

<b>Cunningham v Shands</b>
2011 NY Slip Op 32747(U)
August 24, 2011
Supreme Court, New York County
Docket Number: 401614/08
Judge: Michael D. Stallman
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

BENJAMIN CUNNINGHAM,

Plaintiff,

- v -

FREDDY SHANDS, III, ELRAC, INC. ELAINE LEONARD and  
THE NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

INDEX NO. 401614/08

MOTION DATE 6/23/11

MOTION SEQ. NO. 005

The following papers, numbered 1 to 5 were read on this motion to vacate and to reargue

Notice of Motion; Affirmation — Exhibits A-C [Affidavit], D \_\_\_\_\_ | No(s). 1; 2-3

Affidavit in Opposition — Exhibits \_\_\_\_\_ | No(s). 4

Replying Affirmation \_\_\_\_\_ | No(s). 5

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

*Copies to plaintiff and all counsel.*

## FILED

AUG 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/24/11  
New York, New York

  
\_\_\_\_\_, J.S.C.  
**HON. MICHAEL D. STALLMAN**

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

1. Check one: .....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....
- |  |   |
|--|---|
| <input type="checkbox"/> CASE DISPOSED         | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| <input type="checkbox"/> GRANTED               | <input type="checkbox"/> DENIED                           |
| <input type="checkbox"/> SETTLE ORDER          | <input checked="" type="checkbox"/> GRANTED IN PART       |
| <input type="checkbox"/> DO NOT POST           | <input type="checkbox"/> SUBMIT ORDER                     |
| <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> OTHER                            |
| <input type="checkbox"/> REFERENCE             |   |

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

**FILED**

-----X  
BENJAMIN CUNNINGHAM,

AUG 26 2011

Plaintiff,

NEW YORK  
COUNTY CLERK'S OFFICE  
Index No. 401614/2008

- against -

FREDDY SHANDS, III, ELRAC, INC., ELAINE LEONARD  
and THE NEW YORK CITY TRANSIT AUTHORITY,

**Decision and Order**

Defendants.

-----X

**HON. MICHAEL D. STALLMAN, J.:**

Pursuant to CPLR 5015 (a) (1), defendants Freddy Shands, III and Elrac, Inc. move to vacate the decision and order dated November 22, 2010 and entered December 1, 2010, which denied their motion to vacate the note of issue and for other relief, and upon vacatur, they seek leave to reargue their prior motion. (Motion Seq. No. 005.) Plaintiff *pro se* opposes the motion.

Shands and Elrac separately move for summary judgment dismissing the action, on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). (Motion Seq. No. 006.) Defendants New York City Transit Authority and Leonard support the motion, and plaintiff opposes the motion. Plaintiff moves to “strike” the “MTA defendants’ motion.” (Motion Seq. No. 007.)

This decision addresses all three motions.

**BACKGROUND**

Plaintiff alleges that, on June 16, 2007, he was injured when a New York City Transit Authority Bus driven by Elaine Leonard made contact with a motor vehicle driven by defendant Freddy Shands, III and owned by defendant Elrac, Inc. Plaintiff and nonparty Richard Robinson

allegedly were passengers in Shands's vehicle. Two other actions arose out of this motor vehicle accident, *Shands v New York City Transit Authority*, Index No, 102165/2008 and *Robinson v N.Y.C. Transit Authority*, Index No. 400355/2009. Robinson has discontinued his action as against Freddy Shands, III and Elrac, Inc.

By decision and order dated September 16, 2008, Justice Donna M. Mills granted Elrac's motion to dismiss the complaint and any cross claims in this action as against it. (Martorella Affirm. dated 3/18/11, Ex E.)

The bill of particulars alleges that, as a result of this alleged motor vehicle accident, plaintiff sustained herniated discs at C4-C7, and L5-S1, and injuries to his right hip, right arm, right shoulder, neck and back, some of which are believed or may be permanent in nature. (Martorella Affirm. dated 3/18/11, Ex C [Bill of Particulars ¶ 6].) In August 2008, plaintiff, who was represented by Gary S. Fish, Esq., apparently decided to represent himself. (Martorella Affirm. dated 3/18/11, Ex D.) Plaintiff testified at his deposition that, at the time of the accident, he was employed by Gotham Registry, a nursing agency, working per diem as a licensed nursing assistant. (Martorella Affirm. dated 3/14/11, Ex A<sup>1</sup> [Exhibit L (Cunningham EBT), at 10-11].)

