

Gonzalez v 80 W. 170 Realty LLC
2018 NY Slip Op 33414(U)
November 20, 2018
Supreme Court, Bronx County
Docket Number: 301333/2013
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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LIESHA GONZALEZ,

Plaintiff,

Index No. 301333/2013

v.

DECISION AND ORDER

80 WEST 170 REALTY LLC,

Defendant.

-----X
GONZALEZ, D.:

Upon: i) the Order to Show Cause, by Scott Haworth, Esq., attorney for the defendant, for an Order: 1) pursuant to CPLR Rule 3126(2), precluding portions of the proposed trial testimony of plaintiff's medical experts, Drs. Anson Moise and Michael Faloon; or, in the alternative 2) pursuant to CPLR Rule 3101(d) and CPLR Rule 3124, compelling plaintiff to supplement the untimely expert disclosures and adjourning the October 16, 2018 trial date; 3) pursuant to CPLR Rule 3101(d) and CPLR Rule 3124, permitting defendant 80 West 170 Realty LLC to respond to these untimely disclosures by designating additional medical experts to conduct physical examinations of plaintiff and serve all appropriate CPLR Rule 3101(d) disclosures; 4) pursuant to CPLR Rule 3124, compelling plaintiff to produce additional medical authorizations for release via trial subpoena both to the courthouse and to defendant's counsel's office; and 5) granting such other and further relief as this Court may deem to be just and proper; and ii) the Affirmation in Opposition, dated October 12, 2018, by Jhosandys Sears, Esq., attorney for the plaintiff.

PROCEDURAL HISTORY

This action was commenced by the filing of a Summons and Verified Complaint on February 26, 2013. Issue was joined by service of the defendant's Answer, on or about July 23, 2013.

The plaintiff served a verified bill of particulars, on or about December 11, 2013. A preliminary conference was held on March 4, 2014. The plaintiff served a supplemental bill of particulars, on or about May 12, 2014; a second supplemental bill of particulars on or about August 19, 2014; and a third supplemental bill of particulars, on or about September 10, 2015. A compliance conference was held on October 29, 2014.

A note of issue and certificate of readiness was served and filed, on or about September 21, 2015. On or about September 11, 2018, the plaintiff served expert disclosures for Dr. Michael Faloon and Dr. Anson Moise. The defendant now moves to: preclude the testimonies of Dr. Faloon and Dr. Moise; designate additional medical experts to conduct further independent medical examinations of the plaintiff; and compel the plaintiff to provide unrestricted HIPAA authorizations for the plaintiff's medical records prior to the subject accident based on her testimony at the July 31, 2014 examination before trial.

There have been multiple conferences in the Pre-Trial Part and Special Trial Part. The trial of this matter is scheduled for December 17, 2018.

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff arising from a trip and fall accident that occurred on November 24, 2012, at the premises known as 80 West 170th Street, in the County of the Bronx, City and State of New York.

On July 31, 2014, at the plaintiff's examination before trial she testified she injured her right shoulder in a prior car accident. One-year post-examination before trial, on August 20, 2015, the plaintiff underwent a lumbar discectomy at C4-C5, C5-C6, with Dr. Faloon for the alleged injuries suffered in the subject trip and fall accident.

The defendant argues that Dr. Faloon and Dr. Moise should be precluded from testifying since the disclosures, dated September 11, 2018, are untimely. The defendant contends that if the doctors are not precluded, the plaintiff should be compelled to supplement the disclosures with much more detail since they are vague. The defendant also argues that it should be allowed to designate new experts to conduct further independent medical examinations of the plaintiff. The defendant also alleges its entitled to unrestricted HIPAA authorizations since the plaintiff had a prior car accident.

The plaintiff opposes the motion arguing that the disclosures are not required or untimely since Dr. Faloon and Dr. Moise are the plaintiff's treating physicians. The plaintiff contends that fresh trial authorizations for the subject accident were already provided to the defendant and submits copies of same.

