

Ebanks v Otis El. Co.
2013 NY Slip Op 33252(U)
December 20, 2013
Supreme Court, New York County
Docket Number: 1153671/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. JusticePART 55EBANKS, PETER

INDEX NO.

153671/12

MOTION DATE

MOTION SEQ. NO.

04

MOTION CAL. NO.

OTIS ELEVATOR COMPANY,
ET AL.

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 annexed decision.

Dated: 12/20/13PK

CYNTHIA S. KERN

J.S.C.

Check one: ☐ FINAL DISPOSITION☒ NON-FINAL DISPOSITIONCheck if appropriate: ☐ DO NOT POST☐ REFERENCEMOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
PETER EBANKS,

Plaintiff,

-against-

OTIS ELEVATOR COMPANY and GOLDMAN
SACHS HEADQUARTERS, LLC d/b/a GOLDMAN
SACHS,

Defendants.
-----X

Index No. 1153671/12

DECISION/ORDER

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>2</u>

Plaintiff commenced the instant action seeking to recover for injuries he allegedly sustained while riding an elevator located in defendant Goldman Sachs Headquarters, LLC d/b/a Goldman Sachs' ("Goldman Sachs") building. Plaintiff now moves by Order to Show Cause for an Order (1) pursuant to CPLR § 3025(b) granting him leave to amend his complaint to add Jones Lang Lasalle Americas, Inc. and The Goldman Sachs Group, Inc. as additional defendants; (2) quashing defendants' subpoena seeking a deposition of non-party Dr. Shariar Sotudeh; and (3) granting plaintiff a Protective Order precluding the conducting of depositions of physicians who have either examined or provided treatment to the plaintiff. For the reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts are as follows. On or about January 24, 2011, plaintiff was allegedly injured when he was riding in a freight elevator in defendant Goldman Sachs' building located at 200 West Street, New York, New York. Plaintiff alleges that after the commencement of the action, he learned that Jones Lang Lasalle Americas LLC is the managing agent of the subject building and The Goldman Sachs Group, Inc. is the party that signed the agreement with defendant Otis Elevator Company for elevator maintenance services for the subject building. Plaintiff further alleges that on November 1, 2013, his counsel received a "Deposition Subpoena" and a "Notice to Take Examination Before Trial," directing non-party Dr. Sotudeh, the physician who treated plaintiff after a 2008 motor vehicle accident, to appear for a deposition. Plaintiff then moved by Order to Show Cause to amend his complaint to add the two additional parties, to quash the subpoena served on Dr. Sotudeh and for a protective order precluding further depositions of physicians.

As an initial matter, plaintiff's motion for an Order pursuant to CPLR § 3025(b) for leave to amend his complaint to add Jones Lang Lasalle Americas, Inc. and The Goldman Sachs Group, Inc. as additional defendants in this action is granted without opposition.

Additionally, plaintiff's motion to quash defendants' subpoena seeking a deposition of Dr. Sotudeh is granted. Pursuant to CPLR § 3101(a),

There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

- (3) ...a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and
- (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

However, “[t]he court may at any time...on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device.” CPLR § 3103(a). Additionally, “[i]t is not the norm to seek the deposition of a treating physician, and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment.” *Ramsey v. New York Univ. Hosp. Ctr.*, 14 A.D.3d 349, 350 (1st Dept 2005). Courts have permitted depositions of treating physicians only in instances in which the physician was being subpoenaed to address entries in his/her records that were inconsistent with statements made under oath by the plaintiff as to how the subject incident occurred. *See Caldwell v. Cablevision Systems Corp.*, 20 N.Y.3d 365 (2013); *see also Schroder v. Con Ed Inc.*, 249 A.D.2d 69 (1st Dept 1998).