Plaintiff also testified that he was involved in prior incidents and motor vehicle accidents which resulted in injuries to his neck, back, left arm, wrist, waist, feet and legs. Plaintiff testified that, in 2000, he was involved in a motor vehicle accident during work, where plaintiff lost control of the vehicle he was driving on the highway. (Cunningham EBT, at 14-15.) According to plaintiff,

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<sup>1</sup> Exhibit A to the Affirmation of John P. Martorella dated March 14, 2011 consists of the papers submitted in Shands and Elrac's prior motion to strike the complaint or strike the note of issue, and for other relief. In the prior motion, Cunningham's EBT was annexed as Exhibit L to the Affirmation of John P. Martorella dated August 16, 2010.

he was taken to “Queens Medical Center in Elmhurst,” and he received workers’ compensation benefits based on “left lung and neck and back” injuries. (*Id.* at 14, 19.) Plaintiff testified that, after the left the hospital, he went to see “Dr. Gerborich,” whom plaintiff believes is an orthopedist with an office located on East Tremont Avenue in the Bronx. (*Id.* at 16, 18.)

Plaintiff testified that, sometime in 2004 or 2005, a security guard assaulted him in a McDonald’s restaurant (*Id.* at 31, 34, 36.) Plaintiff stated his “left arm and waist” were hurt in that assault, and that “the police took me to Bellevue Hospital, I believe.” (*Id.* at 33.) According to plaintiff, he brought a federal lawsuit against McDonald’s and the City of New York, which was settled. (*Id.* at 31, 33.)

Plaintiff further testified that, in 2005, “some federal agents broke into my home,” and he suffered injuries to “my back, my feet, my legs, my entire body, you might as well, say, my neck” during the course of the alleged incident. (*Id.* at 35, 38.) According to plaintiff, the federal agents assaulted him and handcuffed him, and while they were searching his home, plaintiff ran out of the house in handcuffs. (*Id.* at 39, 41). Plaintiff stated that, as he was “just running out, and the bus loaded with the police officers drove by my house,” and “I bounced off the bus as the bus was going by and I rolled on the ground.” (*Id.* at 41.) According to plaintiff, he was taken to St. Barnabas Hospital in the Bronx, and he received further treatment from “Med Alliance,” a facility located at 635 East Fordham Road in the Bronx, and had a MRI taken at Bronx Park Radiology. (*Id.* at 38, 52, 55.) Plaintiff claims that he commenced a federal lawsuit alleging injuries to his “wrist”, “back”, “legs,” and “feet”, along with emotional distress. (*Id.* at 49.)

Plaintiff also testified that, in 2002, he was involved in a “no-fault [auto] accident” where he was a driver, and his vehicle was hit by another vehicle. (*Id.* at 23-24.) When asked for a

description about what happened, plaintiff answered, "I can't remember the accident, ma'am, so much has happened in am [sic] my life since then." (*Id.* at 24.) Plaintiff testified that he thought he was hurt in that accident, but could not remember the hospital he went to, and did not have information about any doctor he went to see for the injuries in that accident. (*Id.*) Plaintiff testified that there was a lawsuit as a result of that accident, which he believed was settled. (*Id.*) When asked what parts of his body were injured in that accident, plaintiff answered, "I don't remember that." (*Id.*) Later in the deposition, plaintiff testified that he injured "just the back area" during the 2002 accident. (*Id.* at 105.)

Dr. De Jesus, a neurologist, and Dr. Emmanuel, an orthopedic surgeon, examined plaintiff on August 25, 2009. Regarding plaintiff's past medical history, Dr. DeJesus wrote in her report, "The claimant was involved in a prior accident in February 2005 in which he was attacked by a guard and hit on his back with a chair, injuring his neck and back." (Martorella Affirm., Ex G) Dr. Emmanuel similarly wrote in her report, "The claimant experienced a prior accident in February 2005 in which he was physically assaulted by a guard, sustaining injuries to his neck and back." (Martorella Affirm. dated 3/18/11, Ex H.)

