

Marquez v Trustees of Columbia Univ. in City of N.Y.
2012 NY Slip Op 31771(U)
June 23, 2012
Supreme Court, New York County
Docket Number: 104744/09
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. M. del
Justice

PART 11

Teodoro Marquez

INDEX NO. 104744/09.

- v -
Trustees of Columbia University

MOTION DATE _____

MOTION SEQ. NO. 05

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the attached Memorandum Decision & Order

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

FILED

JUL 09 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: June 25, 2012

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X
TEODORO MARQUEZ,

Plaintiff,

-against-

Index No. 104744/09

TRUSTEES OF COLUMBIA UNIVERSITY IN
THE CITY OF NEW YORK,

Defendant.

-----X
JOAN A. MADDEN, J.:

FILED

JUL 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

In this action arising out of a construction site accident, defendant Trustees of Columbia University in the City of New York (Columbia) moves, by order to show cause, for an order (i) precluding plaintiff from introducing evidence concerning past and future lost earnings “stemming from his illegal employment in the United States,” and precluding any expert testimony regarding plaintiff’s life care costs, future medical expenses and treatment and other anticipated expenses or, in the alternative, (ii) compelling plaintiff to provide documentary evidence concerning his identity and immigration status and ordering a further deposition of plaintiff regarding plaintiff’s life care costs, future medical expenses and treatment and to reserve Columbia’s right to examine plaintiff’s vocational expert, and permitting Columbia to demand further disclosure. Plaintiff opposes the motion and seeks a protective order against recently served discovery demands annexed to Columbia’s moving papers.

Plaintiff was allegedly injured on November 3, 2008, while performing plastering work at a construction site located at 606 West 116th Street in Manhattan. Plaintiff fell from an unsecured A-frame ladder while working in an apartment on the 11th floor of the building.

Columbia was the owner of the construction site. Plaintiff was an employee of Izzo Construction Corp. (Izzo), which was hired by Columbia to perform plastering work.

Plaintiff commenced the instant action on April 6, 2009, asserting the following claims: (1) common-law negligence; (2) violation of Labor Law § 200; (3) violation of Labor Law § 240 (1); and (4) violation of Labor Law § 241 (6).

Plaintiff filed his note of issue on August 28, 2010. On or about September 21, 2010, plaintiff moved for partial summary judgment on the issue of liability under Labor Law § 240 (1) against Columbia. Columbia opposed the motion and cross moved to dismiss the complaint. By decision and order dated November 29, 2011, this court granted plaintiff's motion and denied Columbia's cross motion. Columbia appealed, and on May 10, 2012, the court's decision and order was affirmed by the Appellate Division, First Department.

On May 7, 2012, Columbia submitted, and the ex parte judge issued, this order to show cause seeking various relief, including precluding plaintiff from introducing evidence concerning past and future lost earnings stemming from his "illegal employment" in the United States, and precluding certain expert testimony relevant to future costs and expenses, or, in the alternative requiring plaintiff to produce certain evidence regarding, inter alia, his immigration status, his identity, and lost earnings claims.

Plaintiff opposes the motion, pointing out that the note of issue was filed almost two years ago, and that plaintiff has already been deposed, and testified that he did not have a green card or social security number, and that plaintiff came to the United States from Peru in 2002 and has been in this county continuously ever since and is not a United States citizen. In any event, plaintiff asserts that his immigration status is irrelevant since, under New York law, an

undocumented worker is entitled to lost earnings in connection with a personal injury action, unless the worker supplied his employer with a false social security card and the employer relied on it, and that there is no evidence that these circumstances exist in the instant case.

Plaintiff also seeks a protective order regarding recent discovery demands served by Columbia and submits various discovery orders showing that plaintiff complied with orders directing that he produce records relevant to earnings, including authorizations for W-2's from his employer, Izzo and attaches W-2's issued by Izzo to plaintiff for 2006-2008. To the extent that Columbia is seeking tax returns, plaintiff notes that the preliminary conference order did not require that such returns be produced. Plaintiff also argues that plaintiff's identity was established during his deposition and that there is no basis for seeking a copy of plaintiff's drivers' license or passport. Furthermore, plaintiff argues that its expert responses were timely and the expert response served after note of issue was filed was based upon a report served the date that the note of issue was filed. In addition, plaintiff argues that Columbia was on notice that plaintiff was claiming he was no longer able to work due to serious injuries sustained as a result of the accident and Columbia waived its right to demand and conduct an examination.

