

Anderson v Singh

2018 NY Slip Op 34037(U)

October 25, 2018

Supreme Court, Westchester County

Docket Number: 58229/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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 PART

-----X
MAXINE BENT-ANDERSON and
HEATHER BENT-TAMIR,

Plaintiffs,

-against-

DECISION & ORDER

Index No. 58229/2016

Motion Date: Sept. 12, 2018

Motion Seq. 5

GURMEET SINGH, NISHAN SINGH, BERNARD MORCHELES and JOHN DOES 1-5 (hereinafter "JOHN DOE") a fictitious name for the individuals or entities which hired, employed or otherwise contracted with Defendant(s) at the time of the subject incident and is responsible by way of vicarious liability, respondeat superior or otherwise for the acts and omissions alleged herein and/or negligently repaired, managed, maintained, controlled, entrusted, and/or owned the subject vehicles described below and involved in the subject incident and whose identity is presently known only to the Defendant(s),

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendant Bernard Morcheles ("Morcheles") pursuant to CPLR 3101 and CPLR 3124 for an order compelling plaintiffs to provide the business and residence addresses for Meryl Arbisfeld ("Arbisfeld") of IME Advocates, all notes, reports, photographs, digital images, moving images/video and audio recordings made by Arbisfeld and IME Advocates concerning the May 7, 2018 examinations of plaintiffs conducted by Dr. Rene Elkin ("Elkin") and the May 9, 2018 examinations of plaintiffs conducted by Dr. Richard Weinstein ("Weinstein"), and for such other and further relief as the Court may deem just and proper.

- Order to Show Cause - Affirmation in Support - Exhibits A-K
- Affirmation in Support by Defendants Gurmeet Singh and Nishan Singh
- Affirmation in Opposition by Plaintiffs - Exhibits A-F

Upon the foregoing papers and the proceedings held on September 12, 2018, this motion

is determined as follows:

Plaintiffs bring this action seeking damages for personal injuries allegedly sustained by them as a result of a motor vehicle accident which occurred on December 8, 2013. Independent medical examinations (“IMEs”) of plaintiffs were conducted on May 7, 2018 and May 9, 2018. After the examinations were conducted Morcheles’ counsel discovered that Arbisfeld of IME Advocates, Inc. was present at the IMEs. Morcheles’ counsel served a post-deposition notice on plaintiffs dated May 22, 2018 and a demand for IME witness disclosure dated May 25, 2018. The post-deposition notice and witness demand sought, inter alia, Arbisfeld’s home and business addresses, all notes, reports, photographs, digital images, moving images/video and recordings made by Arbisfeld with respect to the IMEs, and asked plaintiffs to disclose whether they planned to call Arbisfeld, or any other person affiliated with IME Advocates, to testify at trial, to provide an affidavit in connection with the action, or to offer any evidence at a hearing or trial relating to the IMEs.

In their responses dated June 25, 2018 plaintiffs objected to the demands for Arbisfeld’s notes arguing that as an agent/consultant of plaintiffs’ counsel her notes are shielded from discovery as attorney work product and materials prepared in anticipation of litigation. Additionally, plaintiffs stated, notwithstanding those objections, Arbisfeld did not record, photograph or videotape any part of the IMEs. Plaintiffs also provided the business address for IME Advocates. Plaintiffs stated that they intend to call Arbisfeld as a rebuttal witness at trial in the event the testimony of the IME doctors is inconsistent with Arbisfeld’s recollection of what transpired during the IMEs. Morcheles brings this motion pursuant to a discovery motion briefing schedule dated August 1, 2018.¹

In support of the motion Morcheles argues that in light of the fact that Arbisfeld may be called by plaintiffs to testify at trial concerning her observations of what occurred during the IMEs the items demanded are not immune from disclosure. Morcheles contends that Arbisfeld’s notes are material and necessary for his preparation of a defense to plaintiffs’ claims and to prepare for the cross-examination of Arbisfeld at trial. Morcheles argues that the attorney work product privilege only applies to those materials prepared by an attorney, acting as an attorney, and which contain the attorney’s analysis and trial strategy and that the privilege does not attach to materials which could have been prepared by a layperson, such as Arbisfeld.