DISCUSSION OF LAW

It is well settled that a plaintiff's treating physician is not an expert retained for litigation purposes as contemplated by the statute (*Rios v Red Apple Supermarket*, 1994 N.Y. Misc. LEXIS 717 [App Term, 1st Dept 1994]). Accordingly, CPLR 3101 (d) (1) (i) does not apply to treating physicians (*Santariga v McCann*, 161 A.D.2d 320, 321 [1st Dept 1990]; 3A Weinstein-Korn-Miller, NY Civ Prac P 3101.52a, at 31-214).

The plaintiff served the disclosures for Dr. Faloon and Dr. Moise, on or about September 11, 2018. The defendant concedes Dr. Faloon and Dr. Moise are the plaintiff's treating physicians. Disclosures of the physicians are not required as per CPLR 3101 (d) (1) since they both were retained to treat the plaintiff as opposed to litigation purposes (*Santariga*, 161 A.D.2d at 321). In addition, there is no prejudice to the defendant since HIPAA compliant authorizations for these treating physicians have been provided.

The defendant seeks to compel supplemental disclosures since the disclosures are vague regarding future medical care. Dr. Faloon's disclosure states that the plaintiff will require further pain management; orthopedic visits; neurological visits; physical therapy visits; pain medication; diagnostic testing; and rehabilitation services based on his examination of the plaintiff and review of the medical reports and records exchanged in discovery.

Dr. Moise's disclosure states that the plaintiff will require further pain management; orthopedic visits; neurological visits; physical therapy visits; pain medication; diagnostic testing; and rehabilitation services, based on his examination of the plaintiff and review of the medical reports and records exchanged in discovery. Based on the record, the disclosures describe the need for future medical care. Given that no disclosure is required pursuant to CPLR 3101 (d) (1), there is no basis to compel the plaintiff to supplement any of the disclosures at issue.

The defendant seeks further independent medical examinations of the plaintiff and unrestricted authorizations for the plaintiff's medical records. 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.* at 140; *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" warranting its entitlement to further independent medical examinations of the plaintiff. The bill of particulars, dated December 11, 2013, plead the need for future surgery, medical treatment, physical rehabilitation and costs. Therefore, the defendant has failed to establish "unusual or unanticipated circumstances" warranting a further independent medical examinations of the plaintiff more than three years post-note of issue.

The defendant moves to compel the plaintiff to provide unrestricted HIPAA compliant authorizations since the plaintiff testified she was injured in a prior car accident. On July 31, 2014, the plaintiff testified at an examination before trial that she injured her right shoulder in a previous car accident. No requests for this discovery was made after the examination before trial. Further, the plaintiff is not claiming she injured her right shoulder or exacerbated a pre-existing injury to the right shoulder in this action. In addition, the defendant has not presented any evidence in admissible form showing that the right shoulder injury suffered in the prior car accident contributed to the injuries allegedly suffered in the subject accident.

The defendant also moves to compel the plaintiff to provide fresh trial authorizations, which have already been provided.

ACCORDINGLY, after consideration of the foregoing, the applicable law, a review of the Court file, and due deliberation; it is hereby

ORDERED, the defendant's motion to preclude is DENIED; and it is further

ORDERED, the defendant's motion to compel the plaintiff to supplement the expert exchanges of Dr. Faloon and Dr. Moise is DENIED; and it is further

ORDERED, the defendant's motion to compel further independent medical examinations of the plaintiff is DENIED; and it is further

ORDERED, the defendant's motion to compel the plaintiff to provide unrestricted HIPAA compliant authorizations is DENIED; and it is further

ORDERED, the defendant's motion to compel the plaintiff to provide trial authorizations is DENIED as moot.

This constitutes the Decision and Order of the Court.

Dated: November 20, 2018
Bronx, New York

E N T E R:

A handwritten signature in black ink, appearing to be 'DM' with a large loop and a long, sweeping flourish extending to the right.

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