

Reyes v Nieves
2016 NY Slip Op 32972(U)
July 6, 2016
Supreme Court, Westchester County
Docket Number: 50070/15
Judge: Joan B. Lefkowitz
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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

-----X
MICHAEL REYES,

Plaintiff,

-against-

BRANDON NIEVES and LAURA REYES,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Motion Date: June 27, 2016
Index No. 50070/15

Seq. Nos. 1 & 2

The following papers were read on the following:

(1) motion by defendant Brandon Nieves, pursuant to CPLR 2304 and 3103, for a protective order and quashing the subpoena dated May 5, 2016 and subpoena duces tecum dated May 6, 2016 served on nonparty Cynthia Nieves as facially defective and unenforceable, and for such other and further relief as the court deems just and proper; and

(2) motion by plaintiff Michael Reyes, pursuant to CPLR 3126, precluding defendants from introducing evidence or testimony at trial relating to the injuries or medical condition of defendant Brandon Nieves following the subject motor vehicle accident which occurred on November 21, 2014, and for such other and further relief as the court deems just and proper.

Seq. No. 1

Order to Show Cause - Affirmation in Support - Exhibits A-E
Affirmation in Opposition
Affidavit of Service on Nonparty

Seq. No. 2

Order to Show Cause - Affirmation in Support - Exhibits A-G
Affirmation in Opposition - Exhibits

Upon the foregoing papers and upon the proceedings held on June 27, 2016, these motions are determined as follows:

Factual and Procedural Background

Plaintiff commenced the present action to recover personal injuries sustained in a one car motor vehicle accident on November 21, 2014. The motor vehicle involved in the accident was owned by defendant Laura Reyes. Plaintiff, Laura Reyes' son, alleges that defendant Nieves was operating the motor vehicle at the time of the accident.

Defendant Nieves joined issue on February 25, 2015. In his answer, defendant Nieves denied operating the subject motor vehicle. Defendant Nieves alleges that plaintiff was operating the motor vehicle at the time of the accident.

Depositions of the parties were held in September and November, 2015. Depositions of nonparty witnesses, including police officers, an EMT, and a Manhattanville College security supervisor, were held on November 30, 2015 and January 12, 2016.

At a compliance conference held on February 22, 2016, plaintiff's counsel demanded the emergency room records of defendant Nieves, alleging that such records could contain information which could be used by plaintiff's expert to state an opinion as to which occupant was driving the motor vehicle. More specifically, counsel argued that injuries to defendant Nieves, as detailed in the emergency room records, may demonstrate the position of defendant Nieves in the car at the time of impact. Defendant Nieves objected to disclosure of the medical records. It was then agreed that defendant Nieves would produce the records to the court for an in camera review and determination. A Compliance Conference Referee Report and Order setting forth the foregoing was issued on February 24, 2016.

Thereafter, this court, upon the stipulation of the parties, conducted an in camera review of defendant Brandon Nieves' emergency room records. By Order entered May 4, 2016, this court declined to direct the disclosure of defendant Nieves' emergency room records. As set forth in the Order, this court determined that defendant Nieves did not affirmatively place his medical condition at issue since he denied driving the subject motor vehicle. Accordingly, this court determined that defendant Nieves did not waive the physician-patient privilege with respect to the records. Additionally, after the in camera review, this court determined that the records did not contain information that is material or relevant to a determination of where defendant Nieves was seated in the vehicle at the time of the accident.

A compliance conference was held on May 5, 2016. According to counsel for defendant Nieves, which has not been contradicted by the other parties, at the conference, plaintiff's counsel indicated that he wanted to depose nonparty Cynthia Nieves, defendant Brandon Nieves' mother, regarding her alleged effort to view the subject motor vehicle which had been impounded and was at a tow yard in Harrison. Plaintiff's counsel contended that Cynthia Nieves misrepresented herself to be defendant Laura Reyes, the owner of the subject motor vehicle, and argued that this constituted an admission that defendant Nieves was the driver of the subject

motor vehicle at the time of the accident. The compliance conference was adjourned to May 13, 2016.

