

Veltre v Rainbow Convenience Store, Inc.
2017 NY Slip Op 31808(U)
August 28, 2017
Supreme Court, New York County
Docket Number: 158486/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JOSEPH VELTRE and DENISE SALA VELTRE,

Index No. 158486/14

Plaintiffs,

Motion seq. no. 007

-against-

DECISION AND ORDER

RAINBOW CONVENIENCE STORE, INC.,
EUREKA REALTY CORP., and PEC, LLC,

Defendants.

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BARBARA JAFFE, J.S.C.:

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By notice of motion, defendant Eureka Realty Corp. moves pursuant to CPLR 3126 for an order striking plaintiff's complaint for failing to comply with a prior court order, and pursuant to CPLR 3124 for an order compelling plaintiff to comply with its discovery demands dated November 3 and 10, 2016. Plaintiff opposes.

By notice of cross motion, defendant Rainbow Convenience Store, Inc., moves pursuant to CPLR 3126 for an order striking the complaint for plaintiff's failure to comply with prior court orders, and pursuant to CPLR 3124 for an order compelling plaintiff to reply with its discovery demands dated November 11, 2016. Plaintiff opposes.

I. BACKGROUND

In this action, on February 6, 2014, plaintiff allegedly slipped and fell on snow or ice on the sidewalk in front of premises located in Manhattan. Plaintiff claims that the fall caused a

displaced fracture of his right knee, which required surgery, and at his deposition, he testified, as pertinent here:

- (1) he was not employed between 1987 to 2013 as he was “hurt,” had pneumonia, was in a coma, which led to his hips becoming infected and requiring bilateral hip surgery;
- (2) In December 2002, plaintiff had surgery on his right hip, and in February 2004, he had surgery on his left hip;
- (3) Since 1999, plaintiff has been disabled and is collecting Social Security Disability (SSD) Benefits for a disability related to his hips; and
- (4) In 2001, plaintiff was hospitalized with tuberculosis.

(NYSCEF 208).

In plaintiff’s bill of particulars, he alleges that the accident has caused him to sustain a permanent, partial disability; and that his injuries include “significantly impaired locomotion,” a “necessity for an extensive regimen of occupational, physical, psychological, analgesic and pharmacotherapeutic treatment and/or therapy,” and the “inability to attend to usual and/or customary duties, activities, and/or pursuits.” (NYSCEF 206).

II. EUREKA REALTY’S MOTION

A. Contentions

Eureka Realty seeks an authorization for the facility that maintains records from Mother Cabrini Hospital, which is where plaintiff was hospitalized with tuberculosis and is no longer operational, and asserts that discovery into plaintiff’s prior injuries and illnesses is warranted as he has placed his alleged disability in issue, having claimed that the accident caused him permanent and partial disability, even though he has been receiving SSD benefits since 1999, and as his prior hip injuries and surgeries are relevant to his claim that he now suffers from impaired

locomotion. It also contends that plaintiff's tuberculosis bears on his claims of disability, inability to perform his usual activities, and his psychological well-being and enjoyment of life. (NYSCEF 201).

Eureka Realty also requests:

- (1) an authorization for Dr. Justin Boyd, who treated plaintiff for the injuries at issue in this action, and who saw plaintiff in September 2016 and prescribed medication; Eureka Realty also requests a separate authorization permitting it to conduct an ex parte interview with Dr. Boyd;
- (2) an authorization for plaintiff's pharmacy, observing that plaintiff testified that he takes prescribed medication and alleges a need for pharmacotherapeutic treatment;
- (3) an authorization for Columbia Presbyterian, where plaintiff has been and is currently being treated for hypertension and diabetes, as these conditions may affect his overall disability, physical limitations, and loss of enjoyment of life; and
- (4) laser-color copies of all photographs taken at the accident scene by plaintiff's wife.

(*Id.*).

Plaintiff denies that Eureka Realty is entitled to the discovery it seeks, as he has not placed his entire injury history at issue, but rather limited his damages to his right knee. He asserts that as he visited Dr. Boyd only at Pain Management NY and as a patient of Pain Management, and as plaintiff has already provided an authorization for Pain Management's records, Eureka Realty is not entitled to an additional authorization for Dr. Boyd. Plaintiff contends that the pharmacy's records are not discoverable as he has not made a claim for expenses related to his medication, and as any records related to the medication would be included in Pain Management's records. (NYSCEF 220).

In reply, Eureka reiterates its prior arguments, and observes that plaintiff did not object to

its request for an ex parte interview with Dr. Boyd, nor for copies of the accident scene photographs. (NYSCEF 231).

B. Analysis

Section 3101(a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action. (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000]). What is “material and necessary” generally has been left to the sound discretion of the court and may include “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” (*Id.*, quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). It is irrelevant whether the material is admissible at trial, as pretrial discovery extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof. (*Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]).

Here, plaintiff claims that he is permanently and partially disabled from the accident, and that he now needs extensive and various treatment and the loss of his ability to perform his usual duties and activities. Plaintiff has thus placed in issue his prior hip injuries, especially as those injuries were allegedly the reason for his receipt of SSD benefits, and he now alleges that this accident resulted in a limitation of his locomotion. (*See e.g., Boyea v Benz*, 96 AD3d 1558 [4th Dept 2012] [defendants entitled to all records related to plaintiff’s pre-accident application for SSD benefits as broad allegations of injury, including inability or limited ability to perform normal daily functions and activities, could have resulted from accident or pre-accident injuries and previous claim of inability to work may be related to current claim]; *Kenyon v Caruso Dev. Co., Inc.*, 167 AD2d 966 [4th Dept 1990] [plaintiff’s claim of total disability years before incident

at issue relevant to plaintiff's current claim of disability])).

Moreover, to the extent that Dr. Boyd treated plaintiff recently, Eureka Realty is entitled to an updated authorization for Dr. Boyd's medical records of plaintiff. However, as Eureka Realty does not dispute that the records it received from Pain Management contained information related to any medication that Dr. Boyd prescribed for plaintiff, Eureka Realty is not entitled to an authorization for plaintiff's pharmaceutical records. And, as plaintiff does not allege that he suffered a loss of enjoyment of life, Eureka Realty fails to establish a connection between plaintiff's claimed injuries and previous tuberculosis diagnosis or his current treatment for hypertension and diabetes sufficient to warrant discovery into those ailments.

Absent an objection by plaintiff to Eureka Realty's request for an ex parte interview with Dr. Boyd or to the production of copies of the accident scene photographs, Eureka Realty is entitled to them.

III. RAINBOW'S MOTION

Rainbow contends that plaintiff's response to its November 11, 2016, demand was inadequate, and adopts Eureka Realty's arguments. (NYSCEF 223). As pertinent here, Rainbow requests an authorization for plaintiff's Duane Reade records and copies of the accident scene photographs allegedly taken by plaintiff's wife. (NYSCEF 227).

In opposition, plaintiff asserts that its January 5, 2017, response to Rainbow's demand is sufficient. (NYSCEF 238).

Rainbow is not entitled to disclosure of plaintiff's Duane Reade records for the reasons set forth above, but it is entitled to the photographs, to the extent not already provided.

IV. CONCLUSION

Accordingly, it is hereby

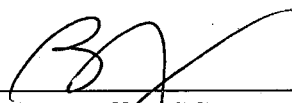
ORDERED, that defendant Eureka Realty Corp.'s motion to strike or compel is granted to the extent of directing that plaintiff provide it, within 20 days of the date of this order, with:

- (1) HIPAA-compliant authorizations for any records or treatment related to all of plaintiff's hip injuries and surgeries;
- (2) a HIPAA-compliant authorization permitting Eureka Realty's counsel to conduct an ex parte interview with Dr. Boyd ; and
- (3) photographs of the accident scene taken by plaintiff's wife, to the extent not already provided; it is further

ORDERED, that the remainder of Eureka Realty's motion is denied; and it is further

ORDERED, that defendant Rainbow Convenience Store, Inc.'s cross motion to strike or compel is granted solely to the extent of directing plaintiff to provide, within 20 days of the date of this order, the accident scene photographs, and is otherwise denied.

ENTER:



Barbara Jaffe, JSC

HON. BARBARA JAFFE

DATED: August 28, 2017
New York, New York