In reply, Columbia argues, *inter alia*, that it is entitled to depose plaintiff as to its immigration status and other issues related to lost earnings since on August 19, 2010, contemporaneously with filing of its Note of Issue, plaintiff's counsel served a Supplemental Bill of Particulars disclosing for the first time plaintiff's life time medical costs and other expenses. Columbia also asserts that the testimony of plaintiff's vocational rehabilitation expert should be precluded as the expert was first disclosed after the note of issue was filed, or that, at the very least, it is entitled to a reservation of its rights to have plaintiff examined by its own vocational

rehabilitation expert.

As a preliminary matter, the court notes that, with one exception, Columbia has not provided a basis for seeking discovery two years after the filing of plaintiff's note of issue. See Sereda v. Sounds of Cuba, Inc., 95 AD3d 651 (1st Dept 2012)(defendant waived right to further discovery and to vacate note of issue); compare, Vargas v. Villa Josefa Realty Corp., 28 AD3d 389 (1st Dept 2006)(where party timely seeks to vacate the note of issue an certificate of readiness, i.e. within 20 days after service of note of issue, party is entitled to additional discovery). Moreover, the court finds that there is no issue regarding plaintiff's identity and the fact that plaintiff sometimes uses his middle name as his first name and his mother's maiden name as a last name does not warrant discovery on this issue.

Columbia's request that discovery be permitted as to plaintiff's immigration status or that plaintiff be precluded from concerning past and future lost earnings is unavailing. There is no dispute that plaintiff is not a United States citizen, does not have a green card or a social security number. More significantly, it is well established that although he is not a United States citizen, plaintiff has a right to recover lost earnings arising out of violation of the Labor Law. See Balbuena v. IDR Realty LLC, 6 NY3d 338 (2005)(holding that unauthorized worker is entitled to recovery damages for his lost earnings due to a violation of Labor Law §§ 240, 241(6), and § 200); Macedo v. J.D. Posillico, Inc., 68 AD2d 508, 511 (1st Dept 2009)(holding that undocumented worker was entitled to lost earnings even assuming he submitted a false social security card to his employer where there is no evidence that the employer sought to comply with his employment verification obligations). In fact, the only apparent exception to this rule is when an employee submits a false social security number to an employer and the employer

obtained verifying documentation as required under Immigration Reform and Control Act of 1986. Id.; see also, Coque v Wildflower Estates Devs., Inc., 58 AD3d 44, 52 (2d Dept 2008). Here, there is no evidence that plaintiff informed his employer that he had either a social security number or green card.

However, given that plaintiff's Supplemental Bill of Particulars regarding future medical costs was filed at the same time as the note of issue, the court finds that Columbia is entitled to a further deposition of plaintiff with respect to his medical condition and treatment between the time of this last deposition and the present and as to any known future medical treatment, and life care costs. In reaching this conclusion, the court does not condone the Columbia's two-year delay in seeking this discovery, but notes that permitting this additional discovery is necessary to prevent "substantial prejudice" to Columbia. Karakostas v. Avis Rent A Car Systems, 306 AD2d 381 (1st Dept 2003).

Next, while it appears that plaintiff has not retained a vocational rehabilitation expert, Columbia's request for a reservation of rights to have plaintiff examined by its own vocational rehabilitation expert is granted as plaintiff is seeking future lost earnings as a result of his injuries. See Freni v. Eastbridge Landing Associates, L.P., 309 AD2d 700 (1st Dept 2003). Accordingly, Columbia shall be permitted to have plaintiff examined by a vocational rehabilitation expert within 60 days of the date of this decision and order and shall serve its expert response within 45 days of such exam.

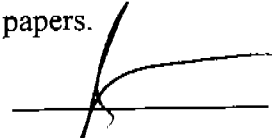
In view of the above, it is

ORDERED that Columbia's motion is denied except with respect to permitting it to depose plaintiff as to the issues indicated herein and as to its application for a reservation of

rights to have plaintiff examined by its own vocational rehabilitation expert as indicated herein;
and it is further

ORDERED that with respect to all other discovery a protective order is granted against
the discovery demands annexed to Columbia's moving papers.

DATED: June 28, 2012


J.S.C.

FILED
JUL 09 2012
NEW YORK
COUNTY CLERK'S OFFICE