

Juarez v Dunleavy

2015 NY Slip Op 32375(U)

November 2, 2015

Supreme Court, Bronx County

Docket Number: 0304355/2009

Judge: Laura G. Douglas

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX PART 11

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JUAREZ, ESTEBAN

Plaintiff(s),

- against -

DUNLEAVY, BRENDAN M.

Defendant(s).
-----X

Index No. 0304355/2009

Calendar No.

DECISION/ORDER

Present:

**HON. LAURA G. DOUGLAS
J.S.C.**

Plaintiff's motion for an order granting leave to reargue his prior motion to strike defendant Mary Kelly's answer, decided by this court August 28, 2014, and upon re-argument for an order striking defendant Kelly's answer is decided as follows.

In this action, plaintiff alleges that he was injured when he fell from the roof of a house that he was hired to renovate. The building in question was co-owned by defendants Brian M. Dunleavy and Mary Kelly. Defendant Kelly alleges that she is entitled to a homeowner's exemption under Labor Law §240(1). Defendant Kelly claims that at first she intended to renovate the home and then live in it herself, but changed her mind and decided to sell it without moving in. She alleges that she changed her mind when her developmentally disabled adult daughter Christina, became depressed when she saw a photograph of herself and her deceased father in the front yard of the house next door, where the family had lived when she was a child (Plaintiff's Exhibit B- Kelly Deposition, p.41 line 12-p.44, line 9).

Plaintiff then served a Demand for Discovery and Inspection dated June 21, 2012 on defendant Kelly. Demand #15 sought "(a)uthorizations to obtain defendant Mary Kelly's daughter Tina's medical records between 2005 and 2007." After plaintiff objected to their demand as irrelevant and requesting confidential records, plaintiff moved to strike defendant Kelly's Answer in a motion dated August 1, 2012. On September 25, 2012, this

court granted plaintiff's motion only to the extent of directing defendant Kelly to provide responses to a number of demands to which she had objected. The decision did not make reference to Demand #15, and thus did not direct any response by defendant to that particular demand (Exhibit D).

Plaintiff served another Demand for Discovery and Inspection on defendant, dated June 24, 2013, in which he made three demands (Exhibit F). The first two demands sought an authorization for Christina's medical records for the depression she suffered as a result of learning that she would be moving to the house where this accident occurred, as well as the medical records themselves. The third demand sought a copy of the photographs showing Christina with her father in front of the house next to the one where the accident took place.

In a subsequent motion, plaintiff again sought an order striking defendant's answer for failure to respond to plaintiff's Demand for Discovery and Inspection dated June 24, 2013. In an order dated August 28, 2014, this court granted plaintiff's motion only to the extent of directing defendant to provide plaintiff with a copy of the photograph described in Demand #3. That portion of the motion seeking authorizations for Christina's medical records and the medical records themselves were denied, with the court noting that demands for Christina's medical records had been previously denied in the court's order dated September 25, 2012 and that a motion to reargue the prior decision was untimely.

Plaintiff, in the instant motion, seeks to reargue the decision of this court dated August 28, 2014. Plaintiff argues that its second set of demands were narrower than the original demands, since they sought the authorization and records only for Christina's depression when she learned of her future move to the house in question, and not for all

of her medical records from 2005 to 2007.

The court in its decision dated August 28, 2014 failed to note that plaintiff's Demands #1 and #2 dated June 24, 2013 were narrower than his earlier demands, as noted above. Thus, although the decision and order dated September 25, 2012 implicitly denied Demand # 15 of the Demands dated June 21, 2012, by not specifically addressing it, Demands #1 and #2 of the Demands dated June 24, 2013, should be decided on their own merits.

Defendant Kelly is seeking to exempt herself from liability in this case under Labor Law §240(1), arguing that she was an owner of a one or two family dwelling, who contracted for, but did not direct or control the work which resulted in plaintiff's injury. In order to qualify for this exemption, defendant must show that the building in question was not going to be used for purely commercial purposes, and that in fact, that was her intention at the time of plaintiff's injury underlying the action (See Davis v. Maloney, 49 AD3d 385 [1st Dept. 2008]). Whether defendant intended to live in the house or sell it will determine whether defendant is entitled to a homeowners exemption under the Labor Law (See Murati v. Harris, 117 AD3d 432 [1st Dept. 2014]). Key to this determination is whether Christina suffered a depression after the accident, resulting in defendant's decision not to live in the house and instead, to sell it.

Defendant's objection to providing Christina's, medical records is based on the fact that Christina is a non-party whose privilege is protected by the Mental Hygiene Law and by the medical privacy privilege (CPLR 4504 [a]), citing Dillenbeck v. Hess, 73 NY2d 278 (1989), for the proposition that a party defending a personal injury action has not affirmatively placed his or her medical condition in issue. However, in the instant case,

by asserting her daughter's medical condition as a basis for an exemption, the defendant has placed said condition in issue. In addition, because defendant is the guardian for her daughter, a developmentally disabled person, she has the same authority to provide the demanded authorization as would a parent over a child (See Surrogate's Court Procedure Act §1761).

Defendant testified at her deposition, that her daughter had to be hospitalized for the depression that she suffered (Exhibit B p.42, lines 22-25). Plaintiff is entitled to discover whether the records of her treatment for depression reveal the reason for this depression and whether it occurred prior to this accident. However, plaintiff is **only** entitled to this information and **not** any other information related to Christina's treatment.

Accordingly, plaintiff's motion for an order granting leave to reargue the decision and order dated August 28, 2014 is granted. Upon re-argument, plaintiff's motion for an order striking defendant Kelly's answer is granted only to the extent which follows.

Defendant Kelly shall provide plaintiff with authorization(s) for Christina's medical records related to her treatment for depression, as previously testified to by defendant, within twenty (20) days of service upon her of a copy of this order with notice of entry. The authorization(s) shall provide that said records be sent to: Hon. Laura Douglas, Bronx Supreme Court, Room 521, 851 Grand Concourse, Bronx, New York 10451, for an in camera inspection.

This constitutes the decision and order of the Court.

Dated: 11-2-15
Bronx, New York

LDG
Hon. Laura G. Douglas, J.S.C