

Shackelford-Johnson v Jamaica First Parking, LLC
2015 NY Slip Op 30898(U)
February 11, 2015
Supreme Court, Queens County
Docket Number: 22939/12
Judge: Carmen R. Velasquez
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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VELVETTA L. SHACKELFORD-JOHNSON,

Plaintiff,

Index No: 22939/12

-against-

Motion

Dated: December 16, 2014

m# 4

JAMAICA FIRST PARKING, LLC,
IMPERIAL PARKING U.S. INC. and
IMPERIAL PARKING (U.S.), LLC,

Defendants.

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The following papers numbered 1 to 8 read on this motion by the defendant for an order, *inter alia*, dismissing the complaint.

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits	1 - 4
Affirmation in Opposition - Exhibits.....	5 - 6
Replying Affirmation.....	7 - 8

Defendant Jamaica First Parking, LLC (hereinafter referred to as "Jamaica") seeks an order, pursuant to CPLR 3126, dismissing the plaintiff's complaint for failure to respond to discovery demands, or in the alternative, an order, pursuant to CPLR 3042, precluding the plaintiff from offering evidence at the time of trial, or in the alternative, pursuant to CPLR §3124, compelling the plaintiff to respond to defendant's discovery demands by a date certain. Plaintiff opposed and defendant Jamaica replied.

Defendant Jamaica further seeks an order striking the answer and cross claims of defendants Imperial Parking U.S. Inc. and Imperial Parking (U.S.), LLC (hereinafter collectively referred to as "Imperial") insofar as asserted against Jamaica, for failure to appear for a court ordered deposition, and granting Jamaica's first cross claim against Imperial, or in the alternative, precluding Imperial from offering any evidence at trial, or in the alternative, compelling Imperial to appear for

deposition. Defendants Imperial did not submit any opposition herein. However, as stated in plaintiff's opposition, a witness for defendant Imperial has appeared and a deposition was held. Accordingly, that branch of defendant Jamaica's motion is denied as academic.

Lastly, defendant Jamaica seeks an order extending its time to move for summary judgment in this action.

Plaintiff commenced this action seeking damages for personal injuries allegedly sustained in a trip and fall accident which occurred on May 10, 2012. Defendant has served upon plaintiff approximately five separate demands for discovery. While defendant states that plaintiff has not provided responses to said demands, it is clear from plaintiff's opposition that a response was provided to each and every demand. The issue rather is that defendant is not satisfied with plaintiff's responses.

Defendant requests authorizations to obtain medical records pertaining to the plaintiff's HIV status and related treatment. Defendant argues that said records are discoverable in that plaintiff has put her past and present medical condition "in issue". Defendant states that while plaintiff's Bill of Particulars alleges that she sustained a "diminution of economic and social capacity", the artful wording equates to a loss of enjoyment of life. Accordingly, defendant contends that medical records pertaining to plaintiff's HIV status and treatment is discoverable.

In opposition, plaintiff argues that her HIV status is wholly irrelevant to the accident and bears no connection to the injuries she sustained. Plaintiff states there is no assertion in her Bill of Particulars or testimony proffered during her deposition that the injuries she sustained exacerbated her HIV condition, and therefore said demand is improper.

It is well settled that the penalty to be imposed on a motion pursuant to CPLR 3126 is in the discretion of the court. (see *Harris v City of New York*, 117 AD3d 790, 790 [2d Dept 2014]; see also *Apladenaki v Greenpoint Mtge. Funding, Inc.*, 117 AD3d 976, 976 [2d Dept 2014].) Further, if the court finds that a party refuses to obey an order for disclosure, or willfully fails to disclose information which ought to have been disclosed, it may sanction that party (CPLR 3126), which sanction may include an order striking that party's pleading. (see CPLR 3126.)

