

<b>City of Mount Vernon v Vallejo</b>
2018 NY Slip Op 33545(U)
June 13, 2018
Supreme Court, Westchester County
Docket Number: 59259/2016
Judge: Joan B. Lefkowitz
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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 CONFERENCE PART

-----X  
CITY OF MOUNT VERNON,  
*Plaintiff,*

- against -

Action No. 1<sup>1</sup> ✓  
Index No. 59259/2016

MARIO VALLEJO and XAVIER VALLEJO,  
*Defendants.*

-----X  
MARIO VALLEJO and XAVIER VALLEJO,

DECISION & ORDER  
Motion Date: 5/14/18  
Motion Seq. Nos. 2, 3

*Third-Party Plaintiffs,*  
- against -

RALPH UZZI,  
*Third-Party Defendant.*

-----X  
MARIO VALLEJO,  
*Plaintiff,*

- against -

Action No. 2 ✓  
Index No. 50853/2018

RALPH UZZI and CITY OF MOUNT VERNON,  
*Defendants.*

-----X  
XAVIER VALLEJO,  
*Plaintiff,*

- against -

Action No. 3  
Index No. 60400/2017

RALPH UZZI, CITY OF MOUNT VERNON and MARIO VALLEJO,  
*Defendants.*  
-----X

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<sup>1</sup>By order dated October 16, 2017, these matters were joined for purposes of discovery and trial (Lefkowitz, J.).

LEFKOWITZ, J.

The following papers were read on motion sequence no. 2 under index no. 60400/2017 (action no. 3) by Sheila A. Murphy, Esq. of the Acocella Law Group, attorneys for defendants, Ralph Uzzi and City of Mount Vernon (hereinafter "movants") for an order pursuant to CPLR 3042 and 3126 striking the pleadings of plaintiff, Xavier Vallejo (hereinafter "plaintiff") and dismissing his complaint for his failure to comply with discovery demands and court orders, or in the alternative, precluding plaintiff from offering any evidence at trial concerning plaintiff's medical or employment records and in motion seq. no. 3 under index no. 60400/2017 (action no. 3), defendant Mario Vallejo (hereinafter "defendant Vallejo") by Tara Parlman, Esq. of the law office of Bryan M. Kulak seeks essentially the same relief:

Motion Seq. No. 2:

Order to Show Cause;  
Affirmation in Support of Motion;  
Exhibits A-W;  
Affirmation in Opposition;  
Exhibit A-D.

Motion Seq. No 3<sup>2</sup>:

Order to Show Cause and  
Affirmation in Support of Motion.

Upon the foregoing papers and proceedings held on May 14, 2018, these motions are determined as follows:

Facts and Procedural Posture

This action sounding in negligence arises from a motor vehicle accident which occurred on June 24, 2016 at approximately 7:05 a.m. on Summit Avenue at or near its intersection with Chestnut Ridge Road in the City of Montvale and State of New Jersey.<sup>3</sup> At the time of the accident, plaintiff Xavier Vallejo was a passenger in a motor vehicle owned and operated by his father, Mario Vallejo<sup>4</sup> when defendant Ralph Uzzi, operating a motor vehicle owned by defendant City of Mount Vernon, struck the automobile in which he was seated.<sup>5</sup>

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<sup>2</sup>Motion Seq. No. 3 by defendant Mario Vallejo is unopposed.

<sup>3</sup>Plaintiff's Exhibit A in opposition, NYSCEF Doc. Nos. 71, 72, P. 17, Line 12; P. 27. Lines 9-10, 12-13; P. 30, Line 7; P. 31; Lines 3-5, 11-12; P. 32, Lines 7, 9, 14, 16; P. 33, Lines 22-25.

<sup>4</sup>Plaintiff's Exhibit A in opposition, NYSCEF Doc. Nos. 71, 72, P. 18, Line 23; P. 19, Line 2.

