

Diaz v Trevisani

2015 NY Slip Op 32863(U)

October 26, 2015

Supreme Court, Westchester County

Docket Number: 61221/2014

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

MARVIN DIAZ,

Plaintiff,

DECISION & ORDER

-against-

Index No. 61221/2014
Motion Date: Oct. 26, 2015

STEPHEN TREVISANI and NINA TREVISANI,
as Executrix of the Estate of ANNETTE TREVISANI,
deceased,

Seq. No. 2

Defendants.

LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order compelling plaintiff to provide responses to defendants' outstanding discovery demand.

- Order to Show Cause - Affirmation in Support - Exhibits
- Affirmation of Good Faith
- Affirmation in Opposition - Exhibits
- Memorandum of Law in Opposition

Upon the foregoing papers and the proceedings held on October 26, 2015, this motion is determined as follows:

Plaintiff seeks to recover damages for injuries allegedly sustained on August 19, 2011 when he fell off a ladder while working at the decedent's property. Plaintiff's alleged injuries include a left distal tibia fracture, left fibula fracture, left pilon fracture, open reduction and internal fixation, need for extended rehabilitation and physical therapy, restriction in motion, and inability to work since the date of the accident (Defendants' Exhibit E, Verified Bill of Particulars).

Defendants seek an order compelling plaintiff to provide responses to defendants' demand for the release of plaintiff's medical records related to his prior accident in 2002 or 2003 (Defendants' Exhibit C, Amended Verified Complaint). On January 14, 2013, plaintiff appeared for a deposition. He testified that as a result of the accident at issue, he cannot stand for more than twenty minutes, but at work he has to do this. Everyday he asks his daughters to put on his socks because when he bends he has back pain. Plaintiff testified there are many things he cannot do anymore, like bending down to pick something up. He cannot walk very well and he cannot jump or run (Defendants' Exhibit P, deposition transcript of Marvin Diaz, p.132-34).

Plaintiff testified he was involved in a prior accident in 2002 or 2003, in which he fell off a scaffold and sustained a fracture to the right leg (Defendants' Exhibit P, deposition transcript of Marvin Diaz, p.138-39, 142). Plaintiff testified he was treated at New Rochelle Hospital, they operated on him, putting in bolts, screws, and platinum, and he left the hospital the next day. He testified that the injury to the right leg did not affect his ability to walk (Defendants' Exhibit P, deposition transcript of Marvin Diaz, p.139-40). He did not bring a lawsuit related to the right leg injury (Defendants' Exhibit P, deposition transcript of Marvin Diaz, p.139).

Defendants served a January 25, 2013 supplemental notice for discovery and inspection seeking a HIPAA compliant authorization for plaintiff's records from New Rochelle Hospital, where the plaintiff had surgery on his right leg in 2002 or 2003. Defendants demanded HIPAA compliant authorizations from any hospital, doctor, medical provider, physical therapist, MRI facility or other medical facility that treated the plaintiff for the right leg injury in 2002 or 2003. (Defendants' Exhibit Q). Plaintiff served a response to the supplemental notice for discovery and inspection dated March 22, 2013, objecting to the demands seeking authorizations related to treatment of the right leg. Plaintiff's response states the records sought are not relevant, as this case involves an injury to the left leg and the records sought are outside the scope of discovery (Defendants' Exhibit R).

In defendants' counsel's affirmation in support, defendants move to strike plaintiff's complaint for failing to provide discovery, or alternatively, compel plaintiff to provide authorizations for medical providers plaintiff treated with for the injury to the right leg. Defendants argue these records are relevant to determine to what extent plaintiff's complaints, including his inability to work, are attributable to plaintiff's prior injury to the right leg.

In opposition, plaintiff argues the authorizations sought are for records that are not relevant to this matter. Plaintiff contends that he alleges limited, specific claims of injuries in this case and defendants are not entitled to obtain records regarding unrelated medical conditions. Plaintiff argues the injury plaintiff sustained to his right leg in 2002 resolved long before the 2011 left leg injury. This issue was not raised by defendants' counsel at three compliance conferences. Defendants failed to follow up to obtain discovery pertaining to plaintiff's right leg until defendants' counsel sent a July 31, 2015 letter seeking outstanding discovery (Defendants' Exhibit S). In an August 14, 2015 letter, plaintiff objected to providing any authorizations with regard to the right leg injury (Plaintiff's Exhibit H). Plaintiff argues by failing to timely follow for discovery pertaining to the right leg injury defendants waived such discovery.

