

Lucci v Cabrera
2015 NY Slip Op 32206(U)
November 12, 2015
Supreme Court, Queens County
Docket Number: 23111/13
Judge: Allan B. Weiss
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Short Form Order**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**Present: Hon. Allan B. Weiss
Justice**IAS PART 2**-----X
JOSEPH A. LUCCI, JR.,Index No. 23111/13

Plaintiff,

Motion Date: 8/12/15

- against -

Motion Seq. No. 1

JOSE J. CABRERA and CRM TRANSIT MIX, LLC,

Defendants.
-----X

The following papers numbered 1 to 12 read on this motion by defendants for an order, *inter alia*, 1) vacating plaintiff's note of issue and removing this action from the trial calendar of this court; 2) compelling discovery responses from plaintiff; 3) compelling plaintiff to appear for independent medical examinations; and 4) extending the time to file a motion for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 6
Answering Affidavits - Exhibits.....	7 - 9
Reply Affidavit - Exhibits	10 - 12

Upon the foregoing papers, and a conference held by the Court Attorney-Referee with appearing counsel on the return date in the Centralized Motion Part, during which time the parties were unable to resolve the motion by stipulation, the motion is decided as follows:

The within action is one for personal injuries allegedly sustained by plaintiff after a motor vehicle accident that occurred on July 3, 2013 in Brooklyn, New York. Plaintiff commenced the action, issue was joined and discovery ensued. Both the Preliminary Conference and Compliance Conference orders directed depositions and an independent medical examination (IME) of the plaintiff, as well as the filing of the note of issue.

In accordance with the Compliance Conference order, plaintiff filed the note of issue on June 12, 2015. In the Certificate of Readiness, counsel for plaintiff stated that physical

examinations had been completed and that there were no outstanding requests for discovery.

Defendants brought the instant motion to vacate the note of issue based on outstanding responses by plaintiff to the Compliance Conference order dated January 20, 2015 (regarding tax authorizations and special damages), a post-deposition demand dated June 16, 2015, the need to conduct the independent medical examinations and to extend their time for making a motion for summary judgment.

In opposition to the motion, plaintiff consents to appear for independent medical examinations and defendants have designated two physicians to conduct same. As such, that branch of defendants' motion to compel same is granted on consent.

Defendants seek a response to outstanding responses by plaintiff to the Compliance Conference order dated January 20, 2015 regarding tax authorizations and special damages. Plaintiff provided an authorization for tax returns on July 8, 2015, however it contained a white-out correction. As such, plaintiff shall provide a new properly executed authorization. With regard to the directive in the Compliance Conference order that plaintiff provide a Supplemental Bill of Particulars as to special damages, although no time frame is given, plaintiff shall supplement same with an itemized list of claimed specials accrued to date.

The last item of discovery sought by defendants is a response to the post-deposition demand of June 16, 2015. Plaintiff served a response to same on July 8, 2015, subsequent to the filing of the motion, providing several authorizations and objecting to other items without stating the basis for the objection.

In opposition, plaintiff asserts that the Court should not consider defendants' reply affirmation in deciding the motion, alleging that it contains an offer of proof regarding entitlement to the items sought. However, the June 16, 2015 post-deposition demand memorializes the demands made on the record at plaintiff's deposition on May 28, 2015, at which time counsel set forth the basis for the demands. Even having been apprised of the basis for the demands at the deposition, plaintiff failed to address defendants' offer of proof in their response to the demands.

Plaintiff provided authorizations in response to items 2, 3, 4, 5, and 11. Defendants now seek full responses to items 1, 6-10, 12 and 13-15.

As to item 1 of the June 16, 2015 demand, which seeks an authorization for the medical records of plaintiff's primary physician, Dr. Vincent Calamia, defendants are entitled to an authorization from the plaintiff. Counsel objected to providing an authorization, as his client was uncertain whether he called/treated with him after the accident. However, plaintiff testified that "I think I even called my primary physician." Due to the equivocal nature of

plaintiff's response, defendants are entitled to an authorization for Dr. Vincent Calamia, limited to the time he treated plaintiff for the injuries claimed herein.

As to item 6 of the June 16, 2015 demand, which seeks laser copies and the electronic/digital files of the remainder of Plaintiff's Facebook photographs, as referenced on page 166 of the deposition testimony of Joseph A. Lucci, Jr. taken on May 28, 2015, this Court finds that defendants have shown entitlement to same. Courts have held that to warrant discovery of private social media accounts, "defendants must establish a factual predicate for their request by identifying relevant information in plaintiff's [social media] account-that is, information that contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims." *Tapp v. New York State Urban Dev. Corp.*, 102 AD3d 620, 621 (1st Dept. 2013), quoting *Patterson v. Turner Constr. Co.*, 88 AD3d 617, 618.

