

Wallach v Park Front Apts., LLC
2015 NY Slip Op 31168(U)
July 8, 2015
Supreme Court, New York County
Docket Number: 653183/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 15

Justice

Index Number : 156310/2012
WALLACH, NANCY
vs
PARK FRONT APARTMENTS, LLC
Sequence Number : 003
DISMISS DEFENCE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3, 4

Answering Affidavits — Exhibits _____ No(s). 5, 6

Replying Affidavits _____ No(s). 7, 8

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/8/15
JUL 08 2015

HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: [] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [] GRANTED [] DENIED [] GRANTED IN PART [] OTHER
3. CHECK IF APPROPRIATE: [] SETTLE ORDER [] SUBMIT ORDER
[] DO NOT POST [] FIDUCIARY APPOINTMENT [] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X

NANCY WALLACH,

Plaintiffs,

- v -

PARK FRONT APARTMENTS, LLC,

Defendants.

-----X

PARK FRONT APARTMENTS, LLC,

Plaintiffs,

- v -

77 DEERHURST CORP. d/b/a SERVCO INDUSTRIES,

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
653183/2014

**DECISION
and ORDER**

Mot. Seq. #003

Third Party Index
No. 653183/2014

Plaintiff, Nancy Wallach (“Plaintiff” or “Wallach”), brings this action for personal injuries allegedly sustained in a slip and fall accident (the “Accident”) on March 12, 2012. Plaintiff claims that the Accident took place on the sidewalk near the premises located at 435 Central Park West, New York, New York (the “Premises”). Plaintiff claims that defendant Park Front Apartments, LLC (“Park Front”) owns the Premises, and that Park Front negligently, recklessly, or carelessly caused Plaintiff’s Accident to occur.

Plaintiff commenced this action on September 11, 2012, by summons and complaint. Park Front interposed an answer to Plaintiff’s complaint on October 24, 2012. Park Front filed a third-party complaint against third-party defendant 77 Deerhurst Corporation d/b/a Servco Industries (“Servco”), the maintenance

company for the subject Premises, on July 2, 2014. Servco interposed a third-party answer to Park Front's third-party complaint on August 26, 2014.

Park Front now moves for an Order, pursuant to CPLR §§ 3124 and 3126, dismissing Plaintiff's complaint for failure to comply with two prior discovery orders; or, pursuant to CPLR § 3126, precluding plaintiff entering into evidence of damages at the time of trial for failure to provide court ordered discovery regarding plaintiffs multiple prior accidents; or, alternatively, pursuant to CPLR § 3124, compelling Plaintiff to provide complete responses to discovery demands.

Servco cross-moves for an Order, pursuant to CPLR § 3126, dismissing Plaintiff's Complaint for failure to comply with Servco's discovery demands; or, pursuant to CPLR §§ 3042(c) and 3126(2), precluding Plaintiff from introducing evidence at the trial of this matter with respect to those items to which Plaintiff has not provided particulars and prohibiting Plaintiff from introducing evidence at the trial of this matter with respect to those items as to which Plaintiff has not provided discovery in response to the demands and notices of the Defendants; or, in the alternative, pursuant to CPLR § 3124, directing that Plaintiff comply with all prior demands and notices of Servco.

Plaintiff opposes.

CPLR § 3101(a) generally provides that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." (CPLR § 3101[a]). The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason." (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]). However, a party is not required to respond to discovery demands which are "palpably improper." (*Gilman & Ciocia, Inc. v. Walsh*, 2007 NY Slip Op 8410, *1 [2d Dep't 2007]). A demand is palpably improper if it seeks information which is irrelevant or confidential, or is overbroad and unduly burdensome. (*Id.*).

Pursuant to CPLR § 3126, a court may impose sanctions when a party willfully fails to disclose information which the court finds ought to have been disclosed. (CPLR § 3126; *Strong v City of New York*, 112 A.D.3d 15, 21 [1st Dep't 2013]). The sanction of striking a party's pleading is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407 [1st Dep't 2006]). Additionally, under

CPLR § 3126, a court may impose sanctions, “[i]f a party served with a demand for a bill of particulars willfully fails to provide particulars which the court finds ought to have been provided pursuant to this rule, including such relief as is set forth in section thirty-one hundred twenty-six of this chapter.” (CPLR § 3126[d]).

In an action for personal injuries, disclosure of confidential medical records is warranted where such records relate to the injury sued upon. (*Del Terzo v Hospital for Special Surgery*, 95 A.D.3d 551, 553 [1st Dep’t 2012]). As a general matter, a plaintiff in an action for personal injuries waives the physician-patient privilege only as to those conditions affirmatively placed in controversy. (*Felix v. Lawrence Hosp. Ctr.*, 100 A.D.3d 470, 471 [1st Dep’t 2012]).

