

Ankrah v General Elec.
2014 NY Slip Op 33828(U)
April 29, 2014
Supreme Court, Westchester County
Docket Number: 60266/2012
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
KINGSLEY ANKRAH,

Plaintiff

DECISION and ORDER

Index No. 60266/2012
Motion Date: Mar 31, 2014
Seq. No. 1

-against-

GENERAL ELECTRIC,
GROCERY HAULERS, INC., and
JAMES BONGIOVANNI,

Defendants

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendants, Grocery Haulers, Inc. and Jason Bongiovanni (hereinafter "defendants") for an order striking plaintiff's note of issue and certificate of readiness and permitting them to conduct further discovery, granting them leave to amend their answer to add a counterclaim for reimbursement of defense costs and expenses and punitive damages for plaintiff's fraudulent lost wage claim and for such other and further relief as this court may deem just and proper.

- Order to Show Cause dated February 18, 2014
- Affirmation in Support; Exhibits A-L
- Affirmation in Opposition; Exhibits A and B
- DVD clips dated October 1, 10, 18 2013 and November 21, 2013 and
- Photographs taken on August 27, 2013
- Reply Affirmation dated April 10, 2014; Exhibits A and B

Upon the foregoing papers, video clips and photographs and upon oral argument heard on March 31, 2014 this motion is determined as follows:

This action, commenced on June 29, 2012 involves a motor vehicle accident which occurred on June 17, 2010 whereby a tractor trailer operated by defendant Jason Bongiovanni on behalf of his employer, defendant Grocery Haulers, Inc., collided with the

vehicle operated by plaintiff. Issue was joined by defendants on or about August 14, 2012.¹ Although plaintiff's verified bill of particulars dated September 5, 2012 stated that plaintiff sustained serious injury as defined by Insurance Law § 5102 it further stated that "plaintiff was not incapacitated from employment".

According to defendants, based upon plaintiff's representations in his bill of particulars, they did not investigate with regard to plaintiff's employment.

After plaintiff was deposed, the parties executed a stipulation dated April 8, 2013 whereby defendants conceded negligence and accepted full liability. The parties agreed that the trial in this matter would be solely on the issue of damages. However, defendants reserved their right to assert a defense of no-fault threshold in this matter.

In the supplemental bill of particulars dated May 23, 2013 plaintiff stated that he sustained special damages as follows: (1) income loss of \$ 1,018,768.00 and (2) social security retirement income loss of \$ 156,752.00. The total claimed economic loss is \$ 1,175,520.00.

In their supplemental notice for discovery and inspection dated July 11, 2013 defendants requested authorizations to obtain plaintiff's employment records, subsequent to his deposition, disclosure as to whether he had applied for any jobs since the date of the accident and whether he received income from any source since the date of the accident. In his response to defendants' supplemental inquiry, plaintiff stated, among other things: (1) that he had not applied for social security disability; (2) he received food stamp benefits but this did not relate to the present matter; (3) he had not been employed since the date of the accident nor had he been able to seek employment; and (4) he had not incurred any penalty regarding child support.

A note of issue was filed on September 12, 2013.

In the second supplemental bill of particulars dated November 11, 2013 plaintiff stated that he may require revision lumbar surgery at an approximate expense of \$ 125,000. He attached to the bill a medical report from Dr. Andrew Merola dated November 2, 2013. Among other things the doctor stated that his most recent examination of plaintiff was on October 21, 2013. The doctor stated that plaintiff "avoids activities that reproduce symptoms which include bending, lifting, twisting, pushing, pulling, stooping, crawling, sitting or standing for prolonged periods of time".

According to defendants they hired Blackstone Investigative Group. On August 27, 2013 plaintiff was observed running up a flight of subway stairs quickly. Based upon this observation, defendants conducted a video surveillance of plaintiff. On four occasions, October 1, 2013, October 10, 2013, October 18, 2013 and November 21, 2013, plaintiff was observed

¹By Stipulation dated August 6, 2012 plaintiff's claims against defendant General Electric were discontinued.

engaging in various activities including working at a restaurant where he carried a bucketful of water, carried supply boxes, stocked food, craned his neck to talk hands free on his cell phone and mopped floors.

According to defendants these surveillance videos have been provided to plaintiff. In a letter dated December 20, 2013 plaintiff's counsel wrote to defense counsel that defendants failed to comply with CPLR 3101 (i). Plaintiff also informed defense counsel that four of the five discs provided of the "purported surveillance exchange" are dark and show no recognizable person or activity. The fifth disc contains four still photos of a person possibly walking. In that letter plaintiff's counsel asserted that the materials provided did not indicate that plaintiff is engaged in employment.