Prior to the May 13, 2016 conference, plaintiff served nonparty Cynthia Nieves a “judicial subpoena,” dated May 5, 2016, noticing her deposition for May 27, 2016 at the offices of plaintiff’s counsel in New York City. Plaintiff also served nonparty Nieves a subpoena duces tecum seeking the production of any and all insurance policies pertaining to general liability in effect on November 21, 2014, including but not limited to automobile insurance policies, umbrella insurance policies and home owner insurance policies.

At the conference on May 13, 2016, plaintiff renewed his request for the deposition of nonparty Cynthia Nieves. A briefing schedule was then issued for the present motions.

Defendant Brandon Nieves’ Motion to Quash the Nonparty Subpoenas

Defendant Nieves’ Contentions in Support

Defendant Nieves now seeks a protective order and an order quashing the subpoenas dated May 5, 2016 and May 6, 2016 served on nonparty Cynthia Nieves.

Defendant Nieves first contends that the subpoenas should be quashed as they are defective on their face. Defendant Nieves contends that the subpoenas are defective since they fail to state the reason why discovery was being sought from the nonparty as required by CPLR 3101(a)(4). Defendant Nieves also contends that the subpoena noticing the deposition is defective as it is returnable at the offices of plaintiff’s counsel in Manhattan and the action is pending in Westchester County.

Second, defendant Nieves asserts that the subpoena to take the nonparty’s deposition must be stricken since plaintiff failed to serve a Notice for Deposition on the other parties as required by CPLR 3107.

Third, defendant Nieves contends that the nonparty subpoenas must be quashed as plaintiff has not shown that the disclosure from the nonparty is material or necessary. Defendant Nieves asserts that nonparty Cynthia Nieves was not present at the accident scene. Although defendant Nieves concedes that Cynthia Nieves was present at the Westchester County Medical Center after being notified of the accident, a parent-child privilege would protect any confidential communications between herself and defendant Nieves, her son.

Defendant Nieves further contends that to the extent that plaintiff seeks to depose Cynthia Nieves with respect to her alleged misrepresentation that she was defendant Reyes in order to gain access to the subject motor vehicle, the alleged misrepresentation and circumstances surrounding it are not material nor relevant to the issues in this action. Defendant Nieves further contends that plaintiff’s counsel inquired about the alleged misrepresentation and circumstances

surrounding it at the depositions of defendant Brandon Nieves and defendant Laura Reyes. Moreover, defendant Nieves contends that plaintiff's counsel's contention that the alleged misrepresentation constitutes an admission by defendant Nieves that he was the operator of the subject motor vehicle is without merit. Defendant Nieves asserts that any statements by nonparty Cynthia Nieves are not admissions by defendant Nieves and are, at best, purely collateral and prejudicial.

Moreover, defendant Nieves contends that discovery regarding that incident has already taken place, such that the nonparty should not be inconvenienced by having to appear to testify as to the incident. To that end, defendant Nieves relies upon the deposition testimony of defendant Nieves, who accompanied Cynthia Nieves to the tow yard, that nonparty Cynthia Nieves never represented herself to be defendant Reyes. Defendant Nieves also relies upon the deposition testimony of defendant Reyes that she did not hear Cynthia Nieves make any misrepresentation and that an assumption was made after she spoke to the personnel at the tow yard, and Cynthia Nieves requested the return of defendant Nieves' cellular telephone and jacket, which he had with him on the night of the accident.

Defendant Nieves also contends that the demand for insurance policies in the subpoena duces tecum served upon nonparty Cynthia Nieves is moot as information and confirmation regarding the insurance policy held by defendant Nieves' family, with whom defendant Nieves resided at the time of the accident, has now been produced to plaintiff. Defendant Nieves asserts that plaintiff was provided with a letter from GEICO defining coverage, a copy of the Declaration sheet and a letter from nonparty Cynthia Nieves that there is no other available insurance coverage.

Plaintiff's Contentions in Opposition

Plaintiff contends that the subpoenas served on nonparty Cynthia Nieves satisfy the requirement of CPLR 3101(a)(4). Plaintiff contends that the subpoena noticing Cynthia Nieves' deposition called for her testimony on behalf of plaintiff. Plaintiff further notes that Cynthia Nieves is defendant Nieves' mother, who visited the hospital immediately following the accident and visited the tow yard where the subject motor vehicle was located. Therefore, plaintiff contends that Cynthia Nieves is fully aware of the circumstances surrounding this action and the reason for her testimony, such that the subpoena placed her on notice of the disclosure sought.

