Ryan v BMR-Landmark at Eastview LLC
2018 NY Slip Op 30195(U)
January 30, 2018
Supreme Court, New York County
Docket Number: 150878/2015
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **12**
Justice

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JOSEPH A. RYAN, JR.,

Plaintiff,

- v -

BMR-LANDMARK AT EASTVIEW LLC, *et al.*,

Defendants.

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INDEX NO. 150878/2015

MOTION DATE

MOTION SEQ. NO. 4

DECISION AND ORDER

THE PIKE COMPANY,

Third-Party Plaintiff,

- v -

UNITED IRON, INC.,

Third-Party Defendant.

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JOHN MORIARTY & ASSOCIATES, INC.,

Second Third-Party Plaintiff,

- v –

UNITED IRON, INC. and GARITO CONTRACTING, INC.,

Second Third-Party Defendants.

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Plaintiff ironworker was injured in the course of a construction accident. (NYSCEF 135). He seeks an order striking the answers of defendants The Pike Company, United Iron, Inc., John Moriarty & Associates, Inc. (JMA), Garito Contracting, Inc., and BMR-Landmark at Eastview

LLC, Biomed Realty Trust, Inc., and Biomed Realty, LP (collectively BMR) or alternatively, compelling them to comply with his discovery demands, issuing a protective order limiting disclosure of his prior medical records, and extending the time for the filing of the note of issue. (NYSCEF 132). BMR, JMA, and Garito oppose insofar as plaintiff seeks to strike their answers. (NYSCEF 184, 182). United Iron opposes all of the relief requested, as does Pike, which also cross-moves for an order striking plaintiff's complaint and compelling him to comply with its discovery demands. (NYSCEF 163).

I. RELEVANT FACTS

Approximately ten years ago, plaintiff fractured his left elbow in a work-related accident. (NYSCEF 159, 187). In 2011, he performed clean-up work at the World Trade Center and, two years ago, as part of the World Trade Center Health Program, underwent a physical examination which revealed that he had high blood pressure and needed to lose weight. (*Id.*).

On January 5, 2015, he allegedly tripped and fell while working, injuring his left shoulder and cervical spine, and soon thereafter commenced this action. (NYSCEF 187). He alleges that his injuries are aggravated and exacerbated by a non-specified pre-existing condition, and have resulted in, *inter alia*, total disability, anxiety and depression, lost income, and lost future earnings. (*Id.*).

On January 28, 2016, plaintiff served all defendants with a discovery demand. (NYSCEF 150). On February 22, 2017, Pike responded and served plaintiff with demands for medical authorizations for, as relevant here, records from Local 580 Health and Welfare, Empire Blue Cross/Blue Shield, and the World Trade Center Health Program. (NYSCEF 167). On or about March 15, 2017, plaintiff objected to Pike's demand, claiming that the records "are not germane to the issues raised in this matter." (NYSCEF 170).

At a deposition held on March 16, 2017, plaintiff testified, as pertinent here, about his prior accident, the resulting elbow injury and treatment, and that he had undergone a physical examination as part of the Word Trade Center Health Program. (NYSCEF 159). By court order dated April 19, 2017, plaintiff was directed to respond to demands for the authorizations and to appear for further deposition. (NYSCEF 174).

On October 4, 2017, plaintiff filed the instant motion. (NYSCEF 132, 155). On November 22, 2017, and November 27, 2017, Pike supplemented its response to plaintiff's discovery demand. (NYSCEF 178, 180).

II. RELEVANT CONTENTIONS

Since this motion was submitted, BMR, JMA, and Pike have appeared for depositions, and both United Iron and Garito represent that they intend to appear pursuant to a court order dated January 17, 2018. Thus, I need not address issues concerning defendants' depositions or whether their answers should be stricken for failure to appear.

Plaintiff contends that the remaining discovery issues must be resolved by motion, as counsel are unable to agree on certain matters, and given his sole claim of injuries to his left shoulder and cervical spine, there is no need to disclose medical records pertaining to his elbow. He thus seeks a protective order. He also asserts that Pike's response to his demands is intentionally and contumaciously incomplete. (NYSCEF 134).

Pike argues that plaintiff's motion is procedurally defective absent an affirmation stating that he conferred with his adversaries in a good faith effort to resolve these issues and it denies that such efforts were expended. It asserts entitlement to plaintiff's medical records concerning his elbow given his claims of psychological injuries, loss of enjoyment of life, permanent disability, and lost earnings. Moreover, it argues, plaintiff's broad allegations of soft tissue

injuries, and injuries aggravated and exacerbated by a pre-existing condition render virtually all of plaintiff's medical history relevant or reasonably calculated to lead to admissible evidence, which would require his continued deposition previously ordered.

Pike claims to have responded to all discovery demands, except those which are objectionable or seek information and documents not in its possession. Rather, it maintains that plaintiff has demonstrated a willful and contumacious pattern of conduct by failing to respond to two discovery demands and provide authorizations. Thus, Pike asserts that the complaint should be stricken or, in the alternative, that plaintiff be compelled to respond to its demands, including those for the authorizations. (NYSCEF 163).

In opposition, United Iron argues plaintiff places his entire physical condition in issue by claiming total disability, and that his injuries were aggravated and exacerbated by pre-existing conditions. It asserts entitlement to records revealing whether any of his alleged injuries are attributable to prior work-related accidents, and that a protective order would prejudice its defense, as would an order prohibiting a further deposition of plaintiff after the documents are produced. (NYSCEF 157).

In reply, and in opposition to Pike's cross-motion, plaintiff reiterates his arguments, asserts that he responded to Pike's discovery demands, and highlights testimony in which he states that he has never been treated for injury to any body part in issue. (NYSCEF 187).

Defendants BMR, JMA, and Garito take no position as to the discovery of plaintiff's medical records or his further deposition. (NYSCEF 184, 182).

III. ANALYSIS

A. 22 NYCRR § 202.7

A discovery motion may be denied for noncompliance with 22 NYCRR § 202.7, which requires that it be accompanied by an affirmation of good faith establishing that the movant attempted to resolve the outstanding discovery issues before filing the motion. (*Natoli v Milazzo*, 65 AD3d 1309, 1310-1311 [2d Dept 2009]; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180, 182 [1st Dept 2006]). Where, however, the record establishes the movant's good faith efforts, and that any attempt to resolve the dispute non-judicially would be futile, this technical defect may be overlooked. (*Loeb v Assara New York I L.P.*, 118 AD3d 457, 458 [1st Dept 2014]; *N. Leasing Sys., Inc. v Estate of Turner*, 82 AD3d 490, 490 [1st Dept 2011]; *Carrasquillo ex rel. Rivera v Netsloh Realty Corp.*, 279 AD2d 334, 334 [1st Dept 2001]).

Although plaintiff's affirmation of good faith contains no reference to communications between the parties, he specifically references such communications and discussions in his affirmation in support of the motion, and states that judicial intervention is necessary as attempts to resolve these matters among counsel have failed. Thus, he has sufficiently complied with the statute. (*Loeb v Assara New York I LP*, 118 AD3d 457, 457 [1st Dept 2014] [affirmation of good faith sufficient when viewed in conjunction with attorney's affirmation in support]). And notwithstanding Pike's contention that plaintiff made no good faith efforts to resolve the dispute, the transcript of plaintiff's deposition reflects that the parties discussed the dispute on at least one occasion and agreed to proceed with plaintiff's deposition pending its resolution. Moreover, counsels' antagonistic approach to recent compliance conferences indicates that this is a highly contentious dispute which would not have been resolved without judicial intervention.

B. Striking the complaint

Absent a preceding motion to compel discovery, Pike's motion to strike the complaint is premature. (*See W & W Glass, LLC v 1113 York Ave. Realty Co. LLC*, 83 AD3d 438, 438 [1st Dept 2011] ["there appear to be no prior motions by plaintiff to compel disclosure, rendering any motion to strike the answer pursuant to CPLR 3126 premature"]). In any event, the record does not reflect any willful or contumacious conduct by plaintiff, as he has provided discovery except as it pertains to those matters at issue here.

C. Compelling discovery

1. Authorizations for prior medical records

A plaintiff's waiver of the physician-patient privilege is limited to those conditions affirmatively placed in controversy. (*Spencer v Willard J. Price Assocs., LLC*, 155 AD3d 592, 592 [1st Dept 2017]; *Diako v Yunga*, 148 AD3d 438, 438 [1st Dept 2017]; *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014]). For records of prior treatment to be discoverable, the movant must establish that they are linked to "the same anatomical parts, organs or member, as well as those body systems or body functions that are alleged to have been affected, with reasonable temporal limitations," and where that link is not immediately apparent, the opinion of a medical expert may be used to establish it. (*Wolf v Walgreens Boots Alliance, Inc.*, 2017 NY Slip Op 31225[U], *1 [Sup Ct, New York County 2017]).

Here, absent any contention that a link between plaintiff's elbow injury and his shoulder and back injuries is immediately apparent and as no expert evidence as to such a link is offered, neither Pike nor United Iron establish entitlement to records of the elbow injury. (*See Diako*, 148 AD3d at 438 [hospital records sought not relevant, as plaintiff did not receive treatment or testing at hospital before accident for any injuries claimed in action]). Nor do they establish

entitlement to records of his prior physical examinations. (*See Spencer*, 155 AD3d at 592 [defendant not entitled to records of high blood pressure where plaintiff alleged injury to knees, back, neck, and shoulder]). Additionally, a claim for loss of enjoyment of life does not entitle defendants to discovery of prior conditions that could impact the plaintiff's ability to enjoy life, even where a plaintiff claims total, permanent disability, or lost earnings. (*Diako*, 148 AD3d at 438; *Gumbs,* 114 AD3d at 574).

Plaintiff thus demonstrates his entitlement to a protective order relating to the records of his prior elbow injury (*see LaPierre v Jewish Bd. of Family & Children Servs., Inc.*, 47 AD3d 896, 896 [2d Dept 2008] [protective order granted for documents not subject to disclosure under CPLR 3101(a)]), and there is no need for a further deposition (*see Karanikolas v Elias Taverna, LLC*, 128 AD3d 905, 906 [2d Dept 2015] [request for further deposition denied as defendant failed to show it would lead to information material and necessary to its defense]).

2. Other discovery

In light of the above, Pike's demand for a response to its November 2016 discovery request need not be addressed, and as plaintiff offers evidence that he provided all of the authorizations sought in Pike's February 2017 discovery request, except the three authorizations at issue in this motion, Pike's motion to compel is denied.

Pike's November 2017 discovery response indicates that discovery demand 44 will be supplemented. Thus, Pike must provide a supplementary response to it.

D. Note of issue

As the note of issue deadline has since been extended, plaintiff's request for a further extension need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is granted to the extent that a protective order is issued with respect plaintiff's medical records pertaining to his prior elbow injury, Pike must supplement its November 22, 2017 discovery response as to demand 44, and is otherwise denied; and it is further

ORDERED, that Pike's cross-motion is denied in its entirety.

1/30/2018
DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE