

Schleger v Jurcsak

2013 NY Slip Op 33899(U)

June 4, 2013

Supreme Court, Nassau County

Docket Number: 17049/10

Judge: James P. McCormack

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**SUPREME COURT - STATE OF NEW YORK
TRIAL/TAS TERM, PART 42 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

_____ X
JEFFREY K. SCHLEGER,

Plaintiffs,

Index No. 17049/10

-against-

**Motion Seq. No.: 004
Motion Submitted: 03/29/13**

**MICHAEL F. JURCSAK, JR., MICHAEL G.
JURCSAK and VALLEY STREAM FIRE
DEPARTMENT,**

Defendants.
_____ X

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Affirmation in Support.....X
Reply Affirmation.....X

Defendants, Michael F. Jurcsak, Jr. and Michael G. Jurcsak (Jurcsak defendants),
move this court for an Order staying this matter and removing it from the trial calendar
pending completion of discovery and an Order pursuant to CPLR § 3124 compelling
plaintiff to provide the defendants with HIPPA compliant authorizations; copies of W2 or
1099 forms relating to the plaintiff's income at Solstice Wellness Center; a duly executed

IRS Form 4506; and authorizations for any other facility where the plaintiff practiced medicine. Plaintiff opposes the Jurcsak defendant's motion and argues the defendants request for further discovery is untimely. The defendant, Valley Stream Fire Department, has provided an affirmation in support of the Jurcsak defendant's motion.

This is an action to recover for personal injuries allegedly sustained by the plaintiff, Jeffrey K. Schleger, in a motor vehicle accident which occurred on August 2, 2009. According to the Jurcsak defendants, an Answer and discovery demands were served on all parties on October 18, 2010. Although authorizations were provided for the Solstice Wellness Center, the authorizations could not be utilized because the Solstice Wellness Center closed in May of 2010. The Jurcsak defendants have requested copies of any W-2 forms or 1099 forms relating to the defendants employment at the Solstice Wellness Center for the two years prior to the accident and for any subsequent year it is claimed that the plaintiff has sustained a loss or decrease in earnings as a result of this accident. The Jurcsak defendants have also demanded that the plaintiff execute an IRS Form 4506, and they state that "special circumstances now exist because the Solstice Wellness Center has closed and there is no information as to plaintiff's earnings prior to or after the accident.

CPLR § 3101 mandates "full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are interpreted liberally to allow for broad disclosure (*see Congel v. Malfitano*, 84 AD3d

1145 [2d Dept 2011] citing *Allen v. Cromwell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968]). This includes evidence required for trial preparation, as well as that which may lead to the disclosure of admissible evidence (*Montalvo v. CVS Pharmacy, Inc.*, 81 AD3d 611 [2d Dept 2011]; see also *Keenan v. Harbor View Health & Beauty Spa*, 205 AD2d 589 [2d Dept 1994]).

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126.

It is well settled that "tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the claim and cannot be obtained from other sources" (*Latture v. Smith*, 304 AD2d 534, 536 [2d Dept 2003]; see *Grossman v. Lacoff*, 168 AD2d 484 [2d Dept 1990]). The defendant failed to make such a showing, and in fact have requested the plaintiff's W-2 forms and 1099 forms, demonstrating that this information can be obtained from sources other than the plaintiff's personal individual tax return. Moreover, the defendants failed to demonstrate the existence of special circumstances warranting disclosure of the plaintiff's tax returns in this case (*cf.* *Dore v. Allstate Indem. Co.*, 264 AD2d 804). The Jurcsak defendants have, however, demonstrated that the plaintiff's W-2 forms and 1099 forms, as it related to the Solstice Wellness Center are necessary given the fact that the Solstice Wellness Center has closed

[* 4]

and can not respond to the plaintiff's requests for information.

In addition, the Jurcsak defendants have requested the plaintiff provide an authorization for Peninsula Hospital, and any other place where plaintiff practiced medicine, to obtain wage and attendance records. In paragraph eight of their October 18, 2010 discover demand the Jurcsak defendants demanded:

“Authorizations permitting the undersigned to obtain the plaintiff's personnel, employment and/or wage records and W-2's from plaintiff's employer(s) for the period two years prior to the occurrence which is the basis for the lawsuit, and for any subsequent year in which it is claimed that the plaintiff sustained a loss and/or decrease in income and/or earnings as a result of the aforementioned occurrence”.

The plaintiff argues pursuant to 22 NYCRR 202.21(e), that the failure of the defendant to move for additional discover within 20 days of the filing of the note of issue constitutes a specific waiver by defendant of any entitlement he might have had to additional discover. Plaintiff is well aware that these demands were made more than two years ago and that they are not demands for “additional discovery”, but rather are demands that were made in October 2010.

As the records pertaining to the Solstice Wellness Center were unavailable pursuant to the authorizations previously provided, and the fact that the Solstice Wellness Center had closed even prior to the time that the authorizations had been provided counsel, this demand can hardly be considered a further demand post note of issue.

[* 5]

Regardless, even if it were considered to be a post note of issue discover request, the fact that the Solstice Wellness Center closed, and could no longer respond to the defendant's demands for employment records is an "unusual or unanticipated circumstances" which is sufficient to support such post-note of issue demands (*see* 22 NYCRR 202.21(d); *Audiovox Corp. v. Benyamini*, 265 AD2d 135, 141 [2d Dept 2000]).

Finally, although Jurcsak defendant move for an Order pursuant to CPLR § 3124 "compelling plaintiff to provide the defendants with HIPPA compliant authorizations enabling the defendants to subpoena the aforementioned records/films for trial", there is no further mention of any medical providers, medical records or films, that would necessitate a HIPPA compliant authorization.

Therefore it is hereby;

ORDERED, that the plaintiff provide the Jurcsak defendants with authorizations for the plaintiff's W-2 forms and 1099 forms for the Solstice Wellness Center for the two years prior to the accident and for any subsequent year it is claimed that the plaintiff has sustained a loss or decrease in earnings as a result of this accident within (30) thirty days of the date of this Order, and it is further;

ORDERED, that the plaintiff provide the Jurcsak defendants with authorizations to obtain wage and attendance records for Peninsula Hospital, and any other place where plaintiff practiced medicine for the two years prior to the accident and for any subsequent year it is claimed that the plaintiff has sustained a loss or decrease in earnings as a result

[* 6]
of this accident within thirty days of the date of this Order, and it is further;

ORDERED, that the Jurcsak defendant's motion for an Order directing the plaintiff to execute an IRS Form 4506 in order for the defendants to obtain a copy of the plaintiff's personal tax return is DENIED, and it is further;

ORDERED, that the Jurcsak defendant's motion for HIPPA compliant authorizations for unspecified medical records and films is DENIED, and it is further;

ORDERED, that this matter is stayed for a period of 30 days.

This constitutes the Decision and Order of the Court.

Dated: June 4, 2013



JAMES P. McCORMACK, A.J.S.C.

ENTERED

JUN 13 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE