Dudley v City of New York
2018 NY Slip Op 32977(U)
October 1, 2018
Supreme Court, Bronx County
Docket Number: 0302983/2015
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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AARONITA DUDLEY,

Index No.: 0302983/2015

DECISION/ORDER

Plaintiff(s),

Present:
HON. MITCHELL J. DANZIGER

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF SANITATION, AND THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendant(s).

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Recitation as Required by CPLR §2219(a): The following papers were read on this Motion to Compel	Papers Numbered
Notice of Motion and Affirmation in Support with Exhibits	1
Affirmation in Opposition	2
Reply Affirmation in Support	3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants move for an order pursuant to CPLR §3124 compelling plaintiff to comply with the City's Notice of Discovery and Inspection dated January 3, 2018, and to comply with the orders of this Court dated October 27, 2015, November 1, 2016 and June 27, 2017. Moreover, defendants seek to have plaintiff appear for a continued deposition on certain subjects, some marked for a rule at her first deposition. Defendants also seek to extend the time of the City to hold an IME until 60 days from the City's designation of an IME doctor.

Initially, and after a full review of the record, it is clear that in regard to the City's Notice of Discovery and Inspection and to the Court's prior discovery orders, defendants seeks two items: Aron's compliant authorizations and plaintiff's full social security number. First, the Court notes that plaintiff was directed to produce Aron's compliant authorizations on at least three occasions by this court: in the preliminary conference order dated October 27, 2015, and in two subsequent compliance conference orders dated November 1, 2016 and June 27, 2017. Plaintiff has not moved

for a protective order relating to the Aron's complaint authorizations. Moreover, it is clear that plaintiff response to the Defendants Notice for Discovery and Inspection, annexed as exhibit "B" to the opposition, does not included Aron's compliant authorizations. Plaintiff offers no excuse for her failure to provide the same. Instead, in response to the defendants' demand number 7 (which seeks the Aron's authorization"), plaintiff provided HIPAA authorizations. There is no argument in plaintiff's opposition against the exchange of Aron's authorization. Therefore, plaintiff is directed to provide defendants with Aron's authorization within 30 days of City's service of this order with notice of entry.

Turning to defendants' demand for plaintiff's full social security number, the City contends that the disclosure of the same is required so that it may comply with 42 U.S.C.A. §1395y, a federal law requiring the report of the number for Medicare purposes. In support, the City cites to *Bey v. City of New York*, CV 2011-5833 BMC MDG, 2013 WL 439090 [EDNY Feb. 5, 2013]). However, the Court finds the instant matter distinguishable from *Rey*. In *Rey*, the court directed plaintiff to disclose her social security number when the matter was being settled by the parties. In light of the fact that monies were being awarded to that plaintiff, the court found that failure to provide the social security number might result in serious consequences to the defendant in failing to comply with a statutory duty to report the identity of a claimant who is entitled to Medicare benefits. In this matter, there is nothing in the record to suggest that the parties are in the process of settlement. The Court notes that the City's entire argument in support of gaining access to plaintiff's social security number rests on *Rey*. Therefore, at this time and based upon the record before it, the Court finds that the disclosure of plaintiff's full social security number is not warranted. This denial is without prejudice for defendants to seek further relief, if so advised.

Turning to defendants' request for a continued deposition, defendants seek additional testimony as to plaintiff's knowledge of the particular area of snow or ice upon which she slipped, and plaintiff's lost earnings. At her first deposition, plaintiff's counsel directed plaintiff not to answer questions relating to her slip and fall. In particular, plaintiff was directed not to answer the question "When you fell, how far did you slip." Plaintiff's counsel objected on the ground that he did not understand what defense counsel meant by "how far." Defense counsel did not rephrase the question but instead asked if plaintiff's counsel was directing plaintiff not to answer, to which

plaintiff's counsel responded, "I'm directing her not to answer until you rephrase it in a way that's understandable." Plaintiff's counsel also directed plaintiff not to answer the question, "Immediately after you fell, did you know exactly what portion of the snow and ice caused you to fall?" Again, plaintiff's counsel directed plaintiff not to answer because "the question is very unclear." On both of these counts, the Court disagrees with plaintiff's counsel.

In her notice of claim, plaintiff alleges she was injured as a result of her, "falling upon hazardous and dangerous snow and ice on the surface of the sidewalk." During her deposition, plaintiff testified that she didn't recall if she fell forward, backward, or to the side, but that she "just slipped." Moreover, she testified that she "slipped on ice, my foot slipped" (exhibit F to the motion at p. 26). Based upon the fact that plaintiff admittedly slipped on ice, the follow up question by defense counsel "how far did you slip" is not only relevant, but is clear. The Court is at a loss as to how plaintiff's counsel found this question to be unclear. When one slips on ice, the nature of that action inherently means that one's foot moves across ice, for some distance, before the act of slipping is over. Plaintiff's foot could have slipped for a short distance before she fell, or plaintiff's foot could have slipped a longer distance before she fell. Plaintiff's counsel's direction for her not to answer this question was inappropriate and unwarranted.

Moreover, plaintiff's counsel also improperly directed plaintiff not to answer the question relating to plaintiff's knowledge of the particular portion of the snow and ice that caused her to fall. Indeed, plaintiff testified that in the past, when she traversed this section of the sidewalk after a snow storm, there was usually a pathway shoveled. However, on the date of the accident, there was no pathway shoveled (id at p. 23). Clearly, the City is seeking information as to the particular area of ice that caused plaintiff to slip. This question is entirely relevant because in order for plaintiff to ultimately prevail on her claims against the City, it must be shown that the City had actual or constructive notice of the snow and ice that caused plaintiff's accident, or that the City caused or created the particular condition that caused plaintiff's accident (*Pena v. City of New York*, 161 A.D.3d 522 [1st Dep't., 2018] [where the court found that notice of the ice in a particular cross-walk was required]); *Rodriguez v. Bronx Zoo Restaurant*, 110 A.D.3d 412 [1st Dep't., 2013][where the court held that an issue of fact was present as to whether defendant has notice of snow and ice on the sidewalk, in front of their franchise restaurant"). Here, in light of plaintiff's testimony that there

was usually a path on the sidewalk where she fell, she may be able to testify as to the location of the snow and ice on the sidewalk, that caused her to slip. If she cannot testify to that information, that is fine, but plaintiff's counsel should not have directed her not to answer. Defendants also seek a further deposition in connection with plaintiff's claims for lost earnings. At the deposition, plaintiff's counsel again directed plaintiff not to answer questions in this regard because plaintiff was not claiming any lost earnings. However, in the supplemental bill of particulars submitted as exhibit "C" to plaintiff's opposition, plaintiff alleges that she lost $265, 200.00 in past lost earnings, and claims future lost earnings. Therefore, questioning on this claim is completely relevant and proper.

Based on the foregoing, the Court directs plaintiff to appear for a further deposition. At said deposition, defendants may question the plaintiff as to her knowledge (if any) of the particular area of the sidewalk where the ice that cause her to slipped was located and her knowledge (if any) of the distance her foot or body traveled from the time she placed her foot on the sidewalk until she fell to the ground. Moreover, defense counsel may also inquire at to plaintiff's lost past and future earnings claim as delineated in the supplement bill of particulars. Plaintiff's counsel shall refrain from directing plaintiff not to answer questions on these matters, but may make objections to form so as to preserve the same for trial.

The City seeks an extension of time to hold an IME until 60 days after it designates an IME doctor. The Court notes that the last compliance conference order directed the City to designate physician(s) in writing by "60 days after plaintiff's EBT" and to hold said examination by "60 days after designation." In light of the fact that the plaintiff's deposition is to be continued, the clock has not yet started for the City to designate. Therefore, the direction set forth in the last compliance order remains in full force and effect and the City's time to act shall commence at the close of plaintiff's continued deposition.

The City shall serve a notice for continued deposition within 30 days of the entry date of this order. Moreover the City is directed to serve a copy of this order, with notice of entry, upon plaintiff, within 30 days of the entry date. As a reminded, plaintiff must serve Aron's authorizations within 30 days of defendants service of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: 1/11/19

Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.