

Calarco v Netherland Gardens Owners, Inc.
2014 NY Slip Op 32989(U)
April 28, 2014
Supreme Court, Westchester County
Docket Number: 51427/2012
Judge: Joan B. Lefkowitz
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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
ANTHONY CALARCO,

Plaintiff,

DECISION and ORDER

Index No. 51427/2012

Motion Date: April 28, 2014

Seq. No. 5

-against-

NETHERLAND GARDENS OWNERS, INC.,

Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendant for an order (1) compelling plaintiff to respond to certain discovery demands; (2) compelling plaintiff to undergo a further medical examination by defendant's neurologist and directing plaintiff to answer all questions concerning his medical history and awarding defendant costs for that examination; and (3) for such other and further relief as this Court deems just and proper. Plaintiff has submitted opposition to the motion.

Order to Show Cause - Affirmation in Support -Exhibits A-F
Affirmation in Opposition
Exhibits A-F

Upon the foregoing papers and upon oral argument heard on April 28, 2014, this motion is determined as follows:

Plaintiff seeks damages for personal injuries allegedly sustained when a wall in the boiler room of defendant's building collapsed on May 25, 2011. At the time of the incident plaintiff was employed as the superintendent of the building known as Netherland Gardens located at 2 Soundview Avenue in White Plains, New York. The action was commenced on or about January, 2012. As there has been significant motion practice relative to discovery issues, a full recitation of the procedural history is not necessary. Defendant brings this motion seeking responses to defendant's notices for discovery and inspection dated August 15, 2013 (the "August 15, 2013 demand") and March 4, 2014 (the March 4, 2014 demand") and defendant's

demand for FOIL records, also dated March 4, 2014 (the "FOIL document demand").

The August 15, 2013 demand includes, inter alia, records and duly executed, written authorizations allowing defendant's counsel to obtain and make copies of any records from the Social Security Administration, the New York State Department of Environmental Conservation, and to obtain copies of all hunting licences held by plaintiff and permits for all guns owned by plaintiff. Defendant contends that this information is directly related to plaintiff's claims of "...impairment, impediment, diminution and retardation of enjoyment of life" as alleged in plaintiff's verified bill of particulars dated April 24, 2012. A review of plaintiff's deposition testimony (Exhibit B to plaintiff's opposition papers) indicates that since the accident at issue plaintiff is unable to engage in a variety of activities he was able to enjoy prior to the accident. Plaintiff complains that he cannot walk a distance without a cane (deposition transcript of Anthony Calarco, June 25, 2013, at 317:18); has difficulty standing or sitting for a prolonged period of time (Tr. at 317:23-25); engaging in sexual activity (Tr. at 318:4, 322:8-324:20); hunting (Tr. At 318:21-22); swimming (Tr. at 318:25), running (*Id.*), swinging a golf club (Tr. at 319:2) a baseball bat (*Id.*) or a softball bat (Tr. at 319:3).

The March 4, 2014 demand sought authorizations allowing defendant's counsel to obtain and make copies of any and all records relating to plaintiff's treatment for substance and/or alcohol abuse from May 2010 to present. Defendant contends that this information is directly related to plaintiff's claim of erectile dysfunction as alleged in his second supplemental verified bill of particulars

Lastly, the FOIL document demand sought any documents that were obtained by plaintiff through a Freedom of Information Law request.

Defendant contends that plaintiff failed to serve the requested materials and has failed to serve any written objections or to move for a protective order with respect to these demands.

On February 19, 2014, plaintiff appeared for an examination by defendant's designated neurologist Dr. Adam Bender ("Dr. Bender"). Defendant contends that Dr. Bender was unable to obtain a complete medical history from plaintiff as a result of "obstructionist tactics" by plaintiff's counsel's paralegal, Mr. Jamal Aaron ("Mr. Aaron"), who accompanied plaintiff during the examination. Defendant refers to Dr. Bender's report, submitted as Exhibit F in support of the motion, which states in pertinent part: "...Mr. Aaron was obstructive to the history portion of the evaluation in that he attempted to add symptoms to what [plaintiff] was complaining of and also did not allow him to answer regarding certain aspects of his past medical history."

Specifically, defendant contends that Mr. Aaron prevented plaintiff from responding to questions concerning the following:

1. Whether plaintiff was in rehabilitation for alcoholism at the time of the accident

and whether he was aware of any neurological consequences of his alcoholism.

2. The details of a 1990 injury to plaintiff's right knee which was operated on for a torn meniscus and ACL.
3. The details of an arthroscopy plaintiff had in 2000 after he injured his right shoulder.

As a result, defendant argues it is entitled to a further neurological exam of plaintiff to obtain answers to those questions which are directly relevant to plaintiff's claims for injuries he has suffered as a result of the current accident as well as his claims of loss of enjoyment of life. Defendant also contends that since the additional examination is a direct result of Mr. Aaron's conduct plaintiff should be responsible for the costs of the additional examination.

In opposition, plaintiff contends that it has or will provide responses to defendant's demands. Plaintiff states that it has provided authorizations for records from the Social Security Administration and the New York State Department of Environmental Conservation. Plaintiff also contends that copies of plaintiff's hunting licenses will be provided as soon as they are received by counsel from plaintiff. Plaintiff's counsel contends that plaintiff does not have gun permits as those are only applicable to handguns and plaintiff does not own handguns.

Plaintiff states that defendant is not entitled to an additional examination by Dr. Bender. Plaintiff argues that Dr. Bender was not prevented from obtaining information that was not already in defendant's possession as a result of plaintiff's deposition, through plaintiff's responses to defendant's discovery demands and as a result of defendant's examination by defendant's orthopedic surgeon Dr. Benjamin Rosenstadt. Plaintiff's counsel denies that plaintiff is or ever was an alcoholic or that plaintiff has ever been in a rehabilitation facility for alcoholism. Additionally plaintiff contends that he responded to a similar question in defendant's March 4, 2014 demand with the response: "Plaintiff has not been treated for substance and/or alcohol abuse from May 2010 to the present." [Exhibit D to plaintiff's opposition papers). Plaintiff argues that the proper forum for these questions was plaintiff's deposition where they were answered by plaintiff, not in a physical exam. Plaintiff contends that a further physical examination is unnecessary since Dr. Bender was not prevented from conducting a thorough physical examination of plaintiff, defendant's counsel questioned plaintiff during his deposition about his prior injuries and defendant has all authorizations and records for those injuries.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." 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, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Relying on *Tucker v Bay Shore Storage Warehouse*, 69 AD3d 609 (2d Dept 2010), plaintiff argues that even when a plaintiff refuses to answer questions during defendant's physical exam, no further exam is warranted where the doctor has otherwise been provided with the relevant information. However, *Tucker* is inapposite to the present case. The *Tucker* court in denying defendant's motion to compel plaintiff to undergo a further examination by defendant's neurologist because plaintiff's counsel instructed plaintiff to refuse certain questions concerning her past medical history relied heavily on the fact that there was no indication by the neurologist that this examination had been hindered by plaintiff's counsel's conduct. In the present case, Dr. Bender's report mentions several times that he was unable to obtain a complete medical history of plaintiff due to Mr. Aaron's conduct.

A physical examination of a party by a physician retained by the other party is authorized by CPLR 3121. "...the law is clear that even an attorney's role is limited at such examination to preclude interference with or restriction upon a legitimate examination (*Allen v State*, 228 AD2d 1001,1002 [3d Dept 1996]) (additional citations omitted). A plaintiff's medical history is "not only an appropriate area of inquiry but is generally necessary for a meaningful examination (*McLane v Meyer*, 264 AD2d 469 [2d Dept 1999], *Maimone v Virga*, 250 AD2d 651, 652 [2d Dept 1998], *Allen v State*, at 1002). A plaintiff's refusal to participate in this part of the examination has been held sufficient grounds to require a further physical examination of plaintiff (See, *McLane v Meyer*, supra; *Maimone v Virga*, supra, *Allen v State*, supra).

In light of the foregoing, defendant is entitled to a further medical examination of plaintiff by Dr. Bender limited only to questions regarding the following:

1. Plaintiff's alleged alcoholism and any related rehabilitation for same.
2. The details of the injury in 1990 to plaintiff's right knee which was operated on for a torn meniscus and ACL.
3. The details of an arthroscopy plaintiff had in 2000 after he injured his right shoulder.

Accordingly, it is

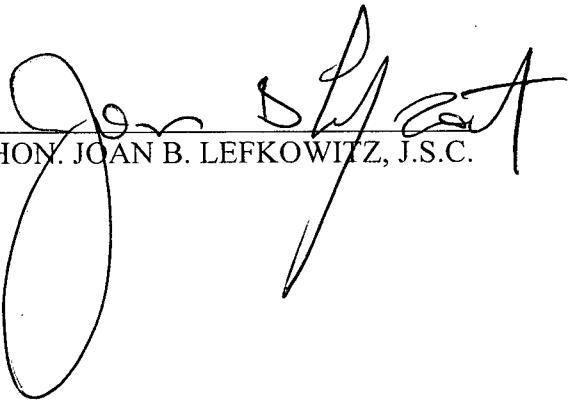
ORDERED that defendant's motion seeking a further physical examination of plaintiff is granted to the limited extent as detailed above; and it is further,

ORDERED that costs for this additional physical examination of plaintiff shall be borne by plaintiff; and it is further

ORDERED that defense counsel shall serve a copy of this order with notice of its entry on plaintiff's counsel within ten days of entry; and it is further

ORDERED that the parties are directed to appear for a conference in the Compliance Part, Room 800, on May 7, 2014, at 9:30 AM

Dated: White Plains, New York
April 28, 2014



HON. JOAN B. LEFKOWITZ, J.S.C.

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