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| Cherubini-Amdur v Target |
| 2016 NY Slip Op 30400(U) |
| March 9, 2016 |
| Supreme Court, New York County |
| Docket Number: 161888/2014 |
| Judge: Manuel J. Mendez |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

MARIA CHERUBINI-AMDUR,

Plaintiff,

-against-

INDEX NO. 161888/2014
MOTION DATE 02-16-2016
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

TARGET, TARGET INC., VNO 195 NORTH
BEDFORD ROAD LLC and VARNADO
REALTY TRUST

Defendants.

The following papers, numbered 1 to 4 were read on this motion to compel discovery.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1 - 4

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Target Corporation's (herein "Target") motion pursuant to CPLR §3124 to compel Plaintiff to produce authorizations requested in prior discovery demands is granted, and the remainder of the motion requesting an immediate striking of Plaintiff's Verified Complaint and a dismissal of the action upon Plaintiff's failure to provide the discovery requested pursuant to §3126 is denied.

Plaintiff alleges that on August 5, 2013, while at defendant Target Inc.'s (hereinafter Target) store, she was injured when struck by a door. Plaintiff commenced an action by summons and complaint dated December 2, 2014, and later served a Supplemental Summons and Verified Amended Complaint on March 27, 2015. After issue was joined, the parties proceeded with discovery.

In Plaintiff's Verified Bill of Particulars of April 1, 2015, Plaintiff asserts claims for neurological and psychological injuries allegedly caused by the incident on August 5, 2013. (see Aff. In Supp. PP 3 and Mot. Exh. I).

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

In the Preliminary Conference Order of July 22, 2015, HIPAA compliant authorizations for each medical provider who treated Plaintiff regarding conditions or injuries alleged in Plaintiff's Verified Bill of Particulars were to be provided to Defendants.

On July 24, 2015, Defendant Target served Plaintiff with a Demand for Authorizations, seeking authorizations to obtain relevant medical records from three specific Doctors who treated Plaintiff, as well as authorizations for "any and all records pertaining to Plaintiff's psychological or psychiatric health and to any psychological or psychiatric treatment undergone by Plaintiff." (see Aff. In Supp. PP 2 and Mot. Exh. C)

On November 2, 2015, Plaintiff served a response to Defendant Target's Demand for Authorizations by providing authorizations for two of the three doctors referred to in the Demand who treated plaintiff after the alleged incident. Plaintiff also responded to Defendant Target's remaining two demands stating that these two particular demands would be "provided, if applicable." (see Aff. In Supp. PP 2 and Mot. Exh. E)

In Plaintiff's EBT of November 6, 2015, Plaintiff testified to being treated by various healthcare providers for neurological and psychological symptoms prior to and after the August 5, 2013 incident. (see Aff. In Supp. PP 4 and Mot. Exh. L).

On November 24, December 7, December 16, December 22 and December 29, 2015, counsel for Defendant Target made attempts, either by telephone, email, or letter, to urge Plaintiff to provide the requested authorizations. (see Aff. In Supp. PP 2 and Mot. Exhs. F, G and H).

On December 2, 2015, Defendant Target served Plaintiff with a Post-EBT Demand requesting authorizations for records from various named healthcare providers who treated Plaintiff. (see Mot. Exh. J).

Plaintiff's counsel responded on December 29, 2015, that Plaintiff's counsel had stated in prior conversations with counsel for Defendant Target that a response to the demands would be provided as soon as Plaintiff's counsel was able to speak with Plaintiff and confirm whether Plaintiff would be making a claim for psychological damages. (see Aff. In Supp. PP 3 and H). Plaintiff's counsel further stated that in the event Plaintiff would not be going forward with a claim for psychological damages, then Defendant Target would not be entitled to its Demand for authorizations for any and all records of Plaintiff's psychological or psychiatric health and treatment. Plaintiff's counsel did then state, however, that an authorization for records covering the "postaccident psych injury" requested by Defendant Target would be provided. (see Mot. Exh. H).

On January 21, 2016, Plaintiff provided an authorization for "all medical records from Dr. Brian R. Apatoff" in response to Defendant Target's original request in its Demand for Authorizations of November 2, 2015. Plaintiff, however, did not provide any further authorizations for psychological or psychiatric health and treatments of Plaintiff requested in the Demand for Authorizations, nor were any authorizations provided for any of the health care providers requested in the December 2, 2015 Post-EBT Demand. (see Aff. In Supp. PP 4 and Mot. Exh. K).

Defendant Target now moves for an Order pursuant to CPLR 3124 compelling Plaintiff to provide the authorizations Defendant Target previously requested (see Mot. Exh. N for a complete list) because Plaintiff has alleged neurological and psychological injuries as a result of the incident on August 5, 2013, and that even if Plaintiff were not to claim neurological and psychological damages, Defendant Target is entitled to the authorizations because Plaintiff may have been suffering from neurological and psychological issues prior to the incident. Defendant Target further requests that in the event Plaintiff fails to provide these authorizations, an immediate striking of the Verified Complaint and dismissal of the action be issued pursuant to CPLR 3126(3).

The motion is unopposed. Defendant annexes proof of service upon the Plaintiff.

The Court may compel compliance with demands, pursuant to CPLR §3124, upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the discovery sought is "material and necessary" as legitimate subject of inquiry or is being used for purposes of harassment. "Material and necessary" is to be liberally interpreted as requiring disclosure of any relevant facts which will assist in trial preparation (Roman Catholic Church of the Good Shepard v. Tempco Systems, 202 A.D. 2d 257, 608 N.Y.S. 2d 647 [1st Dept., 1994]). Discovery should lead to disclosure of admissible proof. Parties to an action are entitled to reasonable discovery of any relevant facts to the action (Allen v. Crowell-Collier Publ.Co., 21 N.Y. 2d 403, 288 N.Y.S. 2d 449, 235 N.E. 2d 430 [1968]; Spectrum Systems International Corporation v. Chemical Bank, 78 N.Y. 3d 371, 581 N.E. 2d 1055, 575 N.Y.S. 2d 809 [1991]).

Defendant Target fails to identify in its moving papers any specific prior Discovery Orders to establish that there was a violation by the Plaintiff. CPLR §3126, requires a showing of violation of a prior Order for discovery and that the failure was willful, contumacious or due to bad faith. (Weissman v. 20 East 9th Street Corporation, 48 A.D. 3d 242, 852 N.Y.S. 2d 67 [1st Dept., 2008]).

Accordingly, it is ORDERED, that defendant Target's motion to compel Plaintiff to provide the requested authorizations is granted, on default, and it is further,

ORDERED that Defendant Target's request to strike Plaintiff's Verified Complaint and dismiss the action upon Plaintiff's failure to provide the requested authorizations is denied, it is further,

ORDERED, that within thirty (30) days from the date of service of a copy of this Order with Notice of Entry upon the Plaintiff, Plaintiff shall provide the requested authorizations in Defendant Target's Demand for Authorizations of November 2, 2015, and Post-EBT Demand of December 22, 2015, and it is further,

ORDERED, that if Plaintiff fails to provide Defendant Target with the authorizations requested in Defendant Target's Demand for Authorizations of November 2, 2015 and Post-EBT Demand of December 22, 2015 within 30 days of being served with a copy of this Order with Notice of Entry, Plaintiff's Verified Complaint will be stricken and the action dismissed.

ENTER:

Dated: March 9, 2016

MANUEL J. MENDEZ
J.S.C.


MANUEL J. MENDEZ
J.S.C.

Check one: **FINAL DISPOSITION** **NON-FINAL DISPOSITION**

Check if appropriate: **DO NOT POST** **REFERENCE**