Morcheles also argues that to the extent that plaintiffs claim the notes are protected from disclosure as materials prepared in anticipation of litigation, there is an exception to that privilege where a party shows that it has a substantial need for disclosure and is unable without undue hardship to obtain that discovery by other means. Morcheles contends that plaintiffs’ intention to call Arbisfeld as a rebuttal witness has placed into issue the accuracy of Arbisfeld’s observations which Morcheles contends can only be determined by examining her notes and reports. Morcheles states that he intends to take Arbisfeld’s deposition and will need her notes

¹ Defendants Gurmeet Singh and Nishan Singh join in support of the motion.

when deposing her, and that the notes cannot be obtained from any source other than from Arbisfeld herself. Additionally, Morcheles states that plaintiffs have not yet provided Arbisfeld's home address.

In opposition, plaintiffs state that Arbisfeld was retained by plaintiffs' counsel as his agent to assist in the preparation of this case for trial. Plaintiffs state that Arbisfeld accompanied plaintiffs to the IMEs and reported her observations concerning what transpired during the examinations back to plaintiffs' counsel, who was unable to attend the IMEs. Plaintiffs state that if their counsel, or an associate or paralegal from counsel's firm had been present at the IMEs their notes would not be discoverable and that as an agent of plaintiffs' counsel, Arbisfeld's notes should be afforded the same protection from discovery. Plaintiffs contend that Arbisfeld's notes are not discoverable because they constitute the mental impressions of an agent/ representative, acting in place of, or as in extension of, plaintiffs' counsel. Additionally, plaintiffs argue that if Morcheles wants to know what transpired during the IMEs he has access to the physicians, retained by the defense, who conducted the IMEs.

Additionally, plaintiffs contend that the IME notes are privileged as materials prepared in anticipation of litigation and are therefore immune from discovery pursuant to CPLR 3101(d)(2). Plaintiffs argue that Elkin and Weinstein, agents of defendants, were present at the IMEs and can provide Morcheles with information concerning what occurred during the IMEs. Plaintiffs contend that Morcheles has failed to demonstrate a basis for applying the exception to CPLR 3101(d)(2) on the basis of substantial need or undue hardship. Plaintiffs also argue that in order to obtain disclosure from non-parties Arbisfeld and IME Advocates, Morcheles was required to demonstrate special circumstances.

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, 406 [1968] [internal quotation marks omitted]; see *Matter of Kapon v Koch*, 23 NY3d 32 [2014]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). Contrary to plaintiffs' contention otherwise, to obtain non-party discovery, a party must only show that the non-party discovery is "material and necessary" to the prosecution or defense of the action (*Matter of Kapon v Koch*, 23 NY3d at 38).

All discovery, however, is subject to protection if the proponent of a privilege establishes its applicability. CPLR 3101 carves out three categories of protected materials, two of which are raised here: attorney work product which is absolutely immune from discovery (CPLR 3101[c]) and materials prepared in anticipation of litigation which enjoy a conditional privilege and are subject to disclosure only upon a showing of substantial need and undue hardship (CPLR

3101[d][2]; see *Forman v Henkin*, 30 NY 3d 656 [2018] [internal citations omitted]).

In the present case the Court finds that the notes and reports prepared by Arbisfeld, as an agent retained by plaintiffs' counsel, are exempt from disclosure as they are subject to the work product privilege (*See Oakwood Realty Corp. v HRH Constr. Corp.*, 51 AD3d 747 [2d Dept 2008]). Additionally, upon the arguments presented, the Court finds no basis to direct plaintiffs to provide Arbisfeld's home address.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that the motion by defendant Bernard Morcheles is denied; and it is further

ORDERED that counsel for all parties shall appear for a conference in the Compliance Part, Courtroom 800, on November 13, 2018 at 10:30 a.m.; and it is further

ORDERED that all other relief requested by any party is denied; and it is further;

ORDERED that defendant Bernard Morcheles is directed to serve all parties with a copy of this order with notice of entry within ten (10) days of entry.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York
October 25 2018



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

Service upon all counsel via NYSCEF

cc: Compliance Part Clerk