Plaintiff argues that, in any event, any defect in the notice can be remedied through an adequate showing in opposition to a motion to quash. In his opposition, plaintiff contends that it is undisputed that Cynthia Nieves visited her son, defendant Nieves, at the hospital after the accident and went to the tow yard to view the subject motor vehicle one day after the accident. Plaintiff further asserts that defendant Nieves' defense is premised on the argument that photographs taken of him at the hospital by Cynthia Nieves establish that he was a passenger in the motor vehicle at the time of the accident. Further, plaintiff contends that defendant Laura Reyes has alleged in a criminal complaint that Cynthia Nieves impersonated her at the tow yard

in order to gain access to the subject motor vehicle. Plaintiff, therefore, argues that Cynthia Nieves possesses information that is material and necessary to the prosecution of this action.

As to notice of the deposition served on defendants, plaintiff contends that CPLR 3107 only requires that notice of a nonparty subpoena be in writing, state the time and place for taking the deposition, the name and address of each person to be examined, but need not enumerate the matters upon which the person is to be examined. Plaintiff further contends that all the parties in the action were served with a copy of the subpoenas served on Cynthia Reyes. Accordingly, plaintiff contends that service of a copy of the subpoena upon defendant was sufficient.

Plaintiff further contends that the more liberal standard for nonparty discovery set forth in *Kapon v Koch* (23 NY3d 32 [2014]), namely “any facts bearing on the controversy,” governs the nonparty discovery at issue. Plaintiff also relies upon the holding in *Kapon v Koch* that “[a]n application to quash a subpoena should be granted ‘[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious’ ... or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*id.* at 38).

In view of the foregoing standard, plaintiff contends that defendant Nieves’ motion for a protective order and order quashing the nonparty subpoenas served on Cynthia Nieves should be denied. Plaintiff asserts that the deposition of Cynthia Nieves is relevant since defendant Nieves testified that Cynthia Nieves, his mother, took photographs of his physical appearance at the hospital and believed that the photographs support his defense that he was a passenger in the motor vehicle. Plaintiff also asserts that Cynthia Nieves’ deposition is relevant to the action since defendant Reyes testified that Cynthia Nieves went to the auto repair lot and impersonated defendant Reyes to gain access to the motor vehicle involved in the subject accident.

Plaintiff’s Motion to Preclude Defendants

Plaintiff’s Contentions in Support

Plaintiff seeks an order precluding defendants from introducing evidence or testimony at trial relating to injuries or the medical condition of defendant Nieves following the subject motor vehicle accident. Plaintiff contends that since this court has previously issued a protective order preventing the disclosure of defendant Nieves’ emergency room records from his treatment after the subject motor vehicle accident based upon defendant Nieves’ invocation of the patient-physician privilege, he should not now be allowed to introduce any evidence at trial regarding his medical condition, including testimony about, or photographs taken of, his injuries from the subject accident purporting to show seatbelt marks. Plaintiff asserts that defendant Nieves has indicated his belief that the photographs constitute proof that his injuries as a result of the accident, namely seatbelt marks, establish that he was in the passenger seat at the time of the accident. Plaintiff contends that defendant Nieves cannot use the patient-physician privilege as both “a sword and a shield” (Plaintiff’s Affm. in Support at ¶ 8). Plaintiff relies upon *Dillenbeck Hess* (73 NY2d 278 [1989]), wherein the Court of Appeals held that a party should not be

allowed to invoke the patient-physician privilege “while simultaneously relying on confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disrupting the party’s claim” (*id.* at 293).

Defendant Nieves’ Opposition

Defendant Nieves opposes plaintiff’s motion to preclude defendants from introducing evidence at trial regarding his medical condition and injuries following the subject accident. Defendant Nieves argues that it is plaintiff, not him, who is attempting to wield the sword in this case. Defendant Nieves asserts that plaintiff, after failing to convince the court that defendant Nieves’ emergency room records should be disclosed, now seeks to preclude evidence that would be probative regarding who was driving the motor vehicle at the time of the accident. Defendant Nieves further contends that the photographs taken by Cynthia Nieves, about which defendant Nieves testified and described at his deposition, were provided to counsel for the other parties, and are not “emergency room photographs” as they were not taken by the hospital personnel nor are they part of the hospital records. Rather, defendant Nieves contends that the photographs happened to be taken by Cynthia Nieves at the hospital and “could have just as easily been taken when he arrived home from the hospital later ...” (Defendant Nieves’ Affm. in Opp. at ¶ 3).

