FILED: BRONX COUNTY CLERK 06/26/2018 02:09 PM INDEX NO. 23152/2015E
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM
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THOMAS CASCIO,

Plaintiff,

- against -

PORT AUTHORITY OF NEW YORK AND NEW JERSEY and TISHMAN CONSTRUCTION CORPORATION,

Defendants.
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DECISION AND ORDER

Index No. 23152/2015E

PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated May 16, 2018 and the affirmation and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated June 19, 2018 and the exhibit submitted therewith; and due deliberation; the court finds:

Defendants move to vacate plaintiff's note of issue and certificate of readiness for trial on the ground that discovery remains outstanding. In addition to the various items of documentary discovery, defendants seek an additional deposition of plaintiff, in light of his recent surgery.

On a motion to compel the production of discovery pursuant to CPLR 3124, the movant bears the burden of establishing a basis for the production of the discovery sought. *See Troshin v. Stella Orton Home Care Agency, Inc.*, 2018 NY Slip Op 30922(U) (Sup Ct N.Y. County May 11, 2018). Movant must "demonstrate that the ... 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." *Brito-Amezquita v. 928 Columbus Holdings LLC*, 2017 NY Slip Op 32514(U), at *4 (Sup Ct N.Y. County Nov. 24, 2017). The opposing party bears the burden of establishing the materials are immune or exempt from discovery. *See Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 939 N.Y.S.2d 333 (1st Dep't 2012). If the resisting party previously asserted a privilege or immunity from disclosure, movant must establish on its motion

to compel such production that the privilege or immunity does not apply. *See id.*

Even if the resisting party failed to timely assert an objection to the material sought, if the court finds that the demands were palpably improper or sought privileged material, response will not be compelled. *See Lea v. N.Y.C. Transit Auth.*, 57 A.D.3d 269, 867 N.Y.S.2d 918 (1st Dep't 2008). As to demands which are not palpably improper and which do not seek privileged information, if the party resisting disclosure failed to seek a protective order or otherwise timely object to production of the discovery sought, it will not be heard to object to the demand. *See Fiore v. Bay Ridge Sanitarium, Inc.*, 48 Misc. 2d 318, 264 N.Y.S.2d 421 (Sup Ct Kings County 1965).

Here, the records and authorizations sought bear directly on plaintiff's claim of damages, and are material and relevant. Plaintiff has not objected to any of the demands and has not opposed their production on this motion. Defendants, however, have not borne their burden of establishing the relevance of the phone number and address for Mercedes Arias, which need not be provided. Nor have defendants established reasonable cause to forego the service of written demands pursuant to CPLR 3120 so as to compel discovery newly-sought in the present motion without prior notice to plaintiff.

Given the newly alleged surgical procedure, defendants would be entitled to the additional deposition and, to the extent plaintiff has already undergone the previously-noticed spinal surgery examination, an additional independent medical examination by a spinal surgeon. *See* CPLR 3043(b); *Brown v. Brink El. Corp.*, 125 A.D.3d 421, 998 N.Y.S.2d 884 (1st Dep't 2015). Defendants are also entitled to reports prepared by plaintiffs treating and examining medical providers. *See* 22 NYCRR § 202.17(b)(1). Plaintiff, however, argues that the additional procedure was performed merely to correct the implantation of a spinal stimulator about which

defendants had already had the opportunity to question plaintiff, and that the procedure merely addressed an already-disclosed condition. Plaintiff, however, was silent as to whether he intends to claim any damages or sequelae resulting from the corrective surgery, and the denial of an additional deposition and examination is premised upon the court's assumption that same will not become an issue. Defendant may revisit the issue if this proves not to be the case.

The certificate of readiness for trial stated no known discovery was outstanding and accordingly contained an incorrect statement of fact when it claimed the case to be trial-ready. *See* 22 NYCRR § 202.21(e). The court has no obligation to permit a case to remain on the trial calendar when discovery is obviously not complete. Plaintiff was free to file a motion to extend the time in which to file a note of issue yet chose not to do so. Plaintiff knowingly filed a note of issue when it is clear "that a material fact in the certificate of readiness is incorrect," 22 NYCRR § 202.21(e), and the note of issue should otherwise be vacated, *see Greco v Wellington Leasing L.P.*, 144 A.D.3d 981, 43 N.Y.S.3d 64 (2d Dep't 2016). Given that the outstanding discovery is limited to the exchange of authorizations for medical records and does not bear on damages, the court will not strike the note of issue or extend the time for dispositive motions.

In opposition, plaintiff submitted a discovery response containing authorizations enabling defendants to obtain the outstanding records and reserving his right to serve certain other authorizations under separate cover. To the extent plaintiff deemed defendants' demand for employment records to be ambiguous, plaintiff shall provide authorizations to obtain the records of plaintiff's employee file, including attendance records, for each employer testified to by plaintiff at his deposition(s).

Accordingly, it is

ORDERED, that defendants' motion to strike the note of issue and certificate of readiness

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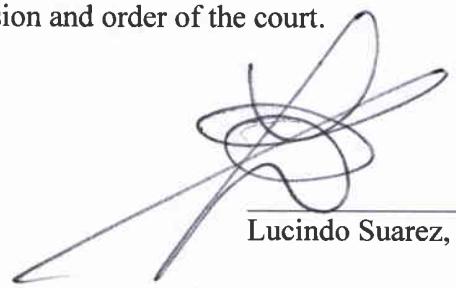
for trial and to compel plaintiff's production of various discovery is granted to the extent that within thirty (30) days after service of a copy of this order with written notice of its entry, plaintiff shall provide to defendants authorizations, to be HIPAA-compliant where protected health information is sought, to obtain plaintiff's employee file, including attendance records, for each employer testified to by plaintiff at his deposition(s); and it is further

ORDERED, that the foregoing shall not be construed to abrogate plaintiff's obligation to appear for the remaining examinations delineated in defendants' January 31, 2018 notice.

This constitutes the decision and order of the court.

Dated: June 22, 2018



Lucindo Suarez, J.S.C.