Plaintiff filed the note of issue on July 22, 2010. Shands and Elrac moved to vacate the note of issue on the ground that plaintiff failed to provide authorizations for the release of medical records from providers who purportedly treated plaintiff, for injuries resulting from motor vehicle accidents in 2000 and 2002, his assault in 2004, and the home invasion in 2005. Shands and Elrac also sought authorizations for the release of diagnostic films and reports from doctors from whom plaintiff purportedly sought treatment as a result of the accident in this action, authorizations for employment records, and authorizations for diagnostic films and reports "in relation to plaintiff's October 1990

right inguinal hernia repair.” (Martorella Affirm. dated 3/14/11, Ex A).

Plaintiff opposed the motion, and submitted copies of authorizations that he purportedly sent to defendants. Plaintiff added, “However, plaintiff just discovered another prior accident which is a Workers Comp September 24, 2001 case where plaintiff was being treated at BAY PLAZA HEALTH GROUP . . . where plaintiff signed HIPAA medical release which was faxed August 20, 2010 by the facility over to both defendants.” (Martorella Affirm. dated 3/14/11, Ex A [Exhibit S (Plaintiff Opp. Aff., at 4)].)

The Court scheduled a motion conference on November 18, 2010 to discuss the discovery issues. By decision and order dated November 22, 2010, the Court denied Shands and Elrac’s motion, stating in pertinent part:

“The Court scheduled a conference to discuss outstanding disclosure issues for November 18, 2010. Plaintiff pro se Cunningham was present, but counsel for movant was not. Someone on behalf of movant telephoned the Part mid-morning and assured the Clerk that an attorney would arrive shortly. No attorney for movant ever appeared, and at 12:40 P.M, the Court marked the motion submitted. Plaintiff’s opposition papers indicate that he served (albeit late) HIPAA authorizations for certain medical facilities. Under the circumstances, movant has not proven entitlement to striking the note of issue. Moreover, by not appearing, movant prevented the Court from determining what disclosure material, if any, might still be outstanding.”

Shands and Elrac’s counsel maintains that it was not notified of the court appearance, but their counsel began calling attorneys to see who could appear in court. (Martorella Affirm. dated 3/14/11 ¶ 17.) Christopher Doering, Esq. claims that he arrived in court at 12:45 p.m. and found that plaintiff had already left the building. (Martorella Affirm. dated 3/14/11, Ex B [Doering Aff. ¶¶ 3-4].)

Shands and Elrac move to vacate the decision and order dated November 22, 2010, which

denied their motion to vacate the note of issue, and upon vacatur, they seek leave to reargue their prior motion. Shands and Elrac separately move for summary judgment dismissing the action, on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff moves to “strike” the “MTA defendants’ motion.” (Motion Seq. No. 007.)

A court conference regarding these motions was held on June 23, 2011.

## DISCUSSION

### Shands and Elrac’s Motion for Summary Judgment

As an initial matter, plaintiff asks that the Court “strike” “the MTA defendants’ motion dated April 15, 2011.” It is clear that the New York City Transit Authority and Leonard did not make such a motion, whereas Shands and Elrac moved for summary judgment, initially returnable on April 15, 2011. Therefore, the Court concludes that plaintiff is asking that the Court “strike” Shands and Elrac’s motion for summary judgment.

To the extent that plaintiff is asking the Court not to entertain or consider Shands and Elrac’s motion for summary judgment, the gist of plaintiff’s argument is that Shands and Elrac purportedly signed a stipulation to restore the action for a settlement conference, which was scheduled for April 13, 2011, but the conference was apparently adjourned because of Shands and Elrac’s motion.

Plaintiff’s argument is unavailing. There is nothing in the record to indicate that the terms of the stipulation expressly, or even impliedly, barred Shands and Elrac from making a motion for summary judgment. Therefore, plaintiff’s motion to “strike the MTA defendants’ motion” is denied.

Shands and Elrac essentially argue that plaintiff’s alleged injuries are minor and not causally connected to the accident. In support of their motion for summary judgment, Shands and Elrac

submit the affirmed reports of Dr. Maria Audrie De Jesus, a neurologist, and Dr. Jacquelin Emmanuel, an orthopedic surgeon. (Martorella Affirm. dated 3/18/11, Exs G, H.) Shands and Elrac also maintain that plaintiff's alleged cervical and lumbar spinal injuries were pre-existing injuries, based on plaintiff's deposition testimony and medical records.

Dr. De Jesus examined plaintiff on August 25, 2008. According to her report, the examination covered areas such as "mental status," "cranial nerves," "motor examination," "reflexes," "sensory," "gait and coordination," and "cerebellar examination." Dr. De Jesus also recorded the ranges of motion, expressed in degrees, and corresponding normal values, at plaintiff's neck, and found full range of motion. Dr. De Jesus concluded that "exacerbation of preexisting neck and back injury, resolved" and that "from a neurologic standpoint, there is no need for further treatment." (Martorella Affirm. dated 3/18/11, Ex G.)

Dr. Emmanuel also examined plaintiff on August 25, 2008. Dr. Emmanuel recorded the ranges of motion, expressed in degrees, and corresponding normal values, in plaintiff's cervical spine, right shoulder, lumbosacral spine, and right hip. Dr. Rosenbaum found that plaintiff had normal ranges of motion in his right shoulder, lumbosacral spine, and right hip. Dr. Emmanuel noted "slightly decreased range of motion of the cervical spine on flexion to 30 degrees (45 degrees normal), extension to 30 degrees (45 degrees normal), lateral bend to 35 degrees (45 degrees normal), right and left rotation to 50 degrees (70 degrees normal)." (Martorella Affirm. dated 3/18/11, Ex H.). Dr. Emmanuel stated, "In my opinion, I find the claimant has no disability." (*Id.*)

Shands and Elrac have not met their prima facie burden of summary judgment, based on the affirmed reports of Dr. De Jesus and Dr. Emmanuel, who both did not state the objective methods used to measure plaintiff's ranges of motion. "The defendant cannot satisfy that burden if it presents

the affirmation of a doctor which recites that the plaintiff has normal ranges of motion in the affected body parts but does not specify the objective tests performed to arrive at that conclusion.” (*Linton v Nawaz*, 62 AD3d 434, 438-439 [1st Dept 2009], *aff’d* 14 NY3d 821 [2010]; *see also Beazer v Webster*, 70 AD3d 587 [1st Dept 2010][“Defendants' failure to indicate the objective tests used to determine the range of motion in plaintiff's cervical spine was fatal to their efforts to establish a prima facie case for summary dismissal”].)

As Shands and Elrac point out, Dr. De Jesus and Dr. Emmanuel both noted under “Past Medical History,” that plaintiff was attacked/assaulted by a guard, sustaining injuries to his neck and back. However, neither Dr. De Jesus nor Dr. Emmanuel conclude that plaintiff’s alleged injuries were pre-existing in nature. Therefore, Shands and Elrac’s contention that plaintiff’s injuries are pre-existing is unsubstantiated.

Because defendants do not demonstrate, as a matter of law, that none of plaintiff’s injuries meet the No Fault threshold, “it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand defendants' motion for summary judgment.” (*Linton v Nawaz*, 14 NY3d at 821.)

#### Shands and Elrac’s Motion to Vacate and Reargue

Shands and Elrac argue that the Court’s decision and order dated November 22, 2010, which denied their motion to strike the complaint, or in the alternative, to strike the note of issue and other relief, should be vacated pursuant to CPLR 5015 (a) (1), because they have a reasonable excuse for not attending the scheduled court conference. Upon vacatur, Shands and Elrac seek leave to reargue their prior motion.

