that each party “amend or supplement a response previously given to a request for disclosure promptly upon the party’s thereafter obtaining information that . . . the response, though correct and complete when made, no longer is correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading.” Significantly, the statute does not require that plaintiff’s counsel provide defendants with all evidentiary material that he intends to produce at trial. Reckson’s submissions in support of the motion, even when considering in connection with Apollo’s submissions, fail to show plaintiff did not correct an incorrect response to a demand for disclosure. Rather, in response to a letter from Reckson’s counsel, plaintiff promptly provided an authorization to obtain her employment records at South Huntington School District. Reckson’s cross motion, therefore, is denied.

Dated: June 1, 2010

PAUL J. BAISLEY, JR.

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J.S.C.