<sup>5</sup>Plaintiff's Exhibit A in opposition, NYSCEF Doc. Nos. 71, 72, P. 38, Lines 11-13, 17-19, P. 40, Line 25; P. 41, Line 2; P. 47, Lines 11-14, 19, 21-22; P. 49, Lines 2-4, 13-14, 17, 19, 20-24;

Plaintiff commenced this action by the filing of a summons and complaint on July 13, 2017<sup>6</sup>, and on August 11, 2017, movants filed their answer.<sup>7</sup> On October 16, 2017, this Court granted the motion of defendant municipality, the plaintiff in action no. 1 and defendant in action nos. 2 and 3, for an order consolidating the action.<sup>8</sup> Thereafter, movants served their demand for a bill of particulars.<sup>9</sup>

By Compliance Conference Referee Report and Order of November 13, 2017 (Lefkowitz, J.), plaintiff was directed, inter alia, to serve his responses to movants' discovery demands together with duly executed authorizations for all his medical providers on or before **November 21, 2017**.<sup>10</sup> When plaintiff did not comply, by Compliance Conference Referee Report and Order of December 1, 2017 (Lefkowitz, J.), plaintiff was again directed to respond to movants' discovery demands on or before December 8, 2017.<sup>11</sup> By letter dated November 10, 2017, plaintiff responded to movants' demands for eyewitnesses, notice witnesses, adverse party statements and photographs and provided authorizations for plaintiff's no-fault file, several medical authorizations and employment authorizations. Additionally, plaintiff provided movants with copies of medical reports from Woodhaven Chiropractic, P.C., Lucky Chiropractic Care, P.C., Alexandre Grigorian, D.O., Dorsten Radiology, P.C., Joseph F. Dorsten, D.O., Ready Medical Service, P.C. and CitiMed together with his bill of particulars in which he averred he sustained "permanent loss of [his] head, neck and back area, and, as a result, [his] entire body."<sup>12</sup> It is observed that with respect to movants' demand for photographs, plaintiff responded that at the present time, he was not in possession of any photographs; however, "should same become available, same will be provided." As to his employment history, plaintiff asserted that he was incapacitated from his employment for one year.

By Compliance Conference Referee Report and Order of December 20, 2017 (Lefkowitz, J.), depositions of all parties were scheduled to be completed on or before January 31, 2018 and a properly executed power of attorney was to be furnished to movant for by plaintiff within three days of the date of the order.<sup>13</sup> Movants contend that during the conference, they requested properly executed HIPAA authorizations and requested plaintiff's response to defendant's demand for discovery and bill of particulars be amended to provide proper addresses for the medical providers listed in their discovery

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<sup>6</sup>NYSCEF Doc. No. 1.

<sup>7</sup>NYSCEF Doc. No. 6.

<sup>8</sup>Movants' Exhibit F to the Affirmation in Support, NYSCEF Doc. No. 47.

<sup>9</sup>Movants' Exhibit G to the Affirmation in Support, NYSCEF Doc. No. 48.

<sup>10</sup>Movants' Exhibit H to the Affirmation in Support, NYSCEF Doc. No. 50.

<sup>11</sup>Movants' Exhibit I to the Affirmation in Support, NYSCEF Doc. No. 50. Although filed by movants as November 29, 2016 Referee Report and Order, the date of such order is in fact, December 1, 2017.

<sup>12</sup>Movants' Exhibit J, Exhibit K, and Exhibit L to Movants' Affirmation in Support, NYSCEF Doc. Nos. 51, 52, and 53.

<sup>13</sup>Movants' Exhibit M to the Affirmation in Support, NYSCEF Doc. No. 54.

responses. Movants complained that some of the addresses plaintiff furnished were incorrect for the providers listed, and there was a concern that the list was not complete. Moreover, when movants attempted to schedule the examinations before trial as directed, plaintiff's counsel advised them that they would not be available until April of 2018, and the depositions would have to be conducted in Manhattan.

