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

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PEDRO LOPEZ,

Plaintiff,

- against -

MTA/NEW YORK CITY TRANSIT AUTHORITY and "JOHN DOES", said names being fictitious and unknown.

Defendants.

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Index No. 109978/2009

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendant moves for an order precluding plaintiff from offering any testimony or evidence at trial as to the injuries alleged in the bill of particulars. In the alternative, defendant requests court-ordered subpoenas for the release of plaintiff's records from Family Court, Criminal Court, and the New York City Administration for Children's Services, and for an order compelling plaintiff to supplying authorizations for those records, so that defendant may obtain information about plaintiff's alleged mental, drug, and alcohol issues. Plaintiff cross-moves for an order compelling defendant to produce photographs and surveillance materials. Defendant separately moves for the issuance of an open commission to depose plaintiff's mother, a New Jersey resident.

BACKGROUND

In this action, plaintiff alleges that, on February 20, 2009, at approximately 11:00 A.M., at the 155th Street IND station in northern Manhattan, the doors of a New York City subway car of a D train closed on him as he was entering the subway car and dragged him along the subway platform.

According to paragraph 10 of the verified bill of particulars, plaintiff allegedly suffered, among other injuries: a comminuted skull fracture; cerebral concussion; cranial lacerations, traumatic brain injury, hemorrahagic infarction in the superior right front lobe with surrounding vasogenic edema, brain damage including memory loss, impaired memory, depression, anxiety, impaired mental function; nasal fracture; and other injuries. (*See* Correa Suppl. Affirm. supporting Plaintiff's Opp. to Defendant's Motion to Compel, Ex 2.)

According to records from Harlem Hospital that defendant obtained, plaintiff was seen for a psychiatric consult on February 24, 2009, based on information from "the PCP Dr. Grumet" that "the patient has had previous suicidal ideation and possible attempts." (Henderson Affirm., Ex A.) The findings of plaintiff's psychiatry consult on February 24, 2009 state, in pertinent part,

> "On the day before being hit by train he was seen by PCP who said he look like on something and worried about even asked if he was suicidal he said no and was to go for psychiatry evaluation the next day. The PCP indicated he once three years ago was on George Washington Bridge and treating [*sic*] to jump and traffic was held for hours until he was gotten. Patient says he does not recall any of this except he has not been with his wife due to problems. He is little anger [*sic*] at me for kind of being a detective. Told him just trying to help him to be clear about what happened to him. Either he slipped and fell which is what he believes but not sure or he could have actually jumped. He is denies [*sic*] suicidal ideation or intention now or in past. He denies ever hearing voices and did admit to one admission to psychiatry for depression."

(Henderson Affirm., Ex A.) Plaintiff was seen again on February 26, 2009, and the findings of the psychiatry consult on February 26, 2009 state, in pertinent part:

> "My concern as psychiatrist was it seemed after what ever caused break-up with family, he was drinking heavy and even went to detox and was started on medication by PCP for depression. He also as per PCP indicated he had threaten[ed] to jump off GWB in past. Patient has no memory of doing that. He also is not aware of why he was in psychiatry hospital for depression in past in New Jersey except for family problem."

(*Id.*)

Defendant claims that it has not been able to obtain details of the plaintiff's family problems, or to locate any facility where plaintiff was seen, diagnosed, or treated for alcohol, drug or mental health issues which allegedly caused his family problems. Defendant believes that ACS, Family Court, and Criminal Court records may provide further information.

On February 2, 2011, defendant purportedly served non-party Digna Molina, plaintiff's mother, with a subpoena as a non-party witness and a deposition notice. It is undisputed that Molina resides in New Jersey.

Defendant moves for an order precluding plaintiff from offering any testimony or evidence at trial as to item 10 in his bill of particulars, or in the alternative, for court-ordered subpoenas for the release of plaintiff's records from Family Court, Criminal Court, and the New York City Administration for Children's Services (ACS), and for an order compelling plaintiff to supplying authorizations for those records. Plaintiff cross-moves for an order compelling defendant to produce photographs and surveillance materials. (Motion Seq. No. 004). Plaintiff's counsel asserts that photographs of the scene on the date of the accident were taken by defendant's investigators, but were not provided to plaintiff following discovery demands.

Defendant separately moves for the issuance of an open commission to depose Molina in New Jersey. (Motion Seq. No. 005.)

Plaintiff opposes both motions. This decision addresses both motions and plaintiff's cross motion. This decision also addresses defendant's request, raised in supplemental papers, to reargue the Court's decision and order dated May 20, 2011, which granted plaintiff's motion to quash a subpoena of non-party Josephine Lopez.

DISCUSSION

Motion Seq. No. 004

Defendant asserts that plaintiff's mental/alcohol/drug condition are relevant to his behavior on the date of accident. (Henderson Affirm. ¶ 5.) According to a toxicology report on the date of plaintiff's alleged accident, plaintiff tested positive for benzodiazepines (Hendersen Affirm., Ex B), which defendant asserts is a class of medication used to wean patients off of alcohol. Defendant believes that records from ACS, Family Court, and Criminal Court "may elaborate" on the issue of where plaintiff was seen, diagnosed, or treated for alcohol, drug, or mental health issues, because "the courts frequently order a party to obtain treatment as part of the resolution of the case." (Henderson Affirm. ¶ 10; Mem. at 3.)[1] Accordingly, defendants seeks a court-ordered subpoena for the release of plaintiff's records from Family Court, Criminal Court, and the New York City Administration for Children's Services (ACS), and for an order compelling plaintiff to supply authorizations for those records.

A. Court-ordered subpoenas for the release of records

"Generally, a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence. 'Rather, its purpose is 'to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding.'" (*Matter of Terry D.*, 81 NY2d 1042, 1044 [1993][internal citations omitted]; *see also Law Firm of Ravi Batra, P.C. v Rabinowich*, 77 AD3d 532, 533 [1st Dept 2010]["a subpoena should be quashed when the subpoena is being used for a fishing expedition to ascertain the existence of evidence"].)

Here, defendant's stated purpose for the court-issued subpoenas is to obtain discovery, which

[1] Defendant's moving memorandum of law (denominated as a brief) was not numbered.

is impermissible. Defendant is not seeking any specific document from ACS, Family Court, and Criminal Court records. For example, defendant has not sought a court-issued subpoena for a specific matter that was before either the Family Court or Criminal Court. Moreover, CPLR 2307 requires that a motion for a court-issued subpoena duces tecum upon a department or bureau of a municipal corporation "shall be made on at least one day's notice to . . . the department, bureau or officer having custody of the . . .document, or other thing. . ." Here, the affidavit of service of defendant's motion indicates that only plaintiff's counsel was served with the motion.

Moreover, for the reasons discussed in the following section, an application for court-ordered subpoenas for the records of Family Court or Criminal Court which are not open to public inspection should be made before the court in which the records are located. Furthermore, it is improper to use the Supreme Court to subpoena records of the Family Court and Criminal Court as a way of bypassing a motion for an order to unseal records, which should be brought before the appropriate court. As to Criminal Court records that are not sealed, they are open to public inspection and copying by defendant at its expense. It is not proper to use a subpoena to require a court to copy and mail records at court expense.

Therefore, the branch of defendant's motion for court-issued subpoenas for records from ACS, Family Court, and Criminal Court is denied.

B. Authorizations for release of ACS, Family Court, and Criminal Court records

> "Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records. . . Thus, Section 4 of the Judiciary Law requires that, with certain exceptions not applicable here, '[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same.' Likewise, Sections 255 and 255–b of the Judiciary Law mandate that court records and docket books be available to the public.

> 'The right of access to court proceedings and records also is firmly grounded in the common law, 'and the existence of the correlating common-law right to inspect and copy judicial records is beyond dispute.' We have recognized the broad constitutional presumption, arising from the First and Sixth Amendments, as applied to the States by the Fourteenth Amendment, that both the public and the press are generally entitled to have access to court proceedings.
>
> The public right to access, however, is not absolute, and public inspection of court records has been limited by numerous statutes. Thus, for example, restrictions have been placed on access to Family Court records (Family Court Act § 166), records in matrimonial actions (Domestic Relations Law § 235), sealed records in criminal cases (CPL 160.50), adoption proceeding records (Domestic Relations Law § 114) and proceedings seeking disclosure of HIV-related information (Public Health Law § 2785[3])."

(*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010].)