Defendant Nieves further contends that he has made full disclosure as to the relevant material probative of the issues in this action, including the physical marks on his body as reflected in the photographs, which defendant Nieves contends reflect markings over his right collarbone area where a passenger seat belt would pass. Accordingly, defendant Nieves contends that the photographs should be presented to and considered by the jury on the liability issue in this action. Further, defendant Nieves contends that the evidence is not privileged and no confidentiality has been claimed as to the evidence. Finally, defendant Nieves contends that plaintiff’s present motion is no more than an attempt by plaintiff to reverse the prior decision and order of this court, and to use the prior decision and order “as a foundation for limiting the defense” (*id.* at ¶ 6).

Oral Argument

At oral argument, counsel for defendant Nieves conceded that defendant Nieves affirmatively placed his physical condition after the accident into controversy by raising the defense that he was a passenger in the motor vehicle as demonstrated by marks on his right shoulder which he alleges were caused by the passenger-side seatbelt. Counsel for defendant Nieves, however, initially asserted that plaintiff was, nonetheless, only entitled to the emergency room records if defendant Nieves decided to introduce the records at trial. After additional questioning by the court, counsel for defendant Nieves then asserted that plaintiff was only entitled to certain portions of the emergency room records and was not entitled to defendant Nieves’ past history or blood work results.

Plaintiff’s counsel argued that plaintiff was entitled to defendant Nieves’ emergency room records without redaction. Plaintiff’s counsel noted that plaintiff and defendant Nieves

were drinking at a bar prior to the accident, and asserted plaintiff was entitled to defendant Nieves' blood work results. Plaintiff's counsel also asserted that plaintiff was entitled to obtain defendant Nieves' emergency room records directly from the provider.

Also, in response to the court's questions regarding why the deposition of nonparty Cynthia Nieves was noticed in Manhattan instead of Westchester County, where she lives, counsel for plaintiff stated that he had no opposition to the deposition being held in Westchester County.

With respect to the subpoena duces tecum, plaintiff's counsel agreed to withdraw the subpoena seeking insurance documentation in light of the insurance information received from nonparty Cynthia Nieves, as well as her letter stating that her family had no other liability insurance. Thereafter, counsel for defendant Nieves agreed to withdraw that branch of defendant Nieves' motion which sought to quash the subpoena duces tecum served on nonparty Cynthia Nieves for insurance documentation.

Although plaintiff's counsel agreed to withdraw the subpoena duces tecum for insurance documentation, plaintiff's counsel stated that he still wanted to depose nonparty Cynthia Nieves regarding the insurance coverage. Counsel for defendant Nieves maintained the objection to the deposition of Cynthia Nieves and argued that plaintiff had already been provided with the photographs of defendant Nieves' right shoulder which showed marks consistent with a passenger-side seat belt and defendant Nieves testified at his deposition regarding the marks on his right shoulder.

Analysis

Plaintiff's Motion for an Order Precluding Defendant Nieves

As noted in this court's prior order entered May 4, 2016, where a party defending a personal injury accident does not affirmatively place his or her medical condition in issue, disclosure of medical records relating to hospitalization immediately after an accident is not permissible (*Dillenbeck v Hess*, 73 NY2d 278). However, where a party defending a personal injury action affirmatively asserts his or her physical condition "either by way of counterclaim or to excuse the conduct complained of by the plaintiff" (*Koump v Smith*, 25 NY2d 287, 294 [1969]), defendant has placed his or her physical condition "at controversy" and waives the patient-physician privilege (*Dillenbeck v Hess*, 73 NY2d at 287-288; *Koump v Smith*, 25 NY2d at 294). The party seeking the discovery regarding a defendant's physical condition has the burden of demonstrating by competent evidence that defendant's physical condition is in controversy, such that any privilege as to the discovery is waived (*id.* at 300; *Dillenbeck v Hess*, 73 NY2d at 287). As recognized by plaintiff, the Court of Appeals has held that "a party should not be permitted to affirmatively assert a medical condition ... in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim" (*id.* at 287; *Koump v Smith*, 25 NY2d at 294).

This court previously held in its prior order that defendant Nieves had not affirmatively placed his physical condition in controversy by merely denying being the driver of the subject motor vehicle, such that he did not waive the privilege as to his emergency room records. Defendant Nieves, however, has now affirmatively asserted a defense based upon his physical condition, namely that marks on his right shoulder establish he was a passenger in the motor vehicle and was not the driver. By asserting this defense based on the photographic evidence, defendant Nieves places his physical condition in controversy.

It would be unfair to allow defendant Nieves to introduce evidence at trial regarding the condition of his right shoulder immediately after the accident, in the form of photographs or testimony, to support his defense that he was in the passenger seat, without allowing plaintiff and defendant Reyes to examine his emergency room records in order to evaluate defendant Nieves' new defense. Accordingly, plaintiff's motion seeking an order precluding defendant Nieves from introducing evidence at trial regarding the condition of his right shoulder after the accident is granted, unless defendant Nieves serves all parties with an unrestricted authorization for his emergency room records within the time period set forth herein.

Defendant Nieves' Motion for a Protective Order and an Order Quashing the Nonparty Subpoena

Turning to the parties' contentions with respect to the subpoena seeking the deposition of nonparty Cynthia Nieves (hereinafter "nonparty subpoena"), this court determines that defendant Nieves properly contends that the nonparty subpoena must be quashed and a new subpoena served by plaintiff on the nonparty.

The subpoena noticing the nonparty deposition is improper as it is returnable at the offices of plaintiff's counsel in Manhattan and the non-party witness resides in Westchester County and there is no indication that the nonparty is employed in New York County. CPLR 3110(2) requires that a nonparty deposition of a New York resident be taken in the county in which he or she resides, or in which he or she is regularly employed or has an office in which he or she regularly transacts business.

Moreover, the nonparty subpoena is facially defective since it failed to provide the nonparty with notice of the circumstances or reasons her deposition was being sought or was required as mandated by CPLR 3101(a)(4). Here, the nonparty subpoena only states that the nonparty is to "give testimony in this action on the part of the plaintiff, MICHAEL REYES." Contrary to defendant Nieves' contention, this language is insufficient to provide the nonparty with notice of the circumstances or reasons for her deposition.

Although plaintiff properly contends that any facial defect with respect to the notice requirement may be cured in the opposition papers to a motion to quash (*Velez v Hunts Point Multi-Svc. Ctr., Inc.*, 29 AD3d 104, 111 [1st Dept 2006]; *In re Aerco Intl., Inc.*, 40 Misc3d 571, 576 [Sup Ct, Westchester County 2013]), it is unclear that improper venue for a deposition in a subpoena may be cured. Notably, plaintiff failed to address the improper venue for the deposition in opposition to defendant Nieves' motion to quash. In view of the fact that plaintiff's

nonparty subpoena lacked both a proper venue for the deposition and notice of the circumstances or reasons for the deposition in the subpoena, an order quashing the subpoena with leave to reserve a subpoena with the proper venue and notice upon the nonparty is warranted.

Contrary to defendant Nieves' contention, however, plaintiff did not violate CPLR 3107. CPLR 3107 requires a party seeking the deposition of any person to give each adverse party twenty days' notice in writing, stating the time and place for the deposition, as well as the name and address of each person to be examined. Plaintiff served a copy of the nonparty subpoena on the defendants and the nonparty subpoena contained the information required by CPLR 3107. Accordingly, plaintiff sufficiently satisfied the requirement of CPLR 3107 which requires service of notice of depositions.

Additionally, although CPLR 2304 provides that a court may quash or modify a subpoena where the material demanded is not relevant to the issues in the action, plaintiff has established that nonparty Cynthia Nieves' deposition testimony may be relevant to certain issues in this action. CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The 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 (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

In the event that Defendant Nieves discloses his emergency room records and intends to introduce evidence at trial regarding the condition of his right shoulder immediately after the accident, in the form of photographs or testimony, to support his defense that he was in the passenger seat, nonparty Cynthia Nieves has relevant information as she was an eyewitness to his condition and took photographs of his physical condition immediately after the accident. Under these circumstances, plaintiff would be entitled to question nonparty Cynthia Nieves as her testimony is relevant and necessary to defendant Nieves' defense that he was not driving the subject motor vehicle at the time of the accident.

Nonparty Cynthia Nieves, who provided certain insurance information which was produced to plaintiff, also may have relevant information regarding the insurance coverage which may be available to cover defendant Nieves, as a member of Cynthia Nieves' household, and plaintiff is entitled to explore the insurance coverage at a deposition of Cynthia Nieves.

Plaintiff, however, failed to demonstrate that Cynthia Nieves' deposition testimony is relevant or necessary as to her attempt to gain access to the subject motor vehicle or her alleged misrepresentation that she was defendant Reyes, the owner of the motor vehicle. These issues go solely to nonparty Cynthia Nieves' credibility and are extrinsic to the relevant issues in this

action. Plaintiff's contention that nonparty Cynthia Nieves' attempt to gain access to the motor vehicle is an admission by defendant Nieves is completely baseless and without merit. Moreover, although plaintiff is entitled to inquire into these areas at trial with respect to Cynthia Nieves' credibility, should she be called as a witness at trial, discovery as to the credibility of a possible nonparty trial witness is not a proper subject for discovery.

Accordingly, the nonparty subpoena is quashed with leave for plaintiff to serve a new subpoena upon nonparty Cynthia Nieves correcting the defects in the original subpoena in accordance with this decision and order. In the event defendant Nieves serves all parties with an unrestricted authorization to obtain his emergency room records from the subject accident, then the nonparty deposition of Cynthia Nieves shall be limited to her observations of defendant Nieves' physical condition after the accident, the photographs which she took of his right shoulder immediately after the accident, and insurance coverage available to cover defendant Nieves. If, however, defendant Nieves fails to serve an unrestricted authorization for his emergency room records and he is precluded from introducing evidence at trial regarding his physical condition and the marks on his right shoulder, as set forth herein, then the deposition of nonparty Cynthia Nieves shall be limited to the insurance coverage since defendant Nieves' physical condition will no longer be at issue in the action.

In view of the foregoing, it is:

ORDERED that plaintiff's motion seeking to preclude defendant Nieves from introducing evidence at trial regarding his injuries or medical condition following the accident is granted to the extent that defendant Nieves is precluded from introducing evidence at trial or otherwise regarding the condition of his right shoulder after the subject accident, photographic or otherwise, unless defendant Nieves serves plaintiff, within seven days of entry of this decision and order, with an unrestricted authorization for his emergency room records regarding the subject accident; and it is further

ORDERED that the branch of defendant Nieves' motion seeking a protective order and an order quashing the subpoena served on nonparty Cynthia Nieves seeking her deposition is granted with leave for plaintiff to serve a new subpoena upon nonparty Cynthia Nieves; and it is further

ORDERED that if defendant Nieves fails to serve all parties with an unrestricted authorization for his emergency room records resulting from the subject motor vehicle accident within seven days of entry of this decision and order, any deposition of nonparty Cynthia Nieves shall be limited to liability insurance coverage available to cover defendant Nieves; and it is further

ORDERED that in the event defendant Nieves serves an unrestricted authorization for his emergency room records on all parties within seven days of this decision and order, any deposition of Cynthia Nieves shall be limited to her observations of defendant Nieves' physical condition after the accident, the photographs of defendant Nieves' right shoulder which she took

immediately after the accident, and liability insurance coverage available to cover defendant Nieves; and it is further

ORDERED that plaintiff is granted leave to serve a new and proper subpoena upon nonparty Cynthia Nieves, provided such service is effectuated by July 15, 2016; and it is further

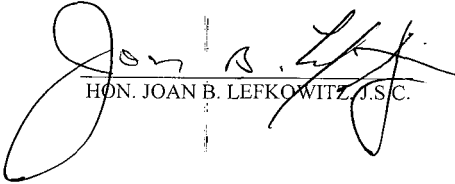
ORDERED that the deposition of nonparty Cynthia Nieves shall be held on or before August 15, 2016; and it is further

ORDERED that counsel for all parties shall appear in the Compliance Part, Courtroom 800, for a conference on August 17, 2016 at 9:30 A.M.; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry on all parties and the nonparty Cynthia Nieves within ten (10) days of entry.

The foregoing constitutes the order of this Court.

Dated: White Plains, New York
July 6, 2016



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

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