

Cole v Escobar

2014 NY Slip Op 32815(U)

May 9, 2014

Supreme Court, Westchester County

Docket Number: 59796/2011

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
GERARD A. COLE and KATHLEEN M. COLE,

Plaintiffs

DECISION and ORDER

Index No. 59796/2011
Motion Date: May 19, 2014
Seq. No. 3

-against-

NELSON ESCOBAR,
TEX MEX CAFÉ, INC.,
H. GARITA MELCHOR,
JACK AND DYLS, INC. dba LITTLE B's,
DAVID THOMAS and SHARON THOMAS,

Defendants

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendants Tex-Mex Café, Inc. and H. Garita Melchor (hereinafter "Tex Mex" and "Melchor" respectively), for an order compelling defendant Nelson Escobar (hereinafter "Escobar") to fully and properly respond to their discovery demands dated September 30, 2013 and January 21, 2014 and, upon his failure to do so, precluding him from offering any evidence at trial, on a motion for summary judgment or on a dismissal motion and dismissing Escobar's cross claims against Tex Mex and Melchor and for such other and further relief as this court deems just and proper.

- Order to Show Cause dated April 17, 2014
- Affirmation in Support
- Exhibits A-M
- Affirmation in Opposition
- Exhibits A-D

Upon the foregoing papers this motion is determined as follows:

In this action plaintiff Gerard Cole (hereinafter "Cole") is alleging personal injuries as a result of a motor vehicle accident that occurred on July 18, 2011. Plaintiffs allege

that a vehicle operated by Escobar while he was intoxicated, collided with a vehicle operated by Cole. Plaintiffs also allege improper conduct and dram shop violations against Tex Mex, Melchor, Jack & Dyls, Inc. and David and Sharon Thomas. Tex Mex and Melchor have denied the substantive allegations asserted against them by plaintiffs.

On or about September 30, 2013 Tex Mex and Melchor served upon the parties their notice for discovery and inspection. The notice contained requests to all parties seeking the name and address of persons claimed to be witnesses to the subject accident; a CPLR 3101 (e) statement; all written reports of the accident; and, all photos, films, drawings, etc. depicting the place of the occurrence as it existed on the date of the accident. As to Escobar specifically, Tex Mex and Melchor requested all bills relating to payments for food and drink made by Escobar on July 17, 2011 and July 18, 2011; all police and accident reports and all relevant reports from the district attorney in connection with Escobar's arrest, detention and prosecution and for their authorizations; and authorizations for Escobar's health records relating to his treatment immediately following the subject accident.

By letter to all parties dated November 6, 2013 Tex Mex and Melchor informed them what discovery was still outstanding and stated that Escobar had not responded at all to its notice dated September 30, 2013. Escobar provided a response on or about December 31, 2013.

By letter to Escobar's counsel dated January 3, 2014 counsel for Tex Mex and Melchor set forth the specific items that needed to be supplemented and demanded further responses. Another letter regarding this, dated January 21, 2014, was also sent. In the meanwhile, a response dated January 13, 2014 was provided. Among other things, Escobar's counsel stated that an authorization for Escobar's medical records (from White Plains Hospital for treatment immediately following the subject accident) would be provided once Escobar signed it. Counsel indicated that the authorization had been forwarded to Escobar. Counsel further stated that she would retrieve information and documentation regarding Escobar's criminal matter and provide it¹.

A post deposition notice for discovery and inspection was served on or about January 21, 2014. Tex Mex and Melchor note that Escobar goes by two different names (Escobar and Figueroa) and has two different birth dates. In that notice they requested, among other items, the social security number for Escobar and Figueroa and a copy of their passports, birth certificates, driver's licenses, car registrations, automobile insurance policies, employment records and, authorizations to obtain the non-privileged portion of the legal file maintained by Escobar's criminal attorney in connection with the subject accident. A follow up request for these items was sent by letter dated February 27, 2014.

Presently, Tex Mex and Melchor are moving for an order compelling Escobar to fully respond to their discovery demands or be precluded from offering any evidence in the future

¹Escobar was arrested, prosecuted and convicted in connection with this matter.

and dismissing the cross claims asserted by Escobar against them. They assert that Escobar has failed to respond to their outstanding discovery demands and that they will be severely prejudiced without this discovery since Escobar is claiming that he was a patron at Tex Mex on the night of the incident.

Escobar opposes the motion. His counsel states that regarding the notice for discovery and inspection dated September 30, 2013, items 1-3, seeking receipts, bills, proofs of payments regarding purchases of food and drink on July 17, 2011 and July 18, 2011 are not available. Escobar paid cash. Counsel states that she has provided information regarding the criminal charges and she is waiting for a signed authorization from Escobar regarding his criminal legal file. Furthermore, counsel states that Escobar is of Puerto Rican descent and the tradition there is to carry two last names, the mother's name and the father's name. Escobar's full name is Nelson Figueroa Escobar. A copy of Escobar's passport (Nelson Figueroa born September 12, 1963), social security card (issued to Nelson Figueroa Escobar), his birth certificate which indicates his father's name is Figueroa, his mother's name is Escobar and that Escobar's birthday is September 12, 1963, have been provided. Counsel explains that insofar as Escobar's vehicle was totaled and he doesn't have it anymore, he no longer is in possession of his registration. Counsel notes that Escobar provided a copy of his license on the date of his deposition. Counsel states that it has requested a copy of the relevant insurance policy on the date of the loss and is waiting for a copy. Counsel will provide authorizations for employment records and Escobar's legal file as soon as she gets them.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). With these principles in mind, the court finds that Tex Mex and Melchor have demonstrated that the disclosure they seek, in light of the facts of this case where it is alleged that Cole was seriously injured on July 18, 2011 when his car came into contact with a car driven by Escobar who was intoxicated after being served alcohol by, among others, defendants Tex Mex and Melchor, are material and relevant to this matter.