Here, defendants established at plaintiff's deposition that plaintiff posted photographs of himself at a business party, six days after his shoulder surgery in December of 2013, although the Verified Bill of Particulars claims plaintiff was "totally disabled" and confined to bed and home for a period of eleven months after the accident on July 3, 2013. The Bill of Particulars further claims that plaintiff was incapacitated from employment over the same period of time, although plaintiff posted several work promotional photographs on Facebook during that time. As such, defendants have established the factual predicate for obtaining access to plaintiff's social media account.

As to items 7-10 and 12 of the June 16, 2015 demand, plaintiff denies possession of any information regarding medical providers or insurance companies involved in a prior incident. Plaintiff is directed to provide an authorization for those medical providers relative to the prior accident, who treated the same parts of the body for which claims are made herein, or in the alternative, to conduct a search to provide a meaningful and informative response to the stated demands, including all efforts to obtain the requested information and names of medical providers, as plaintiff has waived the physician-patient privilege with respect to his "relevant prior medical history concerning those physical conditions, which he affirmatively placed in controversy." *See, Romance v. Zavala*, 98 A.D.3d 726, 727 (2nd Dept. 2012).

As to items 13-15 of the June 16, 2015 demand, plaintiff objects to providing (item 13) business records, communications and e-mails between plaintiff and his employer for the period of three years prior to the accident through 2014, (item 14) laser copies of all photographs and videos of his family vacation in May of 2015, and (item 15) employment records from U.S.Coachways (including payroll records, attendance records, performance reviews, personnel records, etc.) without stating the reasons for the objections.

As to item 13, defendants' demand is denied as overbroad. However, plaintiff is

directed to provide all proof intended to be used at trial substantiating his claim for lost income during the period of time alleged in the Bill of Particulars, within sixty (60) days of service of the within order with notice of entry. Failure to timely provide such proof shall result in preclusion of same at trial.

As to item 14, defendants' demand is denied as overbroad. Defendants have failed to show entitlement to "all photographs and videos taken during Plaintiff's trip to Florida."

As to item 15, defendants' demand for employment records from U.S.Coachways is modified and plaintiff shall provide an authorization for payroll, attendance and employment contracts from the date of plaintiff's first employment, to date.

Accordingly, it is

ORDERED that the within motion, insofar as same seek to vacate the plaintiff's note of issue is denied and, as discovery remains outstanding; and it is further

ORDERED that plaintiff shall appear for the independent medical examination(s) previously designated, within thirty (30) days service of the within order served with notice of entry; and it is further

ORDERED that the failure to appear for physical examinations in accordance herewith shall result in the plaintiff being precluded from offering any evidence at trial with regard to injuries; and it is further

ORDERED that plaintiff shall provide fresh original authorizations for his tax returns without whiteout corrections, within twenty (20) days of service of the within order with notice of entry; and it is further

ORDERED that plaintiff shall provide a Supplemental Bill of Particulars, as directed in the Compliance Conference order, within thirty (30) days service of the within order served with notice of entry; and it is further

ORDERED that plaintiff shall provide fresh HIPAA compliant original authorization for his treating physician, Dr. Vincent Calamia, within twenty (20) days of service of the within order with notice of entry; and it is further

ORDERED that plaintiff shall provide an authorization to obtain the electronic/digital files of Plaintiff's Facebook photographs, limited in time from the date of accident to the present, within twenty (20) days of service of the within order with notice of entry; and it is further

ORDERED that plaintiff shall within thirty (30) days of service of the within order with notice of entry, provide an authorization to obtain records from those providers who treated plaintiff in his prior accident, pertaining to the same parts of the body for which claims are made herein, or in the alternative, to conduct a search to provide a meaningful and informative response to the stated demands by a person with personal knowledge of all efforts made to obtain the requested information ; and it is further

ORDERED that plaintiff shall provide all proof intended to be used at trial substantiating his claim for lost income during the period of time alleged in the Bill of Particulars, within sixty (60) days of service of the within order with notice of entry. Failure to timely provide such proof shall result in preclusion of same at trial; and it is further

ORDERED that plaintiff shall provide an authorization to obtain payroll, attendance and employment contracts from the date of plaintiff's first employment, to date from U.S.Coachways; and it is further

ORDERED that the failure of plaintiff to timely and fully comply with this order shall result in the plaintiff being precluded from offering any evidence at trial in regard to those items sought, but not timely provided, upon determination by the trial court; and it is further

ORDERED that defendants' application for an extension of time to move for summary judgment is denied without prejudice to renewal simultaneously with the making of a motion for summary judgment upon good cause shown for the delay; and it is further

ORDERED that movants shall serve all parties 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 are denied.

Date: November 12 , 2015

J.S.C.