A. Park Front’s Motion

Turning first to Park Front’s motion, Park Front argues that Plaintiff was involved in several prior accidents, including, a motor vehicle accident in 2000, a trip and fall in 2004, a trip and fall in 2001, a work site accident in 2007, and a trip and fall accident in 2006. Park Front argues that Plaintiff’s 2000 motor vehicle accident resulted in an insurance claim, and that each of Plaintiff’s subsequent accidents gave rise to a lawsuit. (Park Front Affirm. ¶ 5). Park Front argues that the claims of each of these prior lawsuits relate to Plaintiff’s claims for injuries in the instant action. (*Id.* ¶ 6).

Park Front served a demand for disclosure dated December 11, 2013, with respect to these prior accidents (the “2013 Demand”). A compliance conference was held on February 4, 2014, where Plaintiff stipulated and agreed to respond to Park Front’s 2013 Demand within 30 days. By compliance conference order dated April 29, 2014, Plaintiff was directed to respond to Park Front’s 2013 Demand on or before May 25, 2014.

On April 30, 2014, Plaintiff provided a response to Park Front’s 2013 Demand, objecting to providing authorizations for medical conditions and/or injuries to body parts not related to the injuries in issue in the instant suit—a right Achilles rupture. However, Park Front claims Plaintiff’s response is insufficient to comply with this Court’s orders directing Plaintiff to respond to Park Front’s 2013 Demand, and that Plaintiff has yet to provide complete responses to Park Front’s 2013 Demand.

Park Front served a further demand for authorizations dated December 1, 2014 (the “2014 Demand”). Park Front’s 2014 Demand seeks authorizations for

particular providers that treated the Plaintiff for the instant action as well as other actions, accidents and injuries. By compliance conference order dated December 9, 2014, Plaintiff was directed to respond to Park Front's 2014 Demand within 30 days.

Park Front claims that Plaintiff failed to respond to Park Front's demand for disclosure dated December 1, 2014 and that Plaintiff is in violation of this Court's compliance conference order directing Plaintiff to respond to Park Front's December 2014 Demand.

Park Front argues that Park Front is entitled to discovery relating to Plaintiff's prior accidents and injuries because Plaintiff claims that she can no longer dance as a result of the Accident, and that she is severely limited in her ability to walk, and enjoy her usual and daily activities of everyday life. Additionally, Park Front argues that Park Front is not obligated to accept Plaintiff's representations as to what body parts were injured in Plaintiff's prior accidents. Park Front further argues that Plaintiff is claiming pain and suffering and loss of enjoyment of life, including limitations of numerous activities, such as dancing, which may overlap with the prior lawsuits.

Plaintiff, in turn, argues that Plaintiff responded to Park Front's December 2013 Demand, objecting to providing authorizations for medical conditions and/or injuries to body parts not related to the injuries in issue in this case. Plaintiff argues that this response is in compliance with this Court's Orders directing Plaintiff to respond to the same.

Plaintiff argues that the prior accidents involved injuries to Plaintiff's left ankle and injuries to Plaintiff's arms, and that these prior injuries are unrelated to the injuries to Plaintiff's right ankle and right Achilles tendon which are in issue here. Plaintiff states that she has not waived medical privilege regarding the treatment to her left ankle in this action and that Park Front is not entitled to any such records. Plaintiff further argues that any issue regarding the discoverability of these records should be submitted to the Court for an *in camera* review to determine the discoverability of any of the records for such treatment. As far as the prior injuries to Plaintiff's arms are concerned, Plaintiff argues this action does not assert any allegations of injury, aggravation of injury or condition related to Plaintiff's arms. Plaintiff argues that Park Front therefore is not entitled to discover unrelated medical information regarding Plaintiff's prior injuries to her arms.

With respect to Plaintiff's alleged motor vehicle accident in 2000, Plaintiff argues that neither Park Front's 2013 Demand nor Park Front's 2014 Demand

contains any demand for records or authorizations pertaining to that incident. Plaintiff argues that Park Front fails to demonstrate a good faith basis for seeking disclosure regarding Plaintiff's purported insurance claim.

Additionally, Plaintiff provides responses to Park Front's 2014 Demand annexed to Plaintiff's opposing papers. Plaintiff objects to providing unlimited and unfettered access to records from providers and facilities again that are not related to the injuries sustained and treatment rendered in this accident. Plaintiff argues that Park Front is requesting authorizations without date restrictions to numerous facilities and providers, and that Park Front is not entitled to unlimited access to Plaintiff's medical history.

Here, although Plaintiff's bill of particulars alleges damages for physical injuries to Plaintiff's right ankle and right Achilles tendon, Plaintiff signed multiple compliance conference Orders directing Plaintiff to respond to Park Front's demands. These Orders do not contain any language expressly limiting or objecting to disclosure relating to Plaintiff's prior injuries. Accordingly, in light of Plaintiff's allegations of loss of enjoyment of the usual activities of Plaintiff's daily life, *in camera* review is necessary to determine the discoverability of the records and authorizations relating to Plaintiff's prior injuries.

B. Servco's Cross-Motion

As for Servco's cross-motion, Servco claims that Plaintiff has willfully and contumaciously failed to respond to Servco's combined discovery demands¹ dated September 18, 2014 (the "Combined Demands"). In addition, Servco claims that Plaintiff willfully and contumaciously failed to provide authorizations pursuant to Servco's demands for authorizations dated September 17, 2014, October 21, 2014 and December 10, 2014, respectively (collectively, the "Demands for Authorizations").

By compliance conference Order dated December 9, 2014, Plaintiff was directed to provide responses to Servco's Combined Demands and Demands for Authorizations. The December 9, 2014 compliance conference Order further directed Plaintiff to submit to a deposition. In accordance with this Court's

¹ Included in Servco's Combined Demands are: a Demand for a Verified Bill of Particulars; Demand for Medicare/Medicaid Information; Demand for Statements; Demand for Names and Addresses of All Witnesses; Demand for Photographs, Slides, Videotapes and/or Motion Pictures; Demand for Medicals; Notice for Discovery and Inspection of Expert Information; Demand for Names and Addresses of all Attorneys; Demand for Social Network Information; and, Notices to Take Depositions.

compliance conference Order, Plaintiff's deposition was scheduled to take place on March 5, 2015. Servco served two good faith letters upon Plaintiff's counsel, dated November 26, 2014 and January 20, 2015, respectively. Servco claims that Plaintiff has failed to respond to Servco's discovery demands and that Plaintiff has not acknowledged Servco's good faith letters. Servco claims that Servco did not have the opportunity to review any medical records in preparation for Plaintiff's deposition, as Plaintiff failed to provide Servco with authorizations for the same.

On March 19, 2015, Plaintiff served the Verified Bill of Particulars upon Servco, together with responses to all other discovery demands in Servco's Combined Demands and Demands for Authorizations. Servco argues that this response is incomplete and fails to satisfy Plaintiff's disclosure obligations under CPLR § 3101(a). Specifically, Servco argues that Plaintiff's response to Servco's Demands for Authorizations contains a blanket objection to records and authorizations relating to Plaintiff's prior accidents and prior injuries. Servco argues that Servco has a good faith basis to obtain Plaintiff's medical records relating to Plaintiff's prior injuries and that Servco is entitled to conduct a further examination of Plaintiff before trial.

Servco further argues that Plaintiff failed to provide an adequate response to Servco's demand for photographs. Servco argues that Plaintiff claims to have suffered injuries resulting from a hazardous condition located at the Premises, namely, a door/door jamb extending into the sidewalk, and that Park Front, in turn, claims that Servco is responsible for said hazardous condition. Servco argues that Plaintiff testified, during her examination before trial on June 17, 2014, that Plaintiff took photographs of the condition in question on her "camera phone" on March 13, 2012, the day after the subject Accident took place. Servco argues that, in response to Servco's demand, Plaintiff provided undated images that are unclear, blurry, and/or not in color, and that it is necessary to the defense of this action that Plaintiff provide Servco with "complete copies of the photographs taken by plaintiff on her 'camera phone' in their original digital format (i.e. JPEG/TIFF) on compact disc." (Servco Reply Affirm. ¶ 14).

Servco also claims that Plaintiff failed to provide any response to Servco's Second Notice for Discovery and Inspection dated February 6, 2015 (the "Second Demand").²

² Servco's Second Demand seeks: "Complete copies of all photographs taken by Plaintiff on her "camera phone" on March 13, 2012, in their original digital format (JPEG/TIFF) on compact disc, of the alleged condition that Plaintiff testified to in her examination before trial on June 17, 2014 which were previously produced in hard copy by Plaintiff in their Response to Defendant/Third-Party Plaintiffs Discovery Demands." (Servco Exh. E).

Here, in light of the foregoing, *in camera* review is necessary to determine the discoverability of the records relating to Plaintiff's prior injuries. Additionally, Servco is entitled to obtain copies of the photographs of the alleged hazardous condition that Plaintiff testified to in her examination before trial on June 17, 2014, in their original digital format (JPEG/TIFF).

Wherefore, it is hereby

ORDERED that Park Front's motion is granted only to the extent that Plaintiff is directed to submit a privilege log covering all responsive documents relating to Plaintiff's prior injuries and describing those withheld documents with sufficient detail to permit the Court to determine which documents are privileged and which must be produced, along with Bates stamped copies of the subject documents, to the court for an *in camera* review within 45 days of receipt of a copy of this Order with notice of entry; and it is further

ORDERED that Servco's cross-motion is granted only to the extent indicated above and Plaintiff is directed to respond to Servco's Second Demand within 20 days of receipt of a copy of this Order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: July 8 2015


EILEEN A. RAKOWER, J.S.C.