

Suriel v Silverstein Props., Inc.
2013 NY Slip Op 33945(U)
August 8, 2013
Supreme Court, Bronx County
Docket Number: 301832/2011
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

-----X
Manuel Suriel,

Plaintiff,

- against -

Silverstein Properties, Inc., Tishman Construction
Corporation and 4 World Trade Center, LLC,
Defendants.
-----X

Index No. 301832/2011

DECISION/ORDER

Present:
HON. LAURA G. DOUGLAS
J.S.C.

Motion by plaintiff for an order, pursuant to CPLR § 3126, striking the defendants' answer on the grounds that they have willfully and unjustifiably failed to respond to plaintiff's Supplemental Demand for Discovery and Inspection dated June 20, 2012 and that defendants Silverstein Properties, Inc. and 4 World Trade Center, LLC have failed to appear for court-ordered depositions, and cross-motion by defendants for an order: a) pursuant to CPLR 3101, 3124, and 3126, compelling plaintiff to supply all outstanding discovery within a time certain and precluding plaintiff from proving those elements of his case at trial for which particulars or discovery have not been provided, and b) pursuant to CPLR 3121, compelling plaintiff to submit to independent medical examinations performed by physicians designated by the defendants are consolidated for the purpose of disposition and decided as set forth below.

Upon oral argument of the motion and cross-motion on Thursday, January 24, 2013, that branch of the plaintiff's motion for an order striking the defendants' answer for failure to respond to plaintiff's Supplemental Demand for Discovery and Inspection dated June 20, 2012 is granted solely to the extent of the terms of the annexed two-page Order of this Court, which has outlined the discovery to be provided by the defendants to the plaintiff.

Turning to the cross-motion, the defendants seek a conditional order of preclusion compelling plaintiff either to supply all outstanding discovery by a date certain, or to be precluded from proving those elements at trial. Specifically, defendants' counsel points to its Supplemental Notice For Discovery and Inspection dated March 12, 2012 and its Second Supplemental Demand For Authorizations dated March 26, 2012, and contends that plaintiff has failed to provide the following items of discovery:

Supplemental Notice For Discovery and Inspection

A HIPAA authorization for Aetna as testified to at plaintiff's depositions on March 6 and 7, 2012; and

Second Supplemental Demand For Authorizations

A HIPAA compliant authorization to obtain plaintiff's records from the physician who treated plaintiff for coronary heart disease as referred to in plaintiff's medical records from Dr. Sidhwani dated March 7, 2011; and

A HIPAA compliant authorization for the physician/surgeon who performed plaintiff's coronary artery bypass graft as referred to in plaintiff's medical records from Dr. Sidhwani dated March 7, 2011; and

A HIPAA compliant authorization to obtain plaintiff's records from Newark Hospital; and

A HIPAA compliant authorization for the physician who treats/treated plaintiff for hypertension.

Defendants argue, with respect to the demand for an authorization releasing plaintiff's records from Aetna health care, in substance, because the pleadings and bills of particulars "allege that plaintiff is no longer able to be gainfully employed," his "prior and/or current medical condition is directly linked to plaintiff's work life expectancy and potential earning capacity." Counsel asserted that the demand for the Aetna health care records is "reasonably calculated to lead to the discovery of information relevant to plaintiff's claims and defendants' defenses." Counsel argued that "plaintiff must be compelled to provide the authorization...or be precluded from pursuing a future lost earnings claim" of approximately \$ 1,500,000.00 non-inflation adjusted, because plaintiff's "prior and/or current medical condition is directly linked to plaintiff's work life expectancy and potential earning capacity." As to the demand for plaintiff's medical records regarding his heart condition, counsel contended that "any records or treatment regarding plaintiff's heart-related treatment are relevant to the instant action," as his "prior and/or current medical condition is directly linked to plaintiff's work life expectancy and potential earning

capacity.”

In opposition to the cross-motion, with respect to demand for plaintiff's Aetna health care records, plaintiff's counsel contended, in substance, that “defendants are not entitled to same as all of plaintiff's medical care related to this accident has been paid by workers compensation and as such this is nothing more than a fishing expedition.” Further, counsel stated that defense counsel has failed to make any showing that the records from Aetna are relevant or would likely lead to discoverable evidence as “[p]laintiff has previously provided authorizations for the release of records from both the workers compensation board and the workers compensation carrier.” As to the demand for plaintiff's medical records regarding his heart condition, counsel asserted that “defendants have failed to provide any support in the instant motion that the alleged treatment for which they seek discovery actually took place. Defendants have failed to annex the applicable records or any deposition testimony regarding same. This evidentiary deficiency can not be cured on reply and as such any request for said records should be denied.”

Turning to the merits of the defendants' cross-motion, that branch of the cross-motion for an order compelling plaintiff to provide a “HIPAA authorization for Aetna as testified to at plaintiff's depositions on March 6 and 7, 2012” is denied at this time, since the defendants have failed to show the relevance of the records sought and whether the requested authorization for Aetna relates to the treatment of plaintiff's injuries as claimed in this action. Further, the cross-moving papers are devoid of a deposition transcript or any other evidence that plaintiff was treated by another entity or physician, other than the workers compensation board and the workers compensation carrier. In addition, that branch of the cross-motion for an order compelling plaintiff to provide an authorization releasing records for Items 3,4,6,and 7 therein, is denied at this time, since the cross-moving papers are devoid of a deposition transcript or any other evidence that would establish that the claims alleged, namely plaintiff's hypertension, coronary heart disease and surgery, are material and necessary to a defense.

That branch of the cross-motion for a conditional preclusion order compelling

plaintiff to appear for an independent medical exam by Dr. Jane Mattson, "a life care planner" and who is not a physician, is denied as premature, since the demand for such discovery is not based upon a demonstration that it is relevant or was mentioned by plaintiff either through pleadings or testimony. It is unrefuted that "plaintiff has appeared for a lengthy neuropsychological exam with testing as well as a vocational rehabilitation exam interview," and that "defendants have failed to annex an affidavit from Ms. Mattson attesting to why this 'exam' is necessary."

Finally, that branch of the cross-motion for, apparently, post-deposition "a duly executed authorization to obtain plaintiff's unemployment records from the New York State Department of Labor" is denied with leave to renew, since the cross-movants have failed to annex an excerpt of the plaintiff's deposition testimony which established either that the plaintiff received unemployment benefits or, at least, was queried about it. All other branches of the cross-motion are decided in accordance with the annexed two-page Order of this Court signed herewith. There is **no** preclusion against plaintiff. The defendants' answer is **not** stricken.

All parties are directed to appear for a **Status Conference on Wednesday, November 13, 2013**, at Bronx Supreme Court, 851 Grand Concourse, Part 11, courtroom 711, at 9:30 a.m. Accordingly, the motion and cross-motion are granted solely as stated herein.

This constitutes the decision and order of this Court.

DATED: 8-8-13
Bronx, New York

LGD
Hon. Laura G. Douglas, J.S.C.