1. Criminal Court records

"[F]iles in the possession of the clerk of the Criminal Court of the City of New York are public records which may be fully examined by any person, unless the papers have been sealed from public scrutiny by the court or by the terms of a statute." (*Matter of Werfel v Fitzgerald*, 23 AD2d 306, 312 [2d Dept 1965].) Thus, access to the plaintiff's Criminal Court records that are not sealed would not require plaintiff's authorization. Therefore, the branch of defendant's motion seeking an order compelling plaintiff to provide authorizations for Criminal Court records is denied.

To the extent that defendant intended to seeks access to criminal court records sealed pursuant to CPL 160.50, the Supreme Court is not the appropriate court in which to make a motion to unseal criminal court records. Although "with two narrow exceptions, the Supreme Court is competent to entertain all causes and to conduct all subsidiary proceedings necessary to determining those causes" (*Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 338 [1993]), the Supreme Court is not the proper court to entertain applications to unseal records of the Criminal Court. (*See*

Lauricella v Tanya Towers, Inc., 8 AD3d 153 [1st Dept 2004]; *Wilson v City of New York*, 240 AD2d 266, 267 [1st Dept 1997].) Criminal Court is in a better position, as custodian of the records, to determine which parties are entitled to notice of the application for an unsealing order.

2. Family Court records

Family Court Act § 166 provides, "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records." "Under the New York Constitution, Supreme Court has concurrent jurisdiction with the Family Court." (*Green v Montgomery*, 95 NY2d 693, 699 [2001].) "As the Court of Appeals said in *Kagen v Kagen*, 21 N.Y.2d 532, 538, 289 N.Y.S.2d 195, 200, 236 N.E.2d 475, 480 supra), it becomes the subject of the exercise of discretion whether in instances of concurrent jurisdiction the Supreme Court should transfer a matter to the Family Court, for 'in many cases, obviously, this would be the better practice.'" (*Kreitz v Austin*, 35 AD2d 811, 812 [2d Dept 1970].)

Although there have been a few instances where the Supreme Court has granted access to inspection of Family Court records, it is this Court's view that the application for access to Family Court records where plaintiff is a party be made to the Family Court, given the circumstances of this case. Defendant is not seeking access to the records of any particular Family Court proceeding. The Family Court of each county is in a better position to determine whether plaintiff was a party in a matter pending before that court, whether those proceedings would have involved plaintiff's alleged alcohol, drug, and mental issues, and who else should be given notice and an opportunity to be heard on defendant's application.

A court order granting access to Family Court records does not require the plaintiff's consent.

Accordingly, the branch of defendant's motion seeking an order compelling plaintiff to provide authorizations for inspection of Family Court records is denied.

3. ACS records

Given that defendant did not apparently serve ACS with this motion, it is premature to determine whether plaintiff ought to provide an authorization for access to ACS records. ACS records are likely to contain sensitive information from and about plaintiff's children, other family members and informants, and disclosure of those records (particularly because they must be shared with plaintiff in this case) might disclose confidential information, thereby potentially placing non-parties at risk. ACS should therefore be given a right to notice and an opportunity to be heard on this issue.

C. An order of preclusion

"In order to invoke the drastic remedy of preclusion (CPLR 3126), the court must determine that the party's failure to comply with a disclosure order was willful, deliberate and contumacious." (*Holliday v Jones*, 36 AD3d 557, 558 [1st Dept 2007]; *accord Gendusa v Yu Lin Chen*, 71 AD3d 1085, 1086 [2d Dept 2010].) Here, defendant has not demonstrated that plaintiff willfully and deliberately failed to comply with disclosure. Therefore, the branch of defendant's motion seeking an order precluding plaintiff from offering any testimony or evidence at trial as to item number 10 in plaintiff's bill of particulars–i.e., plaintiff's alleged injuries–is denied.

D. Plaintiff's cross motion

Plaintiff cross-moves for an order compelling defendant to produce photographs allegedly taken by defendant's investigators on the date of the alleged incident, and for any video surveillance footage depicting the actual incident. According to plaintiff's counsel, defendants produced

photographs in response to plaintiff's combined demand dated November 6, 2009, but the photographs either indicated a different date or were undated. Although defendant responded that there are no surveillance recordings from the 155th Street subway station, and that cameras on the platform are not being recorded, defendant's response was unsworn. (*See* Sells Affirm., Ex 6.)

Plaintiff's counsel also asserts that defendant has not responded to a supplemental notice for discovery and inspection dated March 11, 2010, nor to a further supplemental notice for discovery and inspection dated March 23, 2010. (*See* Sells, Affirm., Exs 7 & 8.)

CPLR 3120, which governs the discovery of documents and things, "contains no provision for the court to order a party to disclose by affidavit whether he or she possessed or had transferred from his or her possession certain specified documents." (6-3120 New York Civil Practice: CPLR P 3120.04.) Therefore, defendant's unsworn response to plaintiff's demand for videotape surveillance footage was not an inadequate response, and it is binding on defendant. However, so that plaintiff may have a sworn response, plaintiff may question defendant at a deposition about the cameras at the 155th Street subway station and whether they recorded any surveillance footage of plaintiff's alleged accident.

Plaintiff's counsel has not demonstrated that defendant's response to plaintiff's supplemental notice for discovery and inspection dated March 11, 2010 was inadequate. In opposition to plaintiff's motion, defendant submitted an affidavit from a retired train station supervisor, who averred, "I have determined that no black box or event recorder existed on the date of the accident as to these R68 cars above-described consist [R68 cars running on the "D" line southbound on 2/20/09 from 155th Street and Eighth Avenue at about 11:45 a.m.]." (Williams Aff. ¶¶ 1-2.) In reply, plaintiff's counsel did object to this affidavit as inadequate. (*See* Correa Reply Affirm.)

Defendant also provided a copy of regulations believed to be applicable in 2009 to the conductor and train operator duties during the operation of a train. (*See* Henderson Aff. in response.) Plaintiff's concern as to whether defendant's counsel correctly provided the applicable rules and regulations can be explored at a deposition of a witness with knowledge of these documents. In the Court's discretion, defendant shall also make available for inspection the Rules and Regulations governing employees of MTA New York City Transit during regular business hours, upon 15 days' written notice to defendant's counsel, and plaintiff's counsel may designate for copying those pages of the Rules and Regulations which it believes are relevant to this action.[2]

With respect to the plaintiff's discovery demands for photographs taken at the scene of plaintiff's accident, and any accident reports prepared by Superintendent Pelzer, Superintendent Allen, and Train Station Supervisor Banks, the parties disagree as to whether such documents exist. As plaintiff's counsel indicates, it is not clear that the representations of defendant's counsel were based upon personal knowledge. Therefore, the Court directs defendant to provide, within 60 days, an affidavit from the person(s) who conducted the search for the accident photographs and accident reports, detailing "where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found." (*Jackson v City of New York* 185 AD2d 768, 770 [1st Dept 1992].)

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[2] If defendant has made available a copy machine for self-service in the building where the inspection takes place, and there is no objection to page(s) being copied, then plaintiff's counsel shall make the copies at its own expense. If copy machines are not available for self-service, plaintiff shall reimburse defendant a reasonable and customary rate for any designated copies to be made as a result of this inspection.

Motion Seq. No. 005: an open commission

"A commission may be issued where 'necessary or convenient' for the taking of a deposition outside of the State." (*Sorrentino v Fedorczuk*, 85 AD3d 759, 760 [2d Dept 2011][citing CPLR 3108].) Here, defendant argues that a commission is necessary because plaintiff's mother, Digna Molina allegedly told defendant's investigator "that she had no intention of appearing for the deposition. Mrs. Modina [*sic*] said that she did not want to get involved, she sees her son maybe twice a year, and that she would not travel to New York because of her age and health." (Weeks Aff. ¶ 5.)

Plaintiff opposes the motion, arguing that Mrs. Molina has no information relevant to the litigation because she was not a witness to the alleged incident. Plaintiff also argues that questions about communications between plaintiff and his mother prior to the alleged incident as to plaintiff's alleged drug or alcohol problems, mental condition, and family court history would be beyond the scope of disclosure. Plaintiff argues that, if the subpoena is not quashed, the Court should at least issue a protective order barring defendant from inquiring to into plaintiff's alleged drug or alcohol problems, mental condition, and family court history.[3]

Plaintiff has placed his mental condition at issue by seeking damages for depression and anxiety resulting from the alleged incident, as indicated in paragraph 10 of the bill of particulars. (Sells Opp. Affirm., Ex 3.) Plaintiff has also placed the condition of his brain at issue by alleging traumatic brain injury. (*Id.*) A long term history of alleged drug or alcohol abuse could lead to admissible evidence bearing on such long term effects on plaintiff's brain function. The alleged alcohol abuse is not based on speculation, as there were notes from the psychiatry consult on

[3] It does not appear that defendant separately cross-moved for such a protective order.

