

Ochoa v Gomberg

2012 NY Slip Op 31491(U)

May 22, 2012

Sup Ct, Nassau County

Docket Number: 16942/10

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

SAMUEL OCHOA,

Plaintiff,

-against-

NATALIE GOMBERG and SAMUEL GOMBERG,

Defendants.

-----X

NATALIE GOMBERG and SAMUEL GOMBERG,

Third-Party Plaintiffs,

-against-

IRENE LINARES-LENO,

Third-Party Defendant.

-----X

Papers Read on this Motion:

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**MICHELE M. WOODARD
J.S.C.**

TRIAL/IAS Part 8

Index No.: 16942/10

Motion Seq. Nos.: 01, 02 & 03

DECISION AND ORDER

In motion sequence number one the defendants, Natalie and Samuel Gomberg, move pursuant to CPLR §3104(a), for an order compelling the plaintiff to appear for a continued deposition under the guidance of a referee. By way of a separate application motion sequence number two, the defendants

additionally move for an order disqualifying plaintiff's counsel due to a conflict of interest.

In motion sequence number three, the plaintiff, Samuel Ochoa, moves for the following relief: a protective order pursuant to CPLR §3103(a) and (b) preventing the defendants from taking an additional deposition of the plaintiff; an order compelling defendant, Natalie Gomberg, to appear for a further deposition, *or in the alternative*, precluding the defendant from offering any evidence at trial and setting the within matter down for an inquest, and; for an award of costs and legal fees incurred in connection to the interposition of the underlying application.

By way of background, the underlying action results from an automobile accident which occurred on December 6, 2009 (*see* Rathje Affirmation in Support at Exh. A). On said date, the plaintiff was a passenger in the vehicle owned and operated by third-party defendant, Irene Linares, which was struck by the vehicle operated by defendant, Natalie Gomberg, and owned by defendant, Samuel Gomberg (*id.* at ¶¶6, 11, 21, 22). The plaintiff alleges that as a result of the subject accident, he has sustained serious injuries and on, September 7, 2010, commenced an action against the Gomberg defendants, who thereafter commenced a third party action against Irene Linares. During the course of the within litigation, the plaintiff was deposed on August 31, 2011, at which time plaintiff's counsel lodged numerous objections to many of the questions posed to Mr. Ochoa by defense counsel (*see* Rathje Affirmation in Support at Exh. D at pp. 9, 10, 33-35, 39-49, 57-59, 68-71, 76-80).

The applications respectively interposed by the moving parties herein thereafter ensued and are determined as set forth hereinafter.

The Court initially addresses the first of the two applications interposed by the defendants, which seeks an order compelling the plaintiff to appear for a continued deposition under the guidance of a referee. In support thereof, counsel contends that the objections posited by plaintiff's counsel served to both interfere with and block necessary and relevant questioning of the plaintiff with respect to the

following: any prior auto accidents in which Mr. Ochoa was involved; any conversations the plaintiff had with Ms. Linares about the subject accident; in what form the plaintiff received any wages, and; how the plaintiff traveled to and from his job as a painter of residential and commercial properties (*see* Rathje Affirmation in Support at ¶¶9, 10, 16, 21, 23). Counsel further asserts that the conduct of plaintiff's counsel constituted various violations of 22 NYCRR §221 thus warranting the relief herein requested (*id.* at ¶¶19, 21, 22, 25).

This branch of the defendants' application is opposed by counsel for the plaintiff, who also moves for a protective order preventing any further questioning of Mr. Ochoa. In both opposing the application, as well as in support for the protective order, counsel argues that all questions with respect to liability and damages have been fully asked and answered and that the request by defense counsel to re-examine the plaintiff is unnecessary and merely an attempt to prolong the underlying litigation (*see* Mansouri Affirmation in Opposition at ¶¶3, 8, 11, 17).

CPLR §3104(a) provides that “[u]pon the motion of any party or witness on notice to all parties or on its own initiative without notice, the court in which an action is pending may by one of its judges or a referee supervise all or part of any disclosure procedure.” In the matter *sub judice*, the Court has fully reviewed the plaintiff's deposition transcript and contrary to the assertions posited by defense counsel, the plaintiff indeed provided meaningful responses to the questions posed. Specifically, Mr. Ochoa testified he was not involved in any prior auto accidents in which he sustained injury to those body parts he is presently claiming were injured as a result of the subject accident, to wit: his neck, left shoulder and chest. Additionally, the plaintiff testified that while he had conversations with Ms. Linares subsequent to the subject accident, the scope thereof was limited to topics surrounding their friendship and did not involve anything having to do with the underlying vehicular accident. Finally, the plaintiff

clearly stated he received his wages in cash and that in traveling to work he was picked up at his home in a truck driven by his boss, Walter Banegas.

Therefore, based upon the foregoing, the defendants' application seeking an order directing the plaintiff to appear for a further deposition is hereby **DENIED**. In accordance therewith, that branch of the plaintiff's application requesting a protective order preventing a further deposition of Mr. Ochoa, is hereby **DENIED** as moot.

The Court now turns to that branch of the plaintiff's motion for an order compelling the defendant, Natalie Gomberg, to appear for a further deposition, or in the alternative, precluding the defendant from offering any evidence at trial and setting the matter down for an inquest. In support thereof, counsel for the plaintiff contends that Mrs. Gomberg refused to answer any questions relating to her physical condition and as such the defendant should be compelled to provide responses with respect thereto (*see* Mansouri Affirmation in Support at ¶¶49, 50).

CPLR§3121(a) authorizes discovery with respect to "the mental or physical condition" of any party, provided the party's mental or physical condition "is in controversy." The Court of Appeals has held that a defendant places his or her mental or physical condition in controversy when he or she "affirmatively asserts the condition either by way of a counterclaim or to excuse the conduct complained of by the plaintiff" (*Koump v Smith*, 25 NY2d 287 [1969] at 294; *Dillenbeck v Hess*, 73 NY2d 278 [1989]). The party seeking discovery bears the burden of establishing that the party from whom the discovery is demanded has placed his or her mental or physical condition "in controversy" (*Koump v Smith supra* at 299; *Dillenbeck v Hess, supra* at 287). In the instant matter, the Court finds that the plaintiff has failed to meet this required showing (*id.*). Here, a review of the relevant pleadings clearly reveals that Mrs. Gomberg has not set forth either any counterclaims or affirmative defenses, the

substance of which are predicated upon her mental or physical condition (*id.*).

Thus, based upon the foregoing, that branch of the application interposed by the plaintiff, Samuel Ochoa, which seeks an order compelling defendant, Natalie Gomberg, to either appear for another deposition or be precluded from offering any evidence at trial, is hereby ***DENIED*** in its entirety.

Finally, the Court addresses the defendants' remaining application seeking disqualification of plaintiff's counsel, Milene Mansouri, pursuant to 22 NYCRR §1200.1.9. In support thereof, counsel argues that plaintiff's current counsel formerly represented third-party defendant, Irene Linares, in connection to personal injuries she allegedly sustained as a result of the identical accident which forms the basis of the underlying action (*see* Rathje Affirmation in Support at ¶10). Counsel further asserts that given this prior representation of Ms. Linares, as well as the adverse interests which exist between Ms. Linares and the plaintiff, disqualification of plaintiff's current counsel is warranted (*id.* at ¶¶11, 12, 14).

The defendants' application is opposed by both the plaintiff, as well as third party defendant, Irene Linares. As to the plaintiff's opposition, counsel contends, *inter alia*, that Mr. Ochoa has never alleged that Ms. Linares was negligent and as such their respective interests are not adverse (*see* Mansouri Affirmation in Opposition dated, March 12, 2012, at ¶26). With respect to Ms. Linares, her attorney has submitted formal opposition to the defendants' application wherein he states "we waive any objection that we might otherwise have had to Ms. Mansouri continuing as attorney for the plaintiff" (*see* Burke Affirmation in Opposition).

22 NYCRR §1200.1.9 [a] states the following: "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Therefore, given that counsel for Ms. Linares has

expressly waived any objections to Ms. Mansouri continuing as plaintiff's counsel, the defendants' instant application is hereby **DENIED**.

In sum, based upon the foregoing, it is,

ORDERED, the Defendants' motion for an order compelling the plaintiff, Samuel Ochoa, to appear for a continued deposition is hereby **DENIED** (Sequence #001); and it is further,

ORDERED, that the Defendants' Motion for an order disqualifying plaintiff's counsel is hereby **DENIED** (Sequence #002); and, it is further,

ORDERED, that the branch of the Plaintiff's application seeking a protective order is hereby **DENIED** as moot(Sequence #003); and it is further,

ORDERED, that the branch of the Plaintiff's application seeking an order compelling defendant, Natalie Gomberg, to appear for an additional deposition, or precluding the defendant from offering any evidence at trial, is hereby **DENIED**. (Sequence #003).

All applications not specifically addressed are **Denied**.

This constitutes the Decision and Order of the Court.

DATED: May 22, 2012
Mineola, N.Y. 11501

ENTER: 
HON. MICHELE M. WOODARD
J.S.C.

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ENTERED
MAY 29 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE