

Cuevas v Baruti Constr. Corp.
2018 NY Slip Op 32117(U)
July 31, 2018
Supreme Court, Bronx County
Docket Number: 306798/2013
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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GIDAR MANUEL CUEVAS,

Plaintiff,

Index No. 306798/2013

v.

DECISION AND ORDER

BARUTI CONSTRUCTION CORP.,

Defendant.

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GONZALEZ, D.:

Upon: i) the Order to Show Cause, by Judy Lu, Esq., attorney for the defendant, Baruti Construction Corp. (“Baruti”), for an Order: a) compelling plaintiff to submit to a vocational rehabilitation examination; b) compelling plaintiff to provide HIPAA compliant and *Arons* trial authorizations for the NYC Division of Liens & Recovery, USA/TPA, Klee & Wolf LLP, Rite Aid Pharmacy, the New York State Workers Compensation Board Carrier, the Internal Revenue Service, the Department of Labor, and the Local 12A Union; c) compelling plaintiff to provide HIPAA compliant and *Arons* authorizations and trial authorizations for all medical records pertaining to plaintiff’s prior hand injury from March 31, 2011, all pleadings and proceedings filed in connection with same, and authorization to obtain plaintiff’s worker’s compensation file in connection with same, as well as trial authorizations from the medical records providers and the workers’ compensation board and carrier; d) staying the trial of this action pending the above discovery and authorizations being provided and an opportunity being given for defendant’s experts to review the discovery subpoenaed to Court and issue supplemental expert reports; and e) such other and further relief as the Court may deem just and proper; ii) the Affirmation in Opposition, dated June 11, 2018, by Nicholas E. Tzaneteas, Esq., attorney for the plaintiff; and iii) the Reply Affirmation, dated June 14, 2018, by Judy Lu, Esq.

PROCEDURAL HISTORY

The action was commenced by the filing of a Summons and Verified Complaint on November 12, 2013. Issue was joined by service of the defendant's Answer, on or about February 12, 2014. The plaintiff served a bill of particulars, on or about August 27, 2014; a supplemental bill of particulars, on or about July 30, 2015; and October 21, 2015.

A note of issue and certificate of readiness was served and filed on or about February 23, 2016. The plaintiff made a motion for partial summary judgment which was decided by Justice Guzman's order, dated June 29, 2017. The plaintiff's motion as to liability against defendant Baruti regarding the Labor Law Section 240(1) claim was granted. The defendant filed a Notice of Appeal of Justice Guzman's order on December 4, 2017. The defendant's appeal was perfected, fully submitted and argued on May 10, 2018. No decision has been rendered by the Appellate Division to date.

The plaintiff served another supplemental bill of particulars and an expert economist disclosure, on or around February 23, 2018. On or around May 14, 2018, the defendant served a demand for trial and *Arons* authorizations. The plaintiff served a notice of rejection on or around May 15, 2018.

There have been multiple pre-trial conferences in the pre-trial and special trial part. The trial of this matter is currently scheduled for July 31, 2018, pending the decision of the Appellate Division.

FACTUAL BACKGROUND

This is an action for personal injuries allegedly sustained by the plaintiff arising from an accident that occurred on September 3, 2012, at the premises located at 141 Phillips Avenue, Riverhead, in the County of Suffolk, City and State of New York while performing his job duties.

Baruti, the general contractor, hired the plaintiff's employer, Dynasty Roofing Siding and Waterproofing, LLC ("Dynasty"), to perform work at the premises.

The bill of particulars, dated August 27, 2014, the supplemental bill of particulars, dated July 30, 2015, and October 21, 2015, alleged economic loss of wages and medicals to be provided once the plaintiff retains an expert economist to perform said calculations, along with a life care plan, estimated to amount to exceed five million dollars. The plaintiff served the defendant with the plaintiff's expert economist disclosure, dated February 23, 2018, and the economist report, dated February 12, 2018, which alleges future medical costs and future loss of wages.

The defendant argues they are entitled to a vocational rehabilitation examination of the plaintiff by their own expert. In addition, the defendant argues that the plaintiff has failed to provide trial and *Arons* authorizations. The defendant seeks a stay of the trial until a vocational rehabilitation examination of the plaintiff is conducted. Further, in order to conduct said exam, the defendant needs trial authorizations.

The plaintiff opposes the motion arguing that defendant was aware of the plaintiff's intent to retain an economist expert. The plaintiff contends that all authorizations have been provided except for *Arons* authorizations since it is post-note of issue discovery. The plaintiff submits proof of providing authorizations by providing the Court with a copy of the trial authorizations with his opposition.

DISCUSSION OF LAW

It is well settled that 22 NYCRR 202.21 (d) permits the Court to authorize additional discovery "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness" that would otherwise cause "substantial prejudice."

(*Audiovox Corp. v Benyamini*, 265 AD2d 135, 140 [2000]; *Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 168 AD2d 376 [1st Dept 1990])

The defendant has failed to establish that there are any “unusual or unanticipated circumstances” permitting a vocational rehabilitation examination of the plaintiff. The plaintiff’s bill of particulars, dated August 27, 2014, the supplemental bill of particulars, dated July 30, 2015, and dated October 21, 2015, gave defendant sufficient notice that an economist expert statement was going to be served regarding future medical costs and future loss of wages.

The plaintiff’s expert disclosure statement, dated February 23, 2018, and third supplemental bill of particulars, dated February 23, 2018, do not present any new and unanticipated claims to warrant a post-note of issue vocational rehabilitation examination of the plaintiff. The defendant waited more than two years post note of issue to seek a vocational rehabilitation examination of the plaintiff. Further, the defendant waited four months to serve the instant order to show cause despite receiving the expert disclosure in February of 2018.

The defendant has failed to show any “unusual or unanticipated circumstances” that would warrant *Arons* authorizations to conduct ex parte interviews of the plaintiff’s medical providers more than two years after the plaintiff filed his note of issue. It is well settled that a defendant seeking authorizations permitting ex parte interviews of a plaintiff’s healthcare providers must demonstrate “unusual or unanticipated circumstances,” pursuant to 22 NYCRR 202.21 (d), to obtain such disclosure after the filing of a note of issue (*Arons v Jutkowitz*, 9 NY3d 393, 441 [2007]; *Shefer v Tepper*, 73 AD3d 447 [1st Dept 2010]).

The Court may grant “a stay of proceedings in a proper case, upon such terms as may be just” (CPLR 2201). Here, the defendant has failed to satisfy his burden in establishing that a stay is appropriate under the circumstances.

ACCORDINGLY, based on the record before the Court, a review of the Court file, the applicable law, and due deliberation; it is hereby

ORDERED, that the defendant's motion to compel a vocational rehabilitation examination of the plaintiff is DENIED; and it is further

ORDERED, that the defendant's motion to provide *Arons* authorizations is DENIED; and it is further

ORDERED, that the defendant's motion to provide trial authorizations is DENIED; and it is further

ORDERED, that the defendant's motion for a stay of the trial is DENIED.

This constitutes the Decision and Order of the Court.

Dated: July 31, 2018
Bronx, New York

E N T E R:



HON. DORIS M. GONZALEZ, J.S.C.