

Wilkowski v New York City Tr. Auth.

2011 NY Slip Op 31339(U)

May 20, 2011

Supreme Court, New York County

Docket Number: 105214/05

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

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PAWEL WILKOWSKI,

Plaintiff,

Index No. 105214/2005

- against -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSIT AUTHORITY, THE LILIAN
GOLDMAN FAMILY, L.L.C., SOLIL MANAGEMENT
CORP., and PETCO ANIMAL SUPPLIES STORES, INC.,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

Defendants New York City Transit Authority and Metropolitan Transit Authority move to vacate and set aside the Court's decision and order dated October 26, 2010, or in the alternative, to renew and reargue the motion of co-defendants The Lillian Goldman Family LLC and Solil Management Corp. (Motion Seq. No. 004). Defendants The Lillian Goldman Family LLC and Solil Management Corp. separately move for the same relief, adopting the arguments of their co-defendants (Motion Seq. No. 005). Plaintiff opposes both motions, and this decision addresses both motions.

Defendants New York City Transit Authority and Metropolitan Transit Authority (the Authorities) previously moved to vacate the note of issue in this action, and defendants The Lillian Goldman Family LLC and Solil Management Corp. also sought the same relief. By decision and order dated October 26, 2010, the Court did not vacate the note of issue, but it directed plaintiff to provide HIPAA compliant authorizations for the release of certain medical records. *Strang Affirm.*, Ex A. In their prior motion papers, defendants The Lillian Goldman Family LLC and Solil

Management Corp. asked the Court to direct plaintiff to state whether he is in the United States or intends to return to the United States in the near future. The Court denied this request, reasoning that defendants "have not explained why plaintiff's current whereabouts and intentions to return to the United States are either relevant or reasonably calculated to lead to admissible evidence as to the issues of the trip and fall personal injury action." *Id.* at 3. An early settlement conference is scheduled for June 15, 2011.

On these motions, defendants seek an order compelling plaintiff: (1) to provide an executed copy of Form G-639 from the Department of Homeland Security, U.S. Citizenship and Immigration Services, to allow defendants to obtain plaintiff's immigration records, and (2) to produce copies of plaintiff's immigration visas, passports, and "other related documents pertaining to plaintiff's ingress and egress from the United States." Defendants do not ask that the note of issue be stricken, but rather ask for a stay of the trial.

Plaintiff argues that defendants should not be allowed to conduct further discovery because the note of issue has been filed, and because defendants did not request such discovery in the prior motions to vacate the note of issue, which addressed solely whether plaintiff would provide authorizations for medical records.

Defendants set forth no valid ground to vacate the Court's prior decision and order. *See* CPLR 5015. Defendants' discovery of case law after they filed their motions to vacate does not constitute newly-discovered evidence.

Defendants' motion to renew and reargue is granted only to the extent that the Court clarifies that the prior decision and order did not rule that plaintiff's current whereabouts or intentions to return to the United States were not discoverable. Rather, the prior decision and order explained that

defendants did not explain why the information would be discoverable.

Defendants here have demonstrated unusual circumstances that have developed subsequent to the filing of the note of issue that require additional post note of issue discovery to prevent substantial prejudice to defendants. As defendants indicate, a jury may consider plaintiff's immigration status as a factor in determining damages (if any). *Balbuena v IDR Realty LLC*, 6 NY3d 338, 362 (2006). As defendants indicate, an expert witness's calculations of plaintiff's lost earnings and lost future earning capacity, which are claimed here, may vary significantly depending on whether the earnings are based on earnings figures for jobs in the United States, or in other parts of the world where plaintiff might have worked. Conceivably, plaintiff may answer questions about his immigration status if he appears at his trial. However, the surprise and uncertainty could result in substantial prejudice to defendants at trial. Therefore, defendants are entitled to conduct this post note of issue discovery.

Citing *Balbuena*, one court (Ling-Cohan, J.) directed a plaintiff to provide a copy of his passport. *Probala v Rlan Holding Co., LLC*, 26 Misc3d 1201 (A) (Sup Ct, NY County 2009). However, the court in *Probala* did not direct plaintiff to execute Department of Homeland Security Form G-639. Justice Ling-Cohan reasoned that the information that the defendants sought could be obtained from other sources, and "claimed serious consequences . . . could result," citing *Gomez v F & T Int'l (Flushing, NY) LLC*, 16 Misc 3d 867 (Sup Ct, NY County 2007). In *Gomez*, Justice Acosta did not permit the defendants to inquire into the plaintiff's immigration status, reasoning that the immigration status was irrelevant because the plaintiff was claiming that he was unable to work in the future. Justice Acosta also stated, "[t]his court will not condone this behavior whether intimidation is the intended result or simply an unfortunate byproduct of litigating a legitimate

concern." *Id.* at 874.

The concerns expressed in *Probala* and *Gomez* are not present in this action. Justice Ling-Cohan expressed concern that inquiring into the plaintiff's immigration status could lead to deportation of the plaintiff in *Probala*. As indicated in the prior decision and order in this case, plaintiff's counsel stated, "Upon information and belief, plaintiff's counsel believes that plaintiff is subject to being barred from reentering the United States, by virtue of having overstayed his visa prior to returning to Poland." *See Strang Affirm.*, Ex A at 1. Thus, the prospect of deportation does not appear to be present in this action. If it is the understanding of plaintiff's counsel that the United States would not grant plaintiff a visa to return to the United States, then an inquiry into plaintiff's past or current immigration status is not going to change significantly what the Department of Homeland Security would already know about plaintiff.

Therefore, the Court grants defendants' requests to compel plaintiff to provide copies of plaintiff's immigration visas and passports, and to provide an executed copy of Form G-639 from the Department of Homeland Security, U.S. Citizenship and Immigration Services. Defendants' request to compel plaintiff to provide "other related documents" is denied, for request does not set specify the documents sought with sufficient particularity. *Related Cos. v Bishop Servs.*, 171 AD2d 421, 421-422 (1st Dept 1991).

The trial of this action is stayed pending compliance with this order and further court order.

Accordingly, it is hereby

ORDERED that, within 90 days, plaintiff shall (1) provide an executed copy of Form G-639 from the Department of Homeland Security, U.S. Citizenship and Immigration Services, to allow defendants to obtain plaintiff's immigration records, and (2) produce copies of plaintiff's

immigration visas and passport(s) to defendants ; and it is further

ORDERED that the trial of this action is stayed pending further order of this court; and it is further

ORDERED that all counsel are directed to appear for a status conference on August 18, 2011 at 3 p.m. in IAS Part 21, 80 Centre St Rm 278, New York, New York.

Copies to counsel.

Dated: May 20 2011
New York, New York

ENTER:



J.S.C.

MON. MICHAEL D. STALLMAN

FILED

MAY 23 2011

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COUNTY CLERK'S OFFICE