In the instant action, plaintiff is entitled to a protective order quashing defendants’ subpoena seeking the deposition of Dr. Sotudeh. As an initial matter, defendants have not established that the deposition of Dr. Sotudeh is material and necessary to the instant litigation or that it is being sought to prove a fact unrelated to diagnosis or treatment. The subpoena states that defendants seek the deposition of Dr. Sotudeh

concerning all of the relevant facts and circumstances in connection with this litigation, including his or her records and/or knowledge as to the plaintiff’s injuries, complaints and/or condition prior and/or subsequent to the alleged occurrence, the treatments, if any, the plaintiff received for such prior and/or subsequent injuries, complaints and/or conditions, and plaintiff’s statements and/or admissions regarding same.

Further, the subpoena states that

[t]he scope of the deposition will include, among other things, the motor vehicle accident of on or about May 21, 2008, the medical records and examinations of the plaintiff...limited to such records, material and testimony prior to the alleged accident dated January 24,

2011 at issue in this case. The testimony of Dr. Shariar Sotudeh is sought...because he or she is alleged to have been a witness to as to the plaintiff's injuries, complaints and/or conditions prior and/or subsequent to the alleged occurrence, the treatments, if any, the plaintiff received for such prior and/or subsequent injuries, complaints and/or conditions, and plaintiff's statements and/or admissions regarding same, as well as documentation as to same.

Thus, the subpoena establishes that defendants seek the deposition of Dr. Sotudeh for testimony regarding plaintiff's diagnosis and treatment after the 2008 accident. Further, defendants are already in the possession of Dr. Sotudeh's medical reports and records regarding plaintiff's 2008 motor vehicle accident and have been provided with an Aarons authorization for Dr. Sotudeh pursuant to *Aarons v. Jutkowitz*, 9 N.Y.3d 393 (2007) which will provide defendants the information they seek. Additionally, defendants are not entitled to a deposition of Dr. Sotudeh as they have not established that plaintiff made inconsistent statements under oath as to how the subject incident occurred. Here, no party has asserted that plaintiff has made a prior inconsistent statement. Rather, it is undisputed that plaintiff has already informed defendants of his 2008 accident and has admitted to sustaining injuries in that accident. Finally, defendants' reliance on *Prelidakaj v. Alps Realty of NY Corp.*, 69 A.D.3d 455 (1st Dept 2010) and *MacNair v. Salamon*, 199 A.D.2d 170 (1st Dept 1993) for the proposition that Dr. Sotudeh's deposition is needed or else Dr. Sotudeh's records will be deemed inadmissible at trial is misplaced. *Prelidakaj* and *MacNair* involved the inadmissibility of certain records at trial due to inconsistent statements made by the plaintiff as to how the accident occurred. However, here, it is undisputed that plaintiff has not taken inconsistent positions as to how his accident occurred. Furthermore, even if the admissibility of Dr. Sotudeh's records were at issue, defendants have not established that they cannot be authenticated in other ways, such as by obtaining a certificate of the records'

authenticity from Dr. Sotudeh's office in preparation for trial.

However, plaintiff is not entitled to a general protective order precluding the conducting of depositions of physicians who have either examined or provided treatment to the plaintiff as such request is premature. If a further deposition of a different physician is sought by defendants, plaintiff must move for a protective order at that time.

Accordingly, it is hereby

ORDERED that the Amended Verified Complaint, in the form annexed to plaintiff's motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and the Amended Verified Complaint, in the form annexed to plaintiff's motion papers, shall be served, in accordance with the CPLR, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
PETER EBANKS,

Plaintiff,

-against-

OTIS ELEVATOR COMPANY, GOLDMAN
SACHS HEADQUARTERS, LLC d/b/a GOLDMAN
SACHS, JONES LANG LASALLE AMERICAS, INC.
and THE GOLDMAN SACHS GROUP, INC.,

Defendants.

-----X

And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional parties; and it is further

ORDERED that the motion of plaintiff to quash the subpoena served by defendants to take the deposition of Dr. Shariar Sotudeh is granted. This constitutes the decision and order of the court.

Dated: 12/20/13

Enter: _____


J.S.C.

CYNTHIA S. KERN
J.S.C.