

Mulayev v J.P. Morgan Chase & Co.

2015 NY Slip Op 30194(U)

January 9, 2015

Supreme Court, Queens County

Docket Number: 701933/13

Judge: Valerie Brathwaite Nelson

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Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: HONORABLE VALERIE BRATHWAITE NELSON IAS PART 7
Justice

-----X
IZRAIL MULAYEV,

Index No. 701933/13

Plaintiff,

Motion Date: 10/22/14

- against -

Motion Cal. No. 105

J.P. MORGAN CHASE & CO.,

Seq. No.: 1

Defendant,
-----X

FILED
JAN 14 2015
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 11 read on this motion by defendant for an order, *inter alia*, vacating plaintiff's note of issue upon plaintiff's failure to comply with discovery, compelling plaintiff to comply with defendant's discovery demands and court orders or dismiss the plaintiff's action, and extending defendant's time to move for summary judgment.

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion - Affidavits - Exhibits | 1 - 4 |
| Answering Affidavits. | 5 - 7 |
| Reply Affidavits | 8 - 10 |
| Stipulation dated 1/22/14..... | 11 |

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action for personal injuries allegedly sustained by the plaintiff as a result of a trip and fall which occurred on May 18, 2013 due to an allegedly defective and dangerous condition on the sidewalk abutting the defendant's premises. Plaintiff commenced the action, issue was joined and discovery ensued.

Pursuant to the terms of the Compliance Conference order of this Court dated March

20, 2014, plaintiff was to respond to defendant's demand for Discovery and Inspection regarding medical authorizations dated March 7, 2014 and serve a Supplemental Bill of Particulars. Plaintiff was directed to "respond fully" to certain items in defendant's demand for a bill of particulars, including special damages, both constructive and actual notice, and the location of the accident. Plaintiff failed to provide all of the requested authorizations, objecting to several as burdensome, overbroad and/or irrelevant and served a Supplemental Bill of Particulars dated March 21, 2014 with the same objections as previously set forth. As a result, defendant brought the within motion.

In opposition to the motion, plaintiff objects to the Court vacating the note of issue or compelling him to provide medical authorizations, claiming a response has been provided.¹ Plaintiff submitted proof of service of several authorizations, objecting again to several others on the basis that the demands are burdensome, overbroad and/or irrelevant.

It is well settled that a party must provide medical authorizations for the release of pertinent medical records when that party has waived the physician-patient privilege by affirmatively putting his physical condition in issue, (*see*, CPLR § 3121[a]), and CPLR § 3101(a) requires full disclosure of all evidence material and necessary to the defense of an action. *See, Alien v. Corwell-Collier Publ Co.*, 21 N.Y.2d 403 (1968). However, a party does not waive the physician-patient privilege with respect to unrelated illnesses or injuries. *See, Romance v. Zavala*, 98 A.D.3d 726 (2nd Dept. 2012). "In order to effect a waiver, a party must affirmatively assert the condition and place that condition in issue." *Fox v. Marshall*, 91 A.D.3d 710 (2nd Dept. 2012), citing *Dillenbeck v. Hess*, 73 N.Y.2d 278, 288. "The burden of proving that a party's mental or physical condition is in controversy, for the purposes of obtaining relevant ... records, is on the party seeking the records." *Budano v. Gurdon*, 97 A.D.3d 497, 498 (1st Dept. 2013).

Defendant has failed to meet its burden of showing that plaintiff has waived his claim of privilege with regard to prior treatment for such conditions as depression, fatigue and vision, by asserting such claims. In light of the strong public policy that a patient's sensitive health information be protected from unwarranted disclosure, this Court finds that plaintiff has not waived the physician-patient privilege with respect to those prior medical records. Consequently, defendant's demand for authorizations is rejected as it has failed to set forth rationale as to why such records are material and necessary to its defense of this

¹ On the return date of the within motion, the parties entered into a stipulation dated October 22, 2014, wherein plaintiff agreed to provide authorizations for his treating primary care physician, orthopedic doctor and/or orthopedic surgeon, as well as other medical authorizations, witness information and to appear for an IME. Additionally, the stipulation resolved various branches of the within motion.

action, *see, e.g., Sonsini v. Memorial Hosp. for Cancer & Diseases*, 262 A.D.2d 185, 186-87 (1st Dep't 1999), or that plaintiff has waived his physician-patient privilege. *See, Romance, supra.*

Plaintiff also objects to providing a Second Supplemental Bill of Particulars setting forth, in greater detail, the responses provided. Counsel has failed to address the significance of entering into a Compliance Conference order dated March 20, 2014 which ordered plaintiff to “respond fully” to several items. A stipulation signed by counsel for a party to an action, during a court appearance, is a binding contract. *See, CPLR § 2104; see also, Okumus v. Living Room Steak House, Inc.* 112 A.D.3d 799 (2nd Dept. 2013). While a court may relieve a party of the consequences of a stipulation made during litigation where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake, or accident (*see Hallock v. State of New York*, 64 N.Y.2d 224, 230), here, the plaintiff has failed to demonstrate good cause sufficient to invalidate the stipulation. *See, Kirkland v. Fayne*, 78 A.D.3d at 660 (2nd Dept. 2010). Further, defendant is entitled to the information sought, including particulars identifying any statute, ordinance, law, rule, or regulation that it is alleged to have violated and to specification of the plaintiff's claims regarding the creation of the allegedly dangerous condition and the special damages allegedly incurred by the plaintiff (*see CPLR § 3043[a][2], [4], [5], [9]*). *See, e.g. Ramondi v. Paramount Fee, LP* 30 A.D.3d 396 (2nd Dept. 2006). The Court finds that plaintiff has violated the Compliance Conference order dated March 20, 2014, by failing to provide a Supplemental Bill of Particulars setting forth the responses with greater particularity.

The Court of Appeals has held, “[I]itigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated (*citations omitted*)” (*Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514 [2005]). Indeed, “the trial court’s responsibility remains the same as it always has been: to fashion an order consistent with its obligation to bring discovery to an end as quickly as possible” (*Lopez v Imperial Delivery*, 282 AD2d 190, 198-199 [2d Dept. 2001]). Pursuant to the foregoing, and with the understanding that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Kihl v Pfeffer*, 94 NY2d 118, 124 [1999]), it is

ORDERED that defendant’s motion is granted to the extent that plaintiff shall comply with the parties stipulation dated October 22, 2014, to the extent that the requested materials have not been provided, within thirty (30) days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendant’s motion is granted to the extent that plaintiff shall appear for orthopedic IME, to the extent not yet completed, within thirty (30) days of service of a

copy of this order with notice of entry; and it is further

ORDERED that plaintiff shall, no later than forty-five (45) days after service of the within order with notice of entry, provide defendant with a Supplemental Bill of Particulars as to items 2, 3, 15, 19(a)(b)(e) and (f), and 22 of defendant's demand, specifically addressing each itemized demand with meaningful and informative responses; and it is further

ORDERED that defendant's application for an extension of time to move for summary judgment is granted to the extent such motion shall be made by no later than sixty (60) days after the completion of the last IME; and it is further

ORDERED that defendant shall serve plaintiff with a copy of this order, with Notice of Entry, within ten (10) days of the date of entry; and it is further

ORDERED that all other applications not specifically addressed herein or resolved by the stipulation of the parties dated October 22, 2014 are denied.

The foregoing constitutes the decision and order of this Court.

Dated: 1/9/15



VALERIE BRATHWAITE NELSON, J.S.C.