By Compliance Conference Referee Report and Order dated February 5, 2018, plaintiff was again directed to provide a properly executed power of attorney within three days, and depositions were scheduled to be completed on February 8, 2018 in Westchester County.<sup>14</sup>

In accordance with this Court's February 5, 2018 order, the deposition of plaintiff was held on February 8, 2018. It is noteworthy that in plaintiff's letter of November 10, 2017 purportedly in response to movants' notice for discovery and inspection, when asked if he had any photographs, plaintiff responded he was not in possession of any photographs. However, plaintiff testified at his deposition that, on the date of the accident, he took photographs and videos of the skid marks that were "left on the road" and of the two cars involved in the accident including the damage done to both vehicles with his cell phone.<sup>15</sup> Moreover, plaintiff testified that his counsel had never asked him for the photographs until the date of the deposition.<sup>16</sup> As the examination before trial continued, movants discovered that plaintiff was aware that the list of medical providers provided to them by plaintiff's counsel was inaccurate.<sup>17</sup> As to the bill of particulars submitted by his counsel, movants requested that same be amended as some of information provided therein was incorrect and certain material was vague. They assert that in their demand for a bill of particulars, under item 16, they requested plaintiff "[S]et forth the nature, location and extent of injuries claimed by the plaintiff, including a description of those alleged to be permanent and those alleged to be aggravated,"<sup>18</sup> and plaintiff responded in relevant part that he sustained "permanent loss of the head, neck and back area, and, as a result, the entire body."<sup>19</sup> Movants point out that as plaintiff "physically walked into the deposition and sat upright in a chair for the duration of the examination, it is presumed that Plaintiff did not in fact suffer a permanent loss of use of his entire body".

Movant contends that at the conclusion of plaintiff's deposition, he provided them with newly executed HIPAA authorizations; however, such authorizations were created by "whiting out" the name of plaintiff's attorney, and the plaintiff thereafter signing the authorization himself.

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<sup>14</sup>Movants' Exhibit N to the Affirmation in Support, NYSCEF Doc. No. 55.

<sup>15</sup>Plaintiff's Exhibit A to his Affirmation in Opposition, NYSCEF Doc. Nos. 71, 72, P. 51, Lines 3-5, 8, 10-12, 14, 24; P. 52, Lines 16-17; P. 53, Lines 2-5, 12-13; P. 54, Lines 3-4.

<sup>16</sup>Plaintiff's Exhibit A to his Affirmation in Opposition, NYSCEF Doc. Nos. 71, 72, P. 55, Lines 11, 14, 17.

<sup>17</sup>Plaintiff's Exhibit A to his Affirmation in Opposition, NYSCEF Doc. Nos. 71, 72, P. 65, Lines 19, 25; P. 66, Lines 2, 6-8, 11-13, 16-18, 21-22; Page 70, Lines 20-21, 23; Page 80, Lines 17-21, 23; P. 81, Lines 9-10, 24; P. 82, Lines 18, 21-22; P. 83, Lines 23-25; P. 84, Lines 4-5, 10-11;

<sup>18</sup>Movants' Exhibit G to the Affirmation in Support, NYSCEF Doc. No. 48.

<sup>19</sup>Movants' Exhibit J to the Affirmation in Support, NYSCEF Doc. No. 51.

By Compliance Conference Referee Report and Order of February 26, 2018, plaintiff was again directed to provide a properly executed power of attorney and new authorizations for his medical and employment records unrestricted as to date.<sup>20</sup> On March 27, 2018, his counsel failed to appear for a court scheduled conference, and by Compliance Conference Referee Report and Order of same date, it was noted that plaintiff failed to comply with the prior order, and he was cautioned that if he failed to comply with the Court's prior order on or before March 29, 2018, the action would be dismissed.<sup>21</sup> By correspondence dated March 28, 2018, plaintiff responded to movants' demands for eyewitnesses, notice witnesses, adverse party statements, photographs, authorizations for his no-fault file and medical records and employment records.<sup>22</sup> Defendant maintains that the responses provided by plaintiff's counsel were identical to those previously served and contained all the same inaccuracies. For example, again, plaintiff claimed he was not in possession of photographs, "should same become available same shall be provided under separate cover".<sup>23</sup> Plaintiff did, however, provide a copy of his power of attorney<sup>24</sup> but again provided a HIPPA authorization for his employer restricted to date.<sup>25</sup>

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" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure 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 v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial 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 (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

"[A] party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR [citation omitted] when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue" (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]; see CPLR 3121[a];

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<sup>20</sup>Movants' Exhibit O to the Affirmation in Support, NYSCEF Doc. No. 58.

<sup>21</sup>Movants' Exhibit R to the Affirmation in Support, NYSCEF Doc. No. 59.

<sup>22</sup>Movants' Exhibit T to the Affirmation in Support, NYSCEF Doc. No. 61.

<sup>23</sup>Movants' Exhibit T to the Affirmation in Support, NYSCEF Doc. No. 61.

<sup>24</sup>Movants' Exhibit U to the Affirmation in Support, NYSCEF Doc. No. 62.

<sup>25</sup>Movants' Exhibit V to the Affirmation in Support, NYSCEF Doc., No. 63.

At oral argument of the within motions, plaintiff conceded that he had not provided all proper medical and hospital HIPPA-compliant authorizations to movant and defendant municipality they had demanded nor had he provided an appropriate authorization directed to plaintiff's employer without restriction to date nor had plaintiff provided movants and defendant municipality with original, proper and duly executed powers of attorney despite this Court's prior orders.

As to movants' request that plaintiff specify which injuries he sustained in the within accident are permanent, plaintiff's counsel responded, on the record that, only those injuries to his shoulder, neck and knee are permanent in nature.

Contrary to plaintiff's verified bill of particulars in which he averred he was incapacitated from his employment for one year<sup>26</sup>, his counsel stated, at oral argument on the record that, plaintiff was, in fact, incapacitated from his employment for one day in accordance with this deposition testimony.<sup>27</sup>

With regard to the demands of movants and defendant Vallejo for photographs and videos concerning the accident, it was conceded that both parties are now in possession of the seven pictures and video referred to in plaintiff's deposition.

In view of the foregoing, it is:

ORDERED that, movants' application in motion seq. no. 2 (action no. 3) and defendant Vallejo's order to show cause in motion seq. no. 3 (action no. 3) are granted to the extent that plaintiff is directed to serve all proper medical and hospital HIPPA-compliant authorizations, employment authorizations unrestricted to date, original, proper and duly executed powers of attorney and an accurate list of the names and addresses of plaintiff's medical providers upon movants and defendant Vallejo on or before June 20, 2018; and it is further

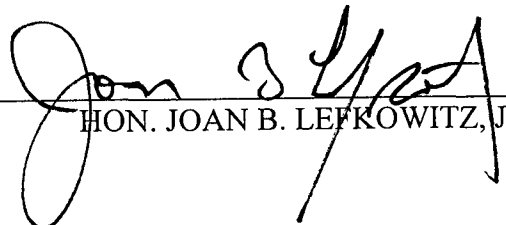
ORDERED that, in the event that plaintiff fails to comply with the Court's directives, movants and defendant Vallejo shall file, on or before June 27, 2018, on notice to plaintiff, an affirmation of noncompliance and proposed order striking plaintiff's complaint; and it is further

ORDERED that, all counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on July 5, 2018, at 9:30 a.m.; and it is further

ORDERED that, movants and defendant Vallejo shall serve a copy of this order with notice of entry upon all parties five (5) within days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
June 13, 2018.

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

<sup>26</sup>Movants' Exhibit J to motion seq. no. 2, plaintiff's verified bill of particulars, para. 18(c).

<sup>27</sup>Plaintiff's Exhibit A to his affirmation in opposition, P. 74, Lines 18-19, 22.

TO:

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