In an affidavit dated December 23, 2013 provided by plaintiff in connection with the surveillance tapes plaintiff stated that he is not an employee of the restaurant seen on the tapes. The restaurant is owned by his aunt, Ellen Matte and he visits her about three times a week. He further stated that occasionally he helps her out while he is there visiting but that he does not work there nor does he receive wages.

Presently, defendants seek an order striking the note of issue so they may complete discovery in light of plaintiff's admission that he engaged in the activities captured on the video. Defendants assert that this video surveillance evidence contradicts plaintiff's assertion of his inability to look for work. They further state that a material question in this matter is the amount of projected "lost wages" which requires further investigation. Defendants request permission to conduct the nonparty deposition of Ellen Matte and to conduct a limited deposition of plaintiff regarding the nature and scope of his employment activities. Defendants note that the nonparty witness may not voluntarily comply with a subpoena and her appearance may require motion practice. Defendants state that Ms. Matte has not responded to the authorizations they served upon her for employment records. Defendants also seek to amend their answer to add a counterclaim for reimbursement of defense costs and expenses and punitive damages in relation to plaintiff's fraudulent lost wage claim.

This motion is opposed by plaintiff. Plaintiff states that defendants' entire video submission must be treated as a nullity insofar as it failed to comply with CPLR 3101 (i). Since disclosure is not complete, plaintiff cannot know the entire span of the surveillance activities. Plaintiff asserts that at best the surveillance shows four incidents in a two month period where plaintiff was engaged in some light activity. Plaintiff concedes that although he is not employed he helps his aunt occasionally while he is hanging out at her restaurant. Plaintiff asserts that even if he has returned to work, changes in his work status do not entitle defendants to further depositions or striking the case from the calendar. Plaintiff notes that even though he indicated to defendants he would not object to their subpoenaing his aunt the nonparty defendants have not indicated that they have subpoenaed the nonparty. Plaintiff states that there is no need to strike the note of issue to permit further discovery. Defendants may question plaintiff at trial about whether he is really unable to work.

At the oral argument of this motion on March 31, 2014 the court directed defendants to provide to this court and plaintiff, on or before April 10, 2014 a complete copy of the video surveillance tapes they took of plaintiff including, but not limited to the clips taken on October 1, 2013, October 10, 2013, October 18, 2013 and November 21, 2013 and to include all portions of such material including but not limited to out-takes, transcripts and or/memorandum in connection therewith. Defendants and plaintiff were permitted to submit to this court by April 10, 2014 reply affidavits and/or affidavits and/or submissions in support of, or in opposition to, this motion.

Following the oral argument, defendants submitted to this court video clips, photos, an affidavit and a reply affirmation. Plaintiff did not make any further submissions.

More particularly, by letter dated April 2, 2014 defendants provided to this court, on notice to plaintiff, four video clips, unedited and unredacted containing the surveillance conducted of plaintiff on the three days in October, 2013 and the one day in November, 2013 herein above mentioned. Defendants further provided to this court and to plaintiff four surveillance photographs taken on August 27, 2013. Lastly, defendants also provided the affidavit of the president of Blackstone Investigative Group, dated April 2, 2014 in which he stated that he that he took the photographs of plaintiff on August 27, 2013 and that he conducted the four video surveillances in October and November, 2013.

In their reply affirmation dated April 10, 2014 defendants state that plaintiff's aunt was served with a subpoena which required her to appear and give testimony on February 20, 2014. However, she did not appear and therefore defendants now are requesting this court to so-order a subpoena requiring that she appear for a deposition on May 7, 2014. Defendants again request an order granting them leave to amend their answer and further note that plaintiff failed to provide a proper authorization to them to obtain plaintiff's tax returns from the IRS. They assert that the information in the tax returns directly relates to plaintiff's economic loss claim and is necessary to their defense.

The note of issue states that discovery proceedings now known to be necessary have been completed. "The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial" (*Tirado v Miller* 75 AD3d 153 [2d Dept 2010]). In light of the fact that a note of issue has been filed in this matter, the defendants are now required to show that unusual or unanticipated circumstances developed subsequent to that filing which require additional discovery to prevent substantial prejudice (22 NYCRR 202.21 [d]; *Audiovox Corp. v Benyamini*, 265 AD2d 135 [2d Dept 2000]). Section 202.21(e) provides that if more than 20 days has elapsed since the filing of the note of issue, good cause must be shown to warrant an order vacating the note of issue.