"The striking of a party's pleading is a drastic remedy only warranted where there has been a clear showing that the failure to comply with [court-ordered discovery] was willful and contumacious" (see *Arpino v F.J.F. & Sons Elec., Co., Inc.*, 102

AD3d 201, 210 [2d Dept 2012]; see also *Gutman v Cabrera*, 121 AD3d 1042 [2d Dept 2014]; *Facey v Silver Express Cab Corp.*, 87 AD3d 1053, 1053 [2d Dept 2011].) Courts have inferred willful and contumacious conduct from a party's repeated failure to comply with court-ordered discovery, together with insufficient explanation for failure to comply, or a failure to comply with court-ordered discovery over an extended period of time. (see *Arpino v F.J.F. & Sons Elec., Co., Inc.*, 102 AD3d at 210; *Orgel v Stewart Tit. Ins. Co.*, 91 AD3d 922, 923 [2d Dept 2012].)

CPLR 3101(a) provides for full disclosure of all matter material and necessary in the prosecution or defense of an action. Further, where applicable, Public Health Law § 2785(2) (a) gives a court discretion to grant an application for the disclosure of confidential HIV-related information upon a showing of "a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding." (Public Health Law § 2785[2][a].) Defendant Jamaica argues that plaintiff's medical records are material and necessary in the defense of this action because plaintiff has placed her enjoyment of life in controversy. Defendant, therefore, claims there is a compelling need for disclosure. Defendant's argument appears to be based on the premise that a "compelling need" under Public Health Law §2785(2) can be established by a showing that the information it seeks is "material and necessary" within the purview of CPLR §3101(a). The argument is flawed for the following reasons.

Public Health Law §2785 (2) provides that, "[i]n assessing compelling need . . . the court shall provide written findings of fact, including scientific or medical findings, citing specific evidence in the record which supports each finding, and shall weigh the need for disclosure against the privacy interest of the protected individual and the public interest which may be disserved by disclosure which deters future testing or treatment or which may lead to discrimination." (Public Health Law § 2785 [5].) In order to satisfy the requirements of Public Health Law §2785(2), defendant was required to present an expert affidavit linking any such condition to an expected diminution in plaintiff's quality of life and life expectancy. (see *Budano v Gurdon*, 97 AD3d 497, 499 [1st Dept 2012].) Without such evidence the court cannot satisfy its obligation, as codified in Public Health Law § 2785(5), to support any ruling finding a compelling need to disclose HIV records with "written findings of fact, including scientific or medical findings, citing specific evidence in the record which supports [such a] finding." (cf. *Doe v Sutlinger Realty Corp.*, 96 AD3d 898, 899 [2d Dept 2012].)

Additionally, Public Health Law § 2785(1) provides: "[n]otwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related

information, except . . . in accordance with the provisions of this section." By operation of the "notwithstanding" clause in Public Health Law § 2785 (1), all other provisions of law, including the "material and necessary" standard under CPLR 3101 (a), are explicitly preempted by the "compelling need" standard under Public Health Law § 2785(2). (see e.g. *Matter of Melendez v Wing*, 8 NY3d 598, 606 [2007]; *Matter of State of New York v Zimmer*, 63 AD3d 1563, 1564 [4th Dept 2009].) Therefore, the courts, as a matter of statutory construction, have rejected a party's attempt to equate the two.

In *Budano v Gurdon* (97 AD3d 497 [1st Dept 2012]), the Appellate Division held that the plaintiff's medical records pertaining to, *inter alia*, his HIV status were not discoverable. The court reasoned that even if the defendant building owner established that plaintiff, who was seeking to recover damages for injuries sustained when he slipped and fell on a staircase in owner's building, suffered from chemical dependency and mental illness and had HIV, discovery of plaintiff's medical records pertaining to alcohol and drug treatment, mental health information, and HIV-related information would not be warranted, where the owner failed to submit an expert affidavit or any other evidence that would establish a connection between those conditions and cause of the accident, nor did he make any effort to link those conditions to plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life.

