

S.K. v Shore Hill at Muttontown Homeowners Assn., Inc.
2018 NY Slip Op 33917(U)
July 12, 2018
Supreme Court, Nassau County
Docket Number: 608692/16
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X
**S.K., an infant, by her mother and natural guardian,
SVETLANA SHNEYDERSHTEYN and SVETLANA
SHNEYDERSHTEYN, individually,**

Plaintiff,

-against-

TRIAL/IAS PART 12

INDEX # 608692/16

Mot. Seq. 1

Mot. Date 5.29.18

Submit Date 5.29.18

**SHORE HILL AT MUTTONTOWN HOMEOWNERS
ASSOCIATION, INC.,**

Defendants.
-----X

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The following papers were read on this motion:

Documents Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	11
Answering Affidavit	27
Reply Affidavit.....	30

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Defendant moves pursuant to CPLR § 3126 to dismiss the complaint or to preclude the plaintiff from alleging liability or damages based on their failure to provide court-ordered discovery, or, in the alternative, pursuant to CPLR § 3124 to compel plaintiffs to respond to defendant's notice to produce dated December 7, 2017.

Before this court is a personal injury action arising out of a slip and fall accident that occurred while plaintiff was walking her dog. On December 7, 2017, counsel for defendant served a notice to produce upon counsel for the plaintiff based upon facts disclosed at plaintiff's deposition. At a subsequent compliance conference, an order was entered on January 11, 2018 directing plaintiffs' counsel to comply by February 15, 2018. After a conference on February 27, 2018, due to plaintiffs' counsel's non compliance, another order was entered directing plaintiffs' counsel to comply within 30 days. Further failure to comply prompted the instant motion. This case was certified ready for trial on

April 20, 2018. At that time, counsel entered into a stipulation that states in relevant part, “[t]he Plaintiffs shall not file their note of issue until all outstanding discovery issues have been resolved. The defendant does not waive any of their discovery demands as raised by their motion.”

In opposition, plaintiffs’ counsel states that on April 19, 2018, he served a response to defendant’s December 7, 2017 notice to produce. Counsel argues that all relevant authorizations have been produced and plaintiffs objected to irrelevant, overbroad and unduly burdensome demands. Thus, according to the plaintiff, sanctions are unwarranted.

In reply, counsel for the defendant contends that plaintiffs’ responses were incomplete and any objections to defendant’s discovery demands are untimely. Further, according to counsel, plaintiff has yet to appear for an independent medical exam.

CPLR § 3101 sets the bounds of discovery and provides that “[t]here shall be full disclosure of all matter *material and necessary* in the prosecution or defense of an action, regardless of the burden of proof . . . [emphasis added].” The phrase “material and necessary” is accorded a liberal construction and requires “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. Cromwell-Collier Pub. Co.*, 21 NY2d 403 [1968]). In addition, the term necessary has been “held to mean ‘needful’ and not indispensable.” (*Id.* at 407). Although, the rules contemplate a liberal interpretation of the breadth of disclosure, “[i]t 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. (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421; see *Quinones v. 9 E. 69th St., LLC*, 132 AD3d at 750).” (*D'Alessandro v. Nassau Health Care Corp.*, 137 AD3d 1195, 1196 [2d Dept 2016]).

There are 13 requests in the December 7, 2017 notice to produce. As all uncontested disclosure has been provided, and the court must rule on the outstanding matters, sanctions under CPLR 3126 are not warranted. The court reviews each request below.

Demand numbers 1, 2, 3, 4 and 7 seek authorizations for certain school, gymnastics, and medical records. Authorizations are attached to plaintiff’s opposition that apparently comply with demands 1, 2, 3, 4 and 7.

Demand 6 seeks a mailing address for Aksana Strachsnow in Hewlett Bay Park and demand number 13 seeks an authorization for the records of Dr. Khan on Marcus Avenue in New Hyde Park. Counsel for plaintiff states that he has complied with demand numbers 6 and 13.

With respect to demand number 12, which seeks an authorization for the infant plaintiff’s Medicaid/Health First records, the authorization is not filled out with Health First/Medicaid as

the provider. As a result, a new authorization must be provided within ten days after service of a copy of this order with notice of entry.

With respect to demand number 5; which seeks copies of photographs depicting the infant plaintiff and her dog Benji taken in 2016, the court agrees that the defendant is entitled to photographs of the dog. Although questions concerning the size of the dog could have been asked at the deposition, the defendant is not precluded from also seeking a photograph as part of disclosure in this case.

With respect to the request for plaintiff's passport (demand number 8), last known address of her nanny Natasha Bera (Bazarova) (demand number 9), the last known address of the housekeeper Olga (demand number 10), and police records with respect to an alleged burglary occurring at the home on July 4, 2017 (demand number 11), defendant concedes that it is seeking such records to check on the credibility of the plaintiff and her mother. The court will not authorize the discovery and inspection of documents solely in order to enable one party in an action to check on the credibility of the other. (*See Dienstag v. Athenson & Passin*, 60 NYS2d 794, 795 [Sup. Ct. N.Y. County 1946] [discovery and inspection of documents in order to enable one party to check on the credibility of another not permitted], *aff'd sub nom. Dienstag v. Athenson & Passin, Inc.*, 270 AD 927 [1st Dept 1946], and *aff'd*, 272 A.D. 801 [1st Dept 1947]; *see also Friel v. Papa*, 87 AD3d 1108 [2d Dept 2011] [trial court did not abuse discretion in limiting deposition questions pertaining to supervision of employees in unrelated matters]). The purpose of a notice to produce is to compel the production of documents that are relevant and material to facts at issue in a pending judicial proceeding. Here, demands 8 through 11 in the notice to produce seek records for the purpose of gaining information to impeach the general credibility of the plaintiff mother, which will not be permitted. (*See Valdez v. Sharaby*, 258 AD2d 458, 458 [2d Dept. 1999] [quashing subpoenas directed at gaining material to impeach witnesses' general credibility]).

Further, plaintiff is directed to appear for a medical examination by a physician of defendant counsel's choosing on a mutually agreeable date no later than 30 days from service of a copy of this order with notice of entry.

Finally, plaintiff's counsel may not file the note of issue until all directed discovery including the physical has been held. Leave is given to the plaintiff to file its note of issue within 30 days after the physical has been held.

For the foregoing reasons, it is hereby

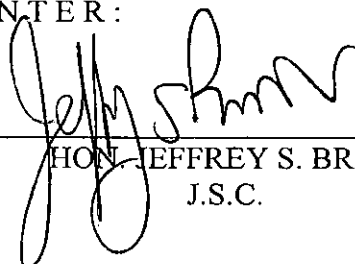
ORDERED, that the defendant's motion for dismissal or preclusion pursuant to CPLR 3126 is **denied**, without prejudice to renew should the discovery directed herein not be provided; and it is further

ORDERED, that the defendant's motion to compel is **granted**, in part, and **denied**, in part as set forth herein.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 12, 2018

ENTER:



HON. JEFFREY S. BROWN
J.S.C.

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ENTERED

JUL 13 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE