Moody v Elliot
2017 NY Slip Op 33537(U)
May 24, 2017
Supreme Court, Westchester County
Docket Number: Index No. 68637/2015
Judge: Joan B. Lefkowitz

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

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WILLIAM MOODY,

Plaintiff,

-against-

DECISION and ORDER
Index No. 68637/2015
Motion Date: May 22, 2017
Seq. Nos. 1 and 2

VERONICA ELLIOT,

Defendant.

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LEFKOWITZ, J.

The following papers were read on defendant's motion for an order: (1) striking plaintiff's complaint or, in the alternative, precluding plaintiff from offering any testimony at the time of trial; (2) granting defendant the costs of this motion and imposing sanctions against plaintiff for his failure to provide the requested discovery; and (3) such other and further relief as this court deems just and proper.

Order to Show Cause dated April 20, 2017; Defendant's Affirmation in Support; Exhibits A-D

The following papers were read on plaintiff's motion for an order sanctioning defendant and granting plaintiff costs related to his opposing defendant's motion.

Order to Show Cause dated May 8, 2017[1]; Affirmation in Opposition to Defendant's Motion and in Support of Plaintiff's Motion; Exhibits 1-18
Defendant's Affirmation in Opposition

Upon the foregoing papers and proceedings held on May 22, 2017, these motions are determined as follows:

[1]The Discovery Motion Briefing Schedule dated April 5, 2017, in regards to defendant's motion states no cross motion shall be made. The court issued a second Discovery Motion Briefing Schedule that same day permitting plaintiff to move for costs and sanctions relating to defendant's motion and directing opposition papers be filed by May 8, 2017. The court issued an order to show cause dated May 8, 2017, relating to plaintiff's motion, extending the time for defendant to file opposition papers to May 15, 2017.

In this action plaintiff alleges serious personal injuries arising from an automobile accident that occurred on December 12, 2012. Plaintiff has been involved in several other incidents and/or lawsuits before this one. The parties executed a preliminary conference stipulation dated March 17, 2016, so-ordered by this court (Lefkowitz, J.). On or about December 2, 2015, defendant served plaintiff with a notice to produce seeking, among other things, authorizations for medical records relating to plaintiff's other incidents that occurred on: September 13, 2013; August 28, 2013; February 24, 2012; December 29, 2011; and September 14, 2011.[2] Plaintiff was deposed on October 19, 2016.[3] Thereafter defendant served plaintiff with two more notices to produce, on or about October 28, 2016, and January 25, 2017, respectively.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." 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 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden 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*, 74 AD3d at 1140). 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]).

Defendant sought eight medically-related authorizations in her notice to produce dated Octboer 28, 2016. The record on this motion reveals that all of these authorizations have been provided. Defendant further sought no-fault or workers compensation files for six occurrences that are not the subject of the present lawsuit. In his response to this notice plaintiff stated that no such files existed for three of those occurrences: September 14, 2011 (a food poisoning incident); September 3, 2013 (no incident occurred on this date); and an A&P assault claim (plaintiff claimed this was neither a work-related incident nor a car accident but rather he was shoved and grabbed from behind and his neck was aggravated). As to two of the other occurrences, plaintiff provided to defendant authorizations, each dated December 15, 2016, to obtain from Geico the no-fault records relating to the occurrences of February 24, 2012, and December 29, 2011. However, the record does not include a copy of any authorization relating to

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[2]In support of her motion defendant attaches as part of Exhibit B (document 24 on the NYSCEF website) only the first page of this notice.

[3]Defendant asserts that to date plaintiff has not served her with a signed transcript and that the transcript was sent plaintiff on or about November 9, 2016. The transcript is considered herein pursuant to CPLR 3116(a).

the occurrence of September 13, 2013. This authorization should be provided.

Regarding his professional status, plaintiff testified at his deposition that his highest level of education is DDS, doctor of dental surgery, that he acquired his license on July 3, 1974, that he was a dentist, and that he was a graduate of SUNY Buffalo School of Dentistry (Exhibit D1 and D2 attached to defendant's affirmation in opposition; pages 9; 66; 104; 124; 155). Defense counsel questioned plaintiff about suspensions and disciplinary actions taken against him in regards to his dentistry practice in 1996, 1998 and 2010 (66-73). Plaintiff testified that before the accident he was working as a dentist (216). He further testified that he was not making a claim for loss of earnings as a result of the subject accident and that he had retired prior to the accident. His counsel clarified that he retired shortly before this accident (217). Plaintiff stated that when he worked as a dentist he did not accept no-fault billing (233).

In the notice to produce dated October 28, 2016, defendant also sought authorizations relating to any and all licensing records maintained by the New York State Board of Regents, Board of Dentistry. In his response plaintiff asserted that this request was overly broad, intended to harass, impalpably improper, not likely to lead to discoverable information and that the information was privileged. Presently, plaintiff states he is a dentist who retired prior to the subject incident. Plaintiff states that he does not seek lost wages. Defendant does not discuss why she seeks these records and their relevance to the subject matter. She simply states that at plaintiff's deposition, among other inquiries, she questioned him about his dentistry license.

The court finds that defendant has not demonstrated that access to plaintiff's licensing records maintained by the New York State Board of Regents, State Board of Dentistry, have any relevance in the present matter relating to an automobile accident and it appears that defendant seeks this disputed discovery solely to impeach plaintiff's credibility.

At his deposition plaintiff testified that he did not retain any attorneys to represent him in the A&P matter (99). In the notice to produce dated October 28, 2016, defendant also sought authorizations relating to all non-privileged portions of legal files maintained by the law office that represented plaintiff in regards to the alleged assault at A&P, and five named lawyers/law firms. Plaintiff objected to this demand as overly broad, intended to harass, impalpably improper and unlikely to lead to discoverable information. Presently, plaintiff asserts that all of these files relate to non-personal injury litigation and therefore have no relevance to the claims in this case. Defendant asserts that at three compliance conferences there was a discussion as to plaintiff's inability to recall why he had retained, or who he had retained as prior counsel for the A&P assault. Defendant refers to plaintiff's deposition testimony at pages 218-32. A review of that part of the deposition transcript reveals that plaintiff retained Richard Portale, another attorney, in a matter involving an altercation. In his affidavit dated April 21, 2017, plaintiff detailed his relationship to the five attorneys whose files defendant seeks, noting that they represented him in various, non-personal injury matters.

Again, the court finds that defendant has not demonstrated that access to these requested legal files is in any way relevant to the present matter relating to an automobile accident.

The last item sought by defendant in her notice to produce dated October 28, 2016, was an authorization to obtain any and all attendance records from New York Sports Club which has been provided.

In the notice to produce dated January 25, 2017, defendant sought an authorization for White Plains Radiology Associates. This authorization, dated March 24, 2017, has been provided. In that same notice defendant further sought no-fault or workers compensation files for seven occurrences (one of which is the subject of the present lawsuit). At his deposition plaintiff testified that the incident on March 3, 2013, involved an assault at the A&P and the August 28, 2013, incident related to a stroke plaintiff allegedly suffered as a result of a neck manipulation during physical therapy for the injuries sustained as a result of the subject incident. Plaintiff presently states these are not work-related or car-related incidents so that there are no no-fault or workers' compensation files that can be provided. Furthermore, in light of his deposition testimony regarding these incidents, it appears that plaintiff already has provided to defendant medical authorizations relating to the incidents and the injuries he allegedly suffered as a result. The incident that occurred on December 18, 2012, relates to the incident at issue in the present matter and authorizations already have been provided. Plaintiff asserts that although the incidents on December 29, 2011 and February 1, 2013, do not involve no-fault or work-related losses, he nevertheless provided to defendant authorizations to obtain whatever records are available relating to these two incidents from Geico.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that the branch of defendant's motion seeking proper relief is granted only to the limited extent that plaintiff is directed to provide to defendant, on or before May 31, 2017, an authorization permitting her to obtain the no-fault records and/or workers' compensation records relating to the occurrence of September 13, 2013, and all other branches of defendant's motion are denied; and it is further,

ORDERED all branches of plaintiff's motion are denied; and it is further,

ORDERED that the parties are directed to appear at a conference in the Compliance Part, Room 800, on June 8, 2017, at 9:30 a.m.; and it is further,

ORDERED that defendant shall serve a copy of this order with notice of entry upon plaintiff within ten days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
May 24, 2017

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