To the extent that Shands and Elrac seek leave to vacate the prior decision and order pursuant to CPLR 5015, such relief is denied. The prior decision and order was not granted on default, because it states, in pertinent part, "Plaintiff's opposition papers indicate that he served (albeit late) HIPAA authorizations for certain medical facilities. Under the circumstances, movant has not proven entitlement to striking the note of issue. Moreover, by not appearing, movant prevented the Court from determining what disclosure material, if any, might still be outstanding." Thus, the Court's prior decision was based on the written submissions, and the motion was not denied simply because Shands and Elrac did not appear at the court conference. Therefore, vacatur pursuant to CPLR 5015 does not lie.

However, to the extent that Shands and Elrac seek leave to reargue the prior decision and order, reargument is granted. Shands and Elrac contended that plaintiff had not provided authorizations for the release of medical records from certain providers, which plaintiff insists were provided. It appears that this dispute is partly due to a miscommunication between plaintiff and counsel for Shands and Elrac, which became apparent when the parties appeared in court on June 23, 2011. Shands and Elrac also sought authorizations from plaintiff's prior employers and from attorneys who represented plaintiff in connection with his workers compensation claim and litigation arising out of the alleged McDonald's restaurant assault and the alleged home invasion.

#### A. Authorizations for Medical Records

Shands and Elrac sought an authorization from plaintiff for the diagnostic films and reports for Dr. Randolph V. Ehrlich, Dr. Ali Guy, and Dr. Daniel Eisenberg, which plaintiff claims he provided by submitting authorizations dated May 4, 2010 and dated August 20, 2010 for Med Alliance Medical & Rehabilitation Services, at 625 East Fordham Road, Bronx, NY 10458. At the

court conference, plaintiff explained that Dr. Randolph V. Ehrlich, Dr. Ali Guy, and Dr. Daniel Eisenberg were practitioners at the Med Alliance office in the Bronx. This appears to be the case. Dr. Eisenberg's treatment notes bear the letterhead of Med Alliance (*see* Martorella Affirm. dated 3/18/11, Ex J.), as does a report from Dr. Randall V. Erhlich. (*See* Martorella Affirm. dated 3/14/11, Ex A.)

Because the authorizations that plaintiff provided for Med Alliance do not appear to be restricted to any particular provider, the Court is not persuaded by Shands and Elrac's contention that plaintiff must provide an authorization for each and every provider with Med Alliance that treated plaintiff. Although Shands and Elrac question whether they have received all the records from Med Alliance, plaintiff claims that, upon his own inquiry about the records, Med Alliance purportedly indicated that defendants had not paid for the copies of plaintiff's medical file. (*See* Martorella Affirm. dated 3/14/11, Ex A [Plaintiff's Opp. Aff. at 3].)<sup>2</sup>

Plaintiff stated that he received treatment from Magenta Medical, P.C., located at 3407 White Plains Road, Bronx, NY 10467, for accidents in 2003 and 2004. (*See* Martorella Affirm. dated 3/14/11, Ex S.) Plaintiff apparently provided an authorization for the release of medical records from Magenta Medical, P.C. to counsel for defendant New York City Transit Authority. (*Id.*) It does not appear from this record that plaintiff provided an authorization from Magenta Medical P.C. for the records to be released to Shands and Elrac's counsel. Shands and Elrac's counsel acknowledged that plaintiff's prior counsel provided authorizations from Magenta Medical for "treatment records related to the subject accident." (*Id.* [Reply Affirm. ¶ 7].) However, according to Shands and Elrac's

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<sup>2</sup> Shands and Elrac's counsel claim that Med Alliance did not submit invoices for payment.

counsel, these authorizations did not provide for the release of records prior to the accident, and that Magenta Medical P.C. informed counsel that plaintiff did not consent to release of these records.

It cannot be determined from this record that the alleged incidents in 2003 and 2004 that plaintiff referred to in affidavit involved injuries similar to those claimed here. Magenta Medical P.C. was not mentioned during plaintiff's deposition. However, given that plaintiff has already provided an authorization to the New York City Transit Authority, and that the information could lead to admissible evidence as to the injuries alleged here, the Court directs plaintiff to provide another authorization to Shands and Elrac's counsel for the records from Magenta Medical, P.C. The authorization should clearly indicate that the years covered for the authorization are from 2003 to the present.