February 26, 2009 that plaintiff was "drinking heavy and event went to detox . . ." (Hendetson Affirm., Ex A.) Because the out-of-state deposition of Digna Molina could reasonably lead at the very least to the disclosure of evidence material and necessary to the prosecution of the action, defendant's motion for an open commission pursuant to CPLR 3108 should be granted. (*Mifsud v City of New York*, 208 AD2d 701, 702 [2d Dept 1994].)

Defendant's request to reargue

Defendant seeks to reargue the Court's decision and order dated May 20, 2011, which granted plaintiff's motion to quash a subpoena of non-party Josephine Lopez, alleged to be plaintiff's estranged wife. (*See* Henderson First Suppl. Affirm., Ex A.) The Court granted plaintiff's motion to quash because plaintiff asserted that Josephine Lopez was not personally served with the subpoena as required under CPLR 2303 (a) and 3106 (b). In supplemental papers, defendant does not contend that it had affirmatively disputed plaintiff's assertion in its opposition papers to the prior motion. Rather, defendant contends that the Court overlooked an affidavit of service annexed as an exhibit to defendant's opposition papers, which was not mentioned or referenced in defendant's previous affirmation in opposition.

As plaintiff's counsel indicates, a motion to reargue is the appropriate manner to point out to the Court any matters of fact or law that the Court overlooked or misapprehended, not in supplemental papers to a motion seeking different relief. Therefore, the defendant's request to reargue is denied as improperly brought.

Were the Court to grant reargument based on this request, the Court would have adhered to its prior decision to quash the subpoena. Although the affidavit of service states that the judicial

subpoena and notice to take deposition was delivered to Josephine Lopez personally (*See* Henderson First Suppl. Affirm., Ex B.), plaintiff's counsel also argued in the prior motion that the subpoenas were defective on their face because they purportedly lacked the notice requirement set forth in CPLR 3101 (a) (4). The Court did not address this argument in its prior decision and order because defendant did not affirmatively dispute plaintiff's assertion that Josephine Lopez was not personally served with the subpoenas.

Were the Court to grant reargument, the Court would have quashed the subpoenas served upon Lopez, based on noncompliance with the notice requirement of CPLR 3101 (a) (4). Although the Court has the discretion to permit the omitted notice to be corrected in appropriate circumstances, this Court declines to exercise such discretion under the circumstances of this case. Defendant did not submit with its application to reargue a subpoena amended to comply with the notice requirement.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion for an order precluding plaintiff from offering certain testimony and evidence at trial, for an order compelling plaintiff to provide authorizations, and for court-issued subpoenas (Motion Seq. No. 004) is denied; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that defendant shall make available for inspection the Rules and Regulations governing employees of MTA New York City Transit in effect during 2009, during regular business hours, upon 15 days' written notice to defendant's counsel, and plaintiff's counsel may designate for copying those pages of the Rules and Regulations which it believes are relevant to this action; and

it is further

ORDERED that defendant shall provide, within 60 days, an affidavit from the person(s) who conducted the search for the accident photographs and any accident/incident reports prepared by Superintendent Pelzer, Superintendent Allen, and Train Station Supervisor Banks about plaintiff's alleged accident, detailing where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, or whether a search had been conducted in every location where the records were likely to be found; and it is further

ORDERED that defendant's motion for an open commission for Digna Molina, a resident of New Jersey, (Motion Seq. No. 005) is granted; and it is further

ORDERED that defendant's request to reargue the Court's decision and order dated May 20, 2011 is denied; and it is further

ORDERED that the parties are directed to appear for a compliance conference in IAS Part 21 on April 26, 2012 at 11:30 a.m.

Copies to counsel. An order granting a commission and a commission in the proposed forms annexed to defendant's moving papers has been signed herewith.

Dated: December 6, 2011
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

NEW YORK
COUNTY CLERK'S OFFICE