

Nakasato v 331 W. 51 St.
2012 NY Slip Op 33943(U)
July 27, 2012
Supreme Court, New York County
Docket Number: 103045-2009
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver

PART 22

Justice

RECEIVED

NAKASATO, AKIRA

INDEX NO. 103045-2009

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AUG 1 - 2012

MOTION DATE

331 WEST 51 ST

MOTION SUPPORT OFFICE MOTION SEQ. NO. 003
NYS SUPREME COURT - CIVIL

The following papers, numbered 1 to 5, were read on this motion for

Notice of Motion/ Order to Show Cause - Affirmation - Affidavit(s) - Exhibits No(s) 1, 2

Answering Affirmation(s) - Affidavit(s) - Exhibits No(s) 3

Replying Affirmation - Affidavit(s) - Exhibits - Memorandum of Law No(s) 4, 5

Upon the foregoing papers, it is ordered that this motion is

In this action to recover for personal injuries allegedly sustained when plaintiff Akira Nakasato ("plaintiff") fell down stairs leading to the basement of Vlada Lounge located at 331 West 51st Street in New York County, plaintiff moves pursuant to CPLR § 3124 for an order compelling defendant Eleben Yau-Mei Wong ("defendant") to furnish statements of plaintiff taken by defendant's expert neuropsychologist, together with the records, raw data, test results, computer printouts and scoring booklets generated in connection with the neuropsychologist's examination of plaintiff. Plaintiff, who alleges that he sustained a traumatic brain injury causing permanent cognitive impairments, contends that the neuropsychologist conducted a thorough interview of him, questioning him about his personal and family history, his past medical history and his present complaints. Plaintiff also contends that the neuropsychologist administered a battery of tests, some of which required plaintiff to write down his responses or to draw shapes and objects. Plaintiff argues that the demanded material constitutes his statements and are therefore discoverable pursuant to CPLR § 3101 [e]. Defendant argues that, pursuant to rules of expert disclosure, she is merely required to disclose a copy of the neuropsychologist's report and to identify all records relied upon by the expert. Defendant also contends that the material sought by plaintiff is privileged and therefore not discoverable. Defendant makes no argument whether the material sought by plaintiff constitutes plaintiff's own statements.

CPLR § 3101 [e] provides in unequivocal language that a "party may obtain a copy of his own statement" in discovery (Theisen v Sunnen, 186 AD2d 81 [1st Dept 1992]). Because the statute enables a party to unconditionally obtain a copy of his or her own statement, it creates an exception to the rule that material prepared for litigation is ordinarily not discoverable (Sands v News America Pub., Inc., 161 AD2d 30, 40 [1st Dept 1990]). In Martinez v KSM Holding Ltd. 294 AD2d 111 [1992]), the Appellate Division, First Department held that the complete files of four experts, three psychologists and a neuropsychiatrist, who performed "psychological, neuro-psychological, IQ, achievement, behavioral observations, general intellectual functioning, verbal reasoning, abstract/visual reasoning, quantitative reasoning, short term memory and social/emotional testing" of plaintiffs were privileged as material

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

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

* 2]

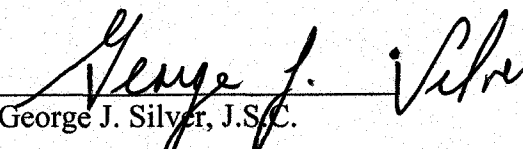
prepared for litigation and thus exempt from disclosure under CPLR § 3101 [d] [2]). Although *Martinez* appears to be at odds with *Sands*, in *Martinez* it was the defendants who were seeking the files of experts retained by the plaintiffs. Since it can be reasonably assumed that the plaintiffs' experts' files did not contain any of the defendants' own statements, *Martinez* and *Sands* are easily reconciled. Moreover, while the Appellate Division, Second Department has held that medical records relied on by defendants' experts, as well as copies of the injured plaintiff's records which were reviewed by the defendants' experts, *writings and other recordings created by the injured plaintiff at or during his examinations*, test results, scored results, measurements, any scales or other documents necessary to interpret the results of the defendants' experts, and notes of the examining physicians were privileged as material prepared for litigation and therefore not discoverable by the plaintiff (*Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729 [2d Dept 2011] [emphasis added]), that holding conflicts with the exception recognized by the First Department in *Sands*. As such, this court declines to follow *Giordano*. Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and defendant is to provide plaintiff with the records, raw data, test results, computer printouts and scoring booklets generated in connection with defendant's neuropsychologist's examination of plaintiff within 45 days of the date of this order; and it is further

ORDERED that plaintiff is to disclose the above referenced material only to his expert witnesses and is to return the above referenced material to defendant at the conclusion of the litigation; and it is further

ORDERED that plaintiff is to serve a copy of this order, with notice of entry, upon all parties within twenty days of entry.

Dated: 27 2012
New York County


George J. Silver, J.S.C.
GEORGE J. SILVER