Plaintiff has indicated that Magenta Medical P.C. "is now name [*sic*] under new management as PRECISE PHYSICAL THERAPY[. . .]" . (See Martorella Affirm. dated 3/14/11, Ex S [Plaintiff's Opp. Aff. at 3].) Therefore, plaintiff is directed to provide an authorization to Shands and Elrac's counsel for the records from Precise Physical Therapy. The authorization should clearly indicate that the years covered for the authorization are from 2003 to the present.

Shands and Elrac's counsel demanded an authorization for the diagnostic films and reports of Dr. Jack Lyons, a radiologist at Distinguished Diagnostic Imaging, P.C. who sent a narrative report to Med Alliance regarding an MRI taken of plaintiff's lumbosacral spine on July 12, 2007. (See Martorella Affirm. dated 3/14/11, Ex A [Exhibit O].) Although plaintiff may be correct to say that Dr. Lyons's report would likely be contained in the medical records of Med Alliance, because the report was addressed to Dr. Ali Guy at Med Alliance's address, it cannot be presumed that the diagnostic films would have been sent there as well. Therefore, plaintiff is directed to provide an

authorization for the release of his medical records from Distinguished Diagnostic Imaging, P.C., at 1484 Williamsbridge Road, Bronx NY 10461, and from Bronx Park Radiology, as plaintiff testified at his deposition.

Shands and Elrac's counsel demanded an authorization "with complete identifying information and worker's compensation claim number, related to Plaintiff's 2000 worker's compensation action," and an authorization "with complete identifying information for Dr. Santoro related to Plaintiff's 2000 worker's compensation action." (*See Martorella Affirm.* dated 3/14/11, Ex A [Martorella Reply Affirm. ¶ 5].) It appears that plaintiff completed authorizations on OCA Form No. 960, and indicated "Workers Com[p]" in Box 9(a) of the form, specifying the information to be released. (*See Martorella Affirm.* dated 3/14/11, Ex A.) However, the form itself does not name a specific provider. In Box 7 of the form, where the provider's name and address should have been listed, plaintiff gave the name and address of Shands and Elrac's counsel. (*See id.*) Thus, although plaintiff might have believed that he provided authorizations for his workers compensation records, the authorizations are, on their face, not proper.

Plaintiff has indicated that medical providers whom he sees in connection with his workers' compensation claim from the May 2000 accident are with Doctors United, a facility located at 907 East Tremont Avenue, Bronx, NY 10460, and that Dr. Santoro is apparently part of Doctors United. (*See Martorella Affirm.* dated 3/14/11, Ex A [Plaintiff's Opp. Aff. At 2.]) Therefore, plaintiff is directed to provide a new authorization on OCA Form No. 960 for Doctors United, i.e., Box 7 of OCA Form No. 960 should filled in with Doctors United, and its address, not the name of Shands and Elrac's counsel. Shands and Elrac's counsel should be filled in Box 8 of OCA Form No. 960. Plaintiff should clearly check off in Box 9 (a) of the form whether he is providing medical records

for a limited period, or the "Entire Medical Record," or "other." If plaintiff checks off "Entire Medical Record," and Box 7 is filled in with Doctors United and its address, then plaintiff need not provide additional authorizations for any individual doctor who treated plaintiff at Doctors United, including "Dr. Gerborovich," as testified to by plaintiff at his deposition.

Although only Shands and Elrac's counsel demanded authorizations for medical records from plaintiff, plaintiff must provide written authorizations permitting all parties to obtain the medical records. (22 NYCRR 202.17 [b] [1].) Thus, plaintiff must provide counsel for the New York City Transit Authority with authorizations for medical records that the Court has directed him to provide to Shands and Elrac's counsel, except for Doctors United, Magenta Medical P.C., and Bay Plaza Health Group. NYCTA acknowledged in a so-ordered stipulation dated November 18, 2010 that it received authorizations from those facilities. (See Martorella Affirm., dated 3/18/11, Ex K.)