Here, defendants submitted evidence of unusual or unanticipated circumstances that developed subsequent to the filing of the note of issue which require additional discovery to prevent substantial prejudice to their defending this case. They also have shown good cause warranting a vacatur of the note of issue. Although plaintiff stated before the note of issue was

filed that as a result of the subject accident he was not able to work and claimed over one million dollars in total economic loss, after the note of issue plaintiff was observed “working” at a restaurant and even he, himself, admitted that he helped out at his aunt’s restaurant occasionally when he visits there. The court notes that after plaintiff served his supplemental bill of particulars in May 2013 setting forth his claimed economic loss, defendants promptly, and before the note of issue was filed, asked for further discovery relating to plaintiff and his employment status. Plaintiff asserted that he had been unable to work since the subject accident. Soon thereafter, defendants hired the private investigator who took the photos and conducted the video surveillance within two months of the filing of the note of issue.

The court has viewed the photos and the four video clips submitted to it and finds that they depict plaintiff working at what appears to be a restaurant located at 188 East 166th Street. The videos show plaintiff, among other tasks, mopping, carrying buckets of water, carrying boxes, stocking food contained in plastic containers on a shelf, sweeping, lifting bins, etc. Plaintiff is also seen walking up a long flight of subway stairs and talking on a cell phone lodged between his neck and shoulders. Accordingly, the note of issue and certificate of readiness should be stricken so that defendants may obtain further discovery in this matter including but not necessarily limited to a further deposition of plaintiff limited to an inquiry about his ability to work and whether he receives any payment, compensation or benefit for work, if any, he performs.

In their reply affirmation defendants request that this court so-order a proposed subpoena uploaded to the NYSCEF system. Firstly, 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. However, 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 this issue of so-ordering the subpoena to be served on plaintiff’s aunt was addressed at a pre-motion conference. No Briefing Schedule regarding this has been issued. Furthermore, the proposed subpoena that defendants seek this court to now so-order, is facially defective in that it fails to satisfy the notice requirement of CPLR 3101 (a)(4). Accordingly, this court declines to so-order the proposed subpoena at this juncture.

In their reply brief defendants note that plaintiff failed to provide a proper authorization to them to obtain plaintiff’s tax returns from the IRS. Tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable and cannot be obtained from other sources (*Levine v City Med. Assocs., P.C.*, 108 AD3d 746 [2d Dept 2013]). Firstly, as herein above discussed, this court is not aware that this issue of an order compelling plaintiff to provide a proper authorization or copies of his tax returns was raised at a pre-motion conference. Notwithstanding, defendants have not made a strong showing that this information is indispensable to their defense; e.g., that plaintiff is self-employed and he is claiming damages for lost earnings. Indeed, defendants claim that plaintiff is employed by his

aunt.

In light of the foregoing, it is:

ORDERED that the branch of defendants' motion seeking to strike the note of issue is granted and the trial readiness order is vacated, and the note of issue and certificate of readiness are stricken; and it is further,

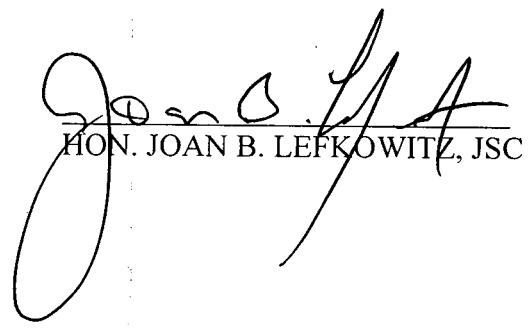
ORDERED that on or before May 16, 2014 plaintiff shall appear for a further deposition limited to an inquiry about his ability to work and whether he receives any payment, compensation or benefit for work, if any, he performs; and it is further,

ORDERED that counsel shall appear for a conference in the Compliance Part of this Court, Courtroom 800, on May 20, 2014 at 9:30 A.M. at which time defendants' counsel may provide a proposed subpoena, properly noticed, for this court's review; and it is further,

ORDERED that defendants shall serve a copy of this decision and order upon plaintiff within seven days of entry thereof.

Dated: White Plains, New York

April 29, 2014


HON. JOAN B. LEFKOWITZ, JSC

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