More particularly, upon a review of the notice for discovery and inspection dated September 30, 2013 served by Tex Mex and Melchor the court finds that Escobar has satisfactorily complied with requests 1-4 contained therein (whereby discovery was sought from

all parties) as to the names and addresses of witnesses, statements pursuant to CPLR 3101 (e), all written accident reports and, photos, films, drawings, etc. relating to the place of the occurrence as it existed on the date of the accident. However, in that notice Tex Mex and Melchor sought additional discovery relating to each party, separately. From Escobar they sought, in items 1-3, receipts, bills, checks and credit card statements with respect to purchases of beverages and foods from defendants on July 17, 2011 and July 18, 2011. Escobar's counsel has satisfactorily responded stating that Escobar does not have these items, adding Escobar paid with cash for his purchases the subject night. In items 4-7, Tex Mex and Melchor seek copies of documents and authorizations to obtain documents such as police reports and records and reports and records from the district attorney relating to the arrest and conviction of Escobar in connection with the subject incident. Although in the response dated December 31, 2013 Escobar's counsel stated that she did not represent Escobar as to the criminal proceedings and provided Tex Mex and Melchor with the name and number of Escobar's criminal attorney, this court finds that Tex Mex and Escobar are nonetheless entitled to items 4-7 and that Escobar should provide the same. In item 8, Tex Mex and Melchor sought authorizations for Escobar's health records for treatment he received immediately following the subject accident. Escobar's counsel states that Escobar only received treatment from White Plains Hospital and that she is waiting for Escobar to sign the authorization. Tex Mex and Melchor also are entitled to this authorization.

Upon a review of the post-EBT notice for discovery and inspection dated January 21, 2014 served by Tex Mex and Melchor upon Escobar, the court finds that Escobar has satisfactorily complied with requests 1-8 contained therein by providing Escobar's social security number, copy of his social security card, copy of his passport, copy of his birth certificate, copy of his driver's license and an adequate statement as to why a registration for a 2008 BMW 335 cannot be provided. However, Escobar should provide a copy of the registration for the car that he was driving on the date of the subject accident, a copy of the car insurance policy issued to Escobar in effect on the date of the subject accident, an authorization to obtain Escobar's employment and personnel records from Isabella's Restaurant and an authorization to obtain the non-privileged portion of Escobar's legal file maintained by Jeffrey Orlando, Esq. in connection with Escobar's arrest arising from the subject accident.

In the Order to Show Cause dated April 17, 2014 Tex Mex and Melchor also seek dismissal of Escobar's cross claims asserted against them. However, neither Tex Mex and Melchor on the one hand, nor Escobar on the other, have addressed this part of the motion in their papers. Moreover, although the Westchester Supreme Court Differentiated Case Management Protocol, Part Rules, states that nothing stated therein prevents or limits counsel from making any motion deemed appropriate to best represent a party's interest in order to foster the just, expeditious and inexpensive resolution of discovery disputes, pre-motion conferences are held to permit the court an opportunity to resolve issues before motion practice ensues. When motion practice is deemed necessary, a Briefing Schedule is established by the court-attorney-referee. The court notes that nothing in this record suggests that the issue of dismissal of the cross claims was addressed at a pre-motion conference. No Briefing Schedule regarding this has been issued. Accordingly, this court declines to consider this issue at this juncture.

In light of the foregoing, it is:

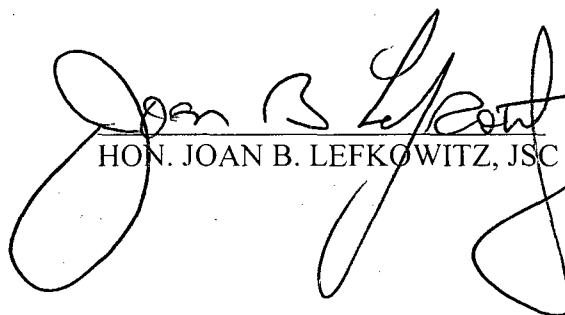
ORDERED that the branch of the motion of defendants Tex Mex Café and H. Garita Melchor seeking an order to compel defendant Nelson Escobar to comply with their discovery demands is granted to the extent that on or before June 6, 2014 Escobar is to fully comply with: (1) the discovery requests set forth in the notice dated September 30, 2013, page 4 and numbered 4-8; and (2) the discovery request set forth in the post-EBT notice dated January 21, 2014 numbered 7, 9, 10 and 11; and it is further,

ORDERED that in the event defendant Nelson Escobar does not provide the discovery as herein above set forth, he will be precluded from offering any evidence at trial, on a motion for summary judgment or on a motion to dismiss, in support of the issues raised thereby; and it is further,

ORDERED that the parties appear for a conference in the Compliance Part, Room 800 on June 10, 2014 at 9:30 A.M.; and it is further,

ORDERED that defendants Tex Mex and Melchor serve a copy of this order with notice of entry upon all parties within ten days of entry.

Dated: White Plains, New York
May 19, 2014


HON. JOAN B. LEFKOWITZ, JSC

To:

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By NYSCEF