In addition to the authorizations that plaintiff must provide now, for the purposes of trial, plaintiff shall provide all defendants' counsel with another set of fresh (i.e., new) HIPAA-compliant authorizations for all medical providers that plaintiff has consulted (or will consult) before trial. For these trial authorizations, the name and address in Box 8 of OCA Form 960 should be "New York State Supreme Court, New York County, Subpoenaed Records Room, 60 Centre St, Room 145M, New York, New York, 10007." The deadline for plaintiff to provide these trial authorizations shall be addressed at the next discovery conference in this case.

As Shands and Elrac point out, plaintiff apparently has not provided the authorizations for the release of medical records from treatment facilities and doctors regarding prior accidents and occurrences which resulted in injuries that might be to same areas of plaintiff's body as the injuries claimed in this action. The record does not indicate that plaintiff provided Shands and Elrac with

authorizations for “Queens Medical Center in Elmhurst,” Bellevue Hospital, and St. Barnabas Hospital. Therefore, the Court directs plaintiff to provide an authorization to Shands and Elrac’s counsel for these providers.

Shands and Elrac have not demonstrated the relevance of medical records related to “Plaintiff’s October 1990 right inguinal hernia repair.” Moreover, the record does not indicate who treated plaintiff for the hernia repair, and those medical records are not likely to be in existence at this time. Therefore, the Court declines to direct plaintiff to provide an authorization for those records.

Lastly, Shands and Elrac’s counsel sought authorizations for the release of medical records from “an unidentified MRI facility” and from those providers that might have treated plaintiff for a motor vehicle accident in 2002. The Court declines to direct plaintiff to provide medical authorizations. The record does not contain any information that would identify a facility or provider, and plaintiff has testified that he has little recollection as to the details of the 2002 motor vehicle accident. Given the claimed circumstances, plaintiff would not be able to comply with such a directive.

#### B. Authorizations for other records

In response to Shands and Elrac’s demands for authorizations, plaintiff answered that his workers compensation attorneys were Daniel S. Elias Esq. and David Hoo, Esq., and provided a telephone number. (*See* Martorella Affirm. dated 3/14/11, Ex A [Exhibit O].) Plaintiff purportedly completed an authorization on OCA Form No. 960, but this authorization does not suffice as an authorization for the release of non-privileged records from Elias and Hoo. OCA Form No. 960 is meant as an authorization only for the release of medical records.

In response to Shands and Elrac's demands for authorizations, plaintiff answered that Gary S. Fish, Esq. handled his litigation involving the alleged assault at a McDonald's restaurant. (*See* Martorella Affirm. dated 3/14/11, Ex A [Exhibit O].) Mr. Fish also commenced the federal case involving the home invasion, and J.M. Weinstein was an attorney hired to conduct depositions in the federal case, where plaintiff is now self-represented. (*See id.*) However, plaintiff apparently did not provide any authorizations for the release of non-privileged portions of Fish's files and of Weinstein's file (to the extent that a file would exist).

There is no court approved form for the release of non-privileged portions of an attorney's file for client matters, and plaintiff is self-represented. Therefore, the Court directs Shands and Elrac's counsel to serve upon plaintiff an authorization for the release of such non-privileged portions of Elias and Hoo's file relating to plaintiff's workers' compensation claim(s) and for the non-privileged portions of Fish's files and Weinstein's file (if such a file exists) relating to plaintiff's lawsuit against McDonald's and the federal litigation. Plaintiff is directed to execute the authorization upon receipt of the authorization from Shands and Elrac's counsel.

Shands and Elrac also demanded that plaintiff provide an authorization for Gotham Registry, the nursing agency where plaintiff allegedly worked at the time of the accident at issue in this lawsuit. Although the record contains two authorizations which purport to release work and employment records, it is unclear who would receive these records, and whose records were being provided. Accordingly, plaintiff is directed to provide an authorization for the release of his employment records for Gotham Registry for the period of two years prior to the alleged accident until the present, i.e., for the period from 2005 to the present. Plaintiff should ask Gotham Registry what paperwork he must complete to furnish Shands and Elrac's counsel with a copy of those

records.