Similarly, where a defendant failed to demonstrate a compelling need for HIV-related information in plaintiff's medical malpractice case, which did not involve any claim relating to an HIV infection, the court declined to issue an order for disclosure of confidential HIV-related information. (see *Del Terzo v Hospital for Special Surgery*, 95 AD3d 551, 553 [1st Dept 2012].)

In the case at bar, defendant has not proffered any evidence that satisfies its burden of establishing a compelling need to obtain the plaintiff's HIV status and related treatment. There is no expert testimony which links plaintiff's HIV status to the cause of the accident, or to plaintiff's ability to recover from her injuries. Without such evidence, this court is unable to make a finding of "compelling need".

The next two demands that plaintiff argues are improper is defendant's demand for photographs of plaintiff taken during a trip to Aruba approximately one year after the accident, as well as authorizations to obtain pictures and information from plaintiff's Facebook account.

Courts have held that to warrant discovery of private social

media accounts, the defendant must establish a factual predicate for said request by identifying relevant information in plaintiff's [social media] account, such as information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, losses, and other claims. (see *Tapp v New York State Urban Dev. Corp.*, 102 AD3d 620, 620 [1st Dept 2013]; *Patterson v Turner Constr. Co.*, 88 AD3d 617, 618 [1st Dept 2011].) The *Patterson* court went on to hold, "plaintiff's mere possession and utilization of a Facebook account is an insufficient basis" to compel access to the account. (*Id.* at 620.) The Second Department, in *Richards v Hertz Corp.*, (100 AD3d 728 [2d Dept 2012], ordered an *in camera* inspection of all status reports, e-mails, photographs, and videos posted on plaintiff's Facebook profile where defendants presented material on plaintiff's public page which contradicted her deposition testimony. However, the Court noted "absent some facts that the person disclosed some information about the subject matter of the pending law suit, granting carte blanche discovery of every litigant's social media records is tantamount to a costly, time consuming fishing expedition." (see *Fawcett v Altieri*, 38 Misc 3d 1022, 1028 [Sup Ct, Richmond County 2013].)

Here, defendant Jamaica has failed to set forth any evidence, other than a picture of plaintiff and mere speculation, that would warrant discovery of plaintiff's private social media account. Similarly, defendant has failed to present any evidence that photographs from plaintiff's trip to Aruba in 2013 are material and necessary to their defense. Plaintiff testified at her deposition that she laid on the beach while in Aruba. Other than defendant's surmise that the photographs will reveal anything to the contrary, there is no evidence which would warrant the discovery of said photographs.

Accordingly, based on the foregoing, it is

ORDERED that the branches of motion by defendant Jamaica First Parking, LLC to dismiss the complaint, or in the alternative, to preclude the plaintiff from offering evidence at the time of trial is denied; and it is further

ORDERED that the branch of defendant's motion to compel the plaintiff to provide authorizations for medical records pertaining to plaintiff's HIV status and related treatment is denied; and it is further

ORDERED that the branch of defendant's motion to compel the plaintiff to provide pictures from her trip to Aruba in 2013 is denied; and it is further

ORDERED that the branch of defendant's motion to compel the

plaintiff to provide photographs, information and access to plaintiff's Facebook account is denied; and it is further

ORDERED that the branch of defendant's motion for updated trial authorizations is granted to the extent that the plaintiff shall, consistent with the Compliance Conference Order, provide fresh HIPAA compliant authorizations, consistent with the directives of this Order, within thirty (30) days after service of a copy of this order with notice of entry; and it is further

ORDERED that the branch of defendant's motion to strike co-defendants Imperial Parking U.S. Inc., and Imperial Parking (U.S.) LLC, for failure to appear for court ordered depositions is denied as moot; and it is further

ORDERED that defendant's application for an extension of time to file summary judgment motion is denied without prejudice to renew simultaneously with the making of a summary judgment motion.

Date: February 11, 2015

CARMEN R. VELASQUEZ, J.S.C.