Plaintiff submits defendants' physical examination reports by Dr. Robert Israel and Dr. Ronald Mann, both orthopedic surgeons. Dr. Israel examined the plaintiff on December 5, 2012. Dr. Israel examined the right and left legs. He noted the gait was normal, no instability was present, and there was full range of motion (Plaintiff's Exhibit E). Dr. Mann examined the plaintiff on June 18, 2015. He documented that plaintiff was walking with a limping gait pattern. Following an examination, Dr. Mann noted there was no apportionment to any prior injuries and there was no pre-existing conditions that had an effect on the plaintiff's recovery. At the end of the report Dr. Mann noted "[a]ny other medical conditions that might exist unrelated to the original injury are felt to be beyond the purview of this examination" (Plaintiff's Exhibit F).

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

It is well settled that by commencing an action for personal injuries, plaintiff waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]; *Romance v Zavala*, 98 AD3d 726 [2d Dept 2012]). Plaintiff waives the privilege with respect to his relevant past medical history, but the privilege is not waived with respect to unrelated illnesses or treatments (*Gill v Mancino*, 8 AD3d 340 [2d Dept 2004]). The burden of proving that a party’s mental or physical condition is in controversy, for purposes of obtaining relevant records, is on the party seeking the records (*Budano v Gurdon*, 97 AD3d 497 [1st Dept 2012]).

Here, defendants fail to establish records related to plaintiff’s treatment of the right leg eight or nine years prior to the incident at issue are material and necessary to the defense of this action. On January 14, 2013, plaintiff testified he has difficulty walking, jumping, and running. He testified he fell off a scaffold and fractured the right leg in 2002 or 2003. He testified he was treated in a hospital, he was operated on, and he left the hospital the following day. Plaintiff testified the injury to the right leg did not affect his ability to walk. Defendants fail to point to any portion of the deposition transcript in which plaintiff was asked or gave additional testimony pertaining to his use of the right leg between the 2002 or 2003 accident and the 2011 accident. The demand for medical records pertaining to plaintiff’s right leg is not reasonable where there is no showing that plaintiff had ongoing complaints or ongoing medical treatment related to the right leg following the 2002 or 2003 injury. It is plaintiff’s position that the injury to the right leg resolved long before the 2011 left leg injury. Defendants argue the records at issue are relevant to determine whether plaintiff’s inability to work is attributable to plaintiff’s prior injury. However, the bills of particulars state “lost earnings are not claimed” (Defendants’ Exhibits E and F). Furthermore, defendants fail to point to any portion of plaintiff’s deposition testimony indicating that the right leg injury affected plaintiff’s ability to work.

Plaintiff submits two reports prepared by defendants’ physical examining physicians. Dr. Israel examined both plaintiff’s right and left leg. He noted the gait was normal, no instability was present, and there was full range of motion (Plaintiff’s Exhibit E). Dr. Mann noted a limping gait pattern, but documented that there was no apportionment to any prior injuries (Plaintiff’s Exhibit F). The physical examining reports do not indicate plaintiff had any residual deficits to the right leg. Defendants fail to demonstrate plaintiff’s prior injury to the right leg is relevant to the allegations in this matter.

Furthermore, in June 2013, defendants made a motion for a change of venue from New York County to Westchester County (Defendants' Exhibit G). By order dated July 24, 2013 (Singh, J.), the motion was granted (Defendants' Exhibit I). While the action was pending in New York County, defendants made a motion to strike plaintiff's complaint or compel plaintiff to provide authorizations for the release of medical records related to the 2002 or 2003 accident in which plaintiff injured his right leg (Defendants' Exhibit H). The Court issued an order dated July 24, 2013 (Singh, J.), denying the motion without prejudice with leave to renew in Westchester County upon transfer of the case (Defendants' Exhibit J). This Court issued compliance conference orders on February 20, 2015, March 31, 2015, and May 29, 2015. The orders provide that "any disclosure demands not raised at the compliance conference are deemed waived." Defendants fail to demonstrate that in the two year period after the motion to change venue was granted, counsel made any effort to seek the discovery at issue by following up with plaintiff's counsel, by raising this discovery issue at a compliance conference, or by making a timely motion. Defendants have waived the opportunity to obtain discovery related to plaintiff's 2002 or 2003 injury to the right leg. Additionally, defendants fail to demonstrate on this motion that such discovery is relevant to the defense of this matter.

In view of the foregoing, it is

ORDERED that defendants' motion is denied in its entirety; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on November 10, 2015 at 9:30 a.m. The parties should anticipate that the matter will be certified as trial ready on that date; and it is further

ORDERED that defendants' counsel is directed to serve a copy of the order with notice of entry on plaintiff's counsel within ten days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
October 26, 2015


HON. JOAN B. LEFKOWITZ, J.S.C.

TO: Sullivan, Papain, Block, McGrath
& Cannavo
120 Broadway
New York, New York 10271
BY NYSCEF