C. A Further EBT and IME of plaintiff

Defendants are entitled to take a further EBT of plaintiff. Plaintiff did not disclose that he was being treated at a facility for a "Workers Comp September 24, 2001 case" until after the note of issue was filed. Moreover, Shands and Elrac had not received the authorizations for medical records discussed above. Defendants are entitled to depose plaintiff fully about all medical treatment and providers about which he earlier asserted lack of clear memory. Defendants are entitled to take an additional orthopedic exam of plaintiff, because plaintiff did not provide them with authorizations from medical providers who treated plaintiff either for the injuries allegedly resulting from the accident at issue in this lawsuit, or for the prior alleged injuries.

Given that plaintiff must provide authorizations to Shands and Elrac, and that defendants are entitled to a further EBT and orthopedic exam of plaintiff, the note of issue must be vacated. Therefore, Shands and Elrac's motion is granted to the extent that reargument is granted, and upon reargument, the note of issue is vacated.

Any other discovery matters not specifically addressed in this decision may be raised at the next discovery conference.

Finally, the branch of Shands and Elrac's prior motion seeking to dismiss the complaint pursuant to CPLR 3126, due to plaintiff's failure to provide authorizations is denied. The Court is not persuaded that the failure of plaintiff, who is self-represented, to provide these authorizations was willful or contumacious.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that the motion by defendants Freddy Shands, III and Elrac, Inc. is granted to the extent that reargument is granted, and upon reargument, the note of issue is vacated; and it is further

ORDERED that the motion for summary judgment by defendants Freddy Shands, III and Elrac, Inc. is denied; and it is further

ORDERED that plaintiff's motion (Motion Seq. No. 007) is denied; and it is further

ORDERED that, within 30 days of a service of a copy of this order with notice of entry, plaintiff shall give Carman, Callahan & Ingham, LLP, located at 266 Main St, Farmingdale, NY 11735 authorizations for the release of medical records, including any diagnostic films or reports, from the following providers:

- 1) Magenta Medical P.C.—the authorization should clearly indicate that the records to be provided are from 2003 to the present
- 2) Precise Physical Therapy—the authorization should clearly indicate that the records to be provided are from 2003 to the present
- 3) Distinguished Diagnostic Imaging P.C.
- 4) Bronx Park Radiology
- 5) Doctors United
- 6) “Queens Medical Center in Elmhurst”
- 7) Bellevue Hospital
- 8) St. Barnabas Hospital; and it is further

ORDERED that, within 30 days of a service of a copy of this order with notice of entry, plaintiff shall give Wallace D. Gossett, Esq., located at 130 Livingston Street, 11<sup>th</sup> Floor, Brooklyn, NY 11201 authorizations for the release of medical records, including any diagnostic films or reports, from the following providers:

- 1) Precise Physical Therapy—the authorization should clearly indicate that the records to be provided are from 2003 to the present
- 2) Distinguished Diagnostic Imaging P.C.
- 3) Bronx Park Radiology
- 4) “Queens Medical Center in Elmhurst”
- 5) Bellevue Hospital

6) St. Barnabas Hospital; and it is further

ORDERED that, within 30 days of a service of a copy of this order with notice of entry and of blank authorization forms, plaintiff shall give Carman, Callahan & Ingham, LLP, located at 266 Main St, Farmingdale, NY 11735, completed authorizations for the following:

- 1) the non-privileged portions of the legal files of Daniel S. Elias Esq. and David Hoo, Esq relating to any workers' compensation claim(s) made by plaintiff;
- 2) the non-privileged portions of the legal files of Gary Fish, Esq. and J.M. Weinstein Fish (if such a file exists) relating to plaintiff's lawsuit against McDonald's and the federal litigation; and it is further
- 3) employment records from Gotham Registry, for the period 2005 to the present

ORDERED that all defendants are entitled to take a further EBT and an orthopedic exam of plaintiff; and it is further

ORDERED that the parties shall appear for a status conference on October 27, 2011, at 3:00 p.m. in IAS Part 21, 80 Centre Street Room 278, New York, New York.

Dated: August 24, 2011  
New York, New York

ENTER:

  
\_\_\_\_\_  
J.S.C.

**MICHAEL D. STALLMAN**  
J.S.C.

**FILED**

AUG 26 2011

NEW YORK  
COUNTY CLERK'S OFFICE