

Valensi v Park Ave. Operating Co., LLC

2014 NY Slip Op 34034(U)

October 21, 2014

Supreme Court, Nassau County

Docket Number: 8899-11

Judge: Steven M. Jaeger

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

DAVID VALENSI, as Attorney-in-Fact for
MARY VALENSI,

Plaintiff,

-against-

PARK AVENUE OPERATING CO., LLC,
Individually, PARK AVENUE OPERATING CO.,
LLC d/b/a PARK AVENUE EXTENDED
CARE FACILITY and PARK AVENUE
EXTENDED CARE FACILITY, Individually,

Defendants.

TRIAL/IAS, PART 39
NASSAU COUNTY
INDEX NO.: 8899-11

MOTION SUBMISSION
DATE: 9-10-14

MOTION SEQUENCE
NO. 003

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Affirmation in Opposition and Exhibits	X
Reply Affirmation and Exhibit	X

Plaintiff moves for an Order pursuant to CPLR §3126 striking Defendants' answer for failing to provide discovery and appear for an examination before trial.

This is an action for alleged personal injuries sustained by Plaintiff due to alleged negligence by Defendants in the care of Plaintiff at Defendants' nursing home. It is alleged that due to Defendants' negligence, Plaintiff fell, resulting in numerous injuries.

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CPLR §3101 requires “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. *Congel v. Malfitano*, 84 AD3d 1145 (2nd 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 (2nd Dept. 2011); see also, *Keenan v. Harbor View Health & Beauty Spa*, 205 AD2d 589 (2nd Dept. 1994).

CPLR §3124 gives the court 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.

To date, Plaintiff has conducted examinations before trial of three witnesses on behalf of Defendants. One of those witnesses, Marva Hayling, was thought to be the aide assigned to Plaintiff at the time of the accident. However, at her examination before trial, Ms. Hayling testified that she was not the aide assigned to Plaintiff at the time of the accident, but was just making rounds when she found Plaintiff. She further testified that the initials on the CNA Accountability Record for the date of the accident are not hers, but she does not know whose initials they are. Plaintiff therefore seeks identification of the person who initialed the CNA Accountability Record and an examination before trial

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of him or her. Defendants contend that the three witnesses provided are sufficient and have given all of the information sought by Plaintiff.

A further examination before trial of a corporate defendant may be permitted upon a showing that (1) the employee already deposed had insufficient knowledge, or was otherwise inadequate, and (2) the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case. *See Schiavone v. Keyspan Energy Delivery NYC*, 89 AD3d 916 (2nd Dept. 2011). Here, although the three witnesses provided may have knowledge of the incident, Ms. Hayling was thought to be the aide assigned to Plaintiff. As she is not, Defendants cannot argue that the witnesses had sufficient knowledge. The aide assigned to Plaintiff should possess information that is material and necessary to Plaintiff's prosecution of the case. Plaintiff is therefore entitled to the name of the aide assigned to Plaintiff on the date of the accident and to conduct her/his examination before trial.

As to the documents demanded, Plaintiff has demonstrated that the floor plan/schematic for the eighth floor is material and necessary to the prosecution of the case, as are the weekly scheduling records for the eighth floor on February 9 and 10, 2010. Defendants have provided responses to the remaining demands in letters stating that the requested documents are not in their possession. This is insufficient, especially because there was testimony from one of Defendants' witnesses at her examination before trial that seemed to indicate that some of the documents may still be maintained at

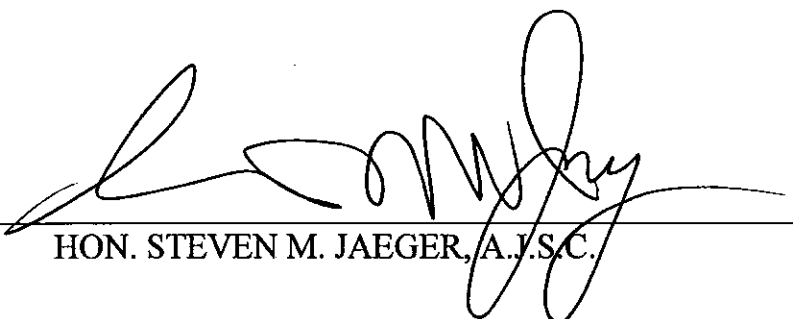
[* 4]

Defendants' facility. Therefore, Defendants are to submit affidavits attesting to the non-existence of the demanded documents if they do not exist. Otherwise, they are to be exchanged.

Accordingly, Plaintiff's motion is GRANTED to the extent that Defendants are to provide the name of the aide assigned to Plaintiff within thirty (30) days of the date of this Order, with the examination before trial of the aide to be held within thirty (30) days thereafter. Further, all documentary discovery is to be exchanged within thirty (30) days of the date of this Order. A failure to comply may result in sanctions.

This constitutes the Decision and Order of the Court.

Dated: October 21, 2014



HON. STEVEN M. JAEGER, A.J.S.C.

ENTERED

OCT 23 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE