

**Vaccaro v Lesch**

2018 NY Slip Op 34382(U)

March 19, 2018

Supreme Court, Westchester County

Docket Number: Index No. 50865/2017

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  
ANTHONY VACCARO and MARIE-LOUISE ERICSEN,

Plaintiffs,

-against-

JACKSON W. LESCH, RICHARD C. LESCH and  
ROHAN OSCAR ANDERSON,

Defendants.

-----X  
LEFKOWITZ, J.

**DECISION AND ORDER**

Index No.: 50865/2017  
Decision Date: Mar. 19, 2018  
Motion Seq.: 5, 6 & 7

The following papers were read on: (1) this motion by defendants Jackson W. Lesch and Richard C. Lesch for an order pursuant to CPLR 3124 to compel plaintiffs to comply with discovery obligations herein (Motion Sequence #5); (2) this motion by defendant Rohan Oscar Anderson for an order pursuant to CPLR 3124 to compel plaintiffs to comply with discovery obligations herein (Motion Sequence #6); and (3) this motion by plaintiff for an order pursuant to CPLR 3104(d) to vacate the Compliance Conference Referee Report & Order dated February 8, 2018, enter a protective order pursuant to CPLR 3103 against certain of defendants' discovery demands; and enter an order pursuant to CPLR 3124 and CPLR 3126 to compel defendants to disclose any party statements they allege plaintiff Vaccaro made relating to insurance claims at issue on defendants' motions:

Motion Sequence #5: Order to Show Cause, Affirmation in Support  
Affirmation of Good Faith, Exhs. A-E

Motion Sequence #6: Order to Show Cause, Affirmation in Support, Exhs. A-L  
Affirmation of Good Faith  
Affirmation in Opposition, Exh. 1

Motion Sequence #7: Order to Show Cause, Affirmation in Support, Exhs. 1-6  
Affirmation in Opposition, Exhs. A-C  
Affirmation in Opposition, Exhs. A-E

Upon the foregoing papers and proceedings held on March 19, 2018, these three motions are consolidated for purposes of decision and are determined as follows:

## **Background**

As most recently enumerated by the Decision and Order of this Court (Walker, J.) dated December 29, 2017, plaintiffs allege that on December 8, 2015, a vehicle operated by defendant Jackson W. Lesch and owned by defendant Richard C. Lesch crashed into the vehicle driven by plaintiff Anthony Vaccaro on the Bronx River Parkway in Westchester County, New York; and that a third vehicle owned and operated by defendant Rohan Oscar Anderson came into contact with the Lesch vehicle, causing such latter vehicle to come into contact with plaintiff a second time. Vaccaro, and plaintiff Marie-Louise Ericson suing derivatively, commenced this action by Summons and Complaint uploaded to NYSCEF on January 19, 2017. As relevant here, all defendants joined issue, the parties entered into a Preliminary Conference Stipulation and Order on or about July 26, 2017, and thereafter the parties proceeded into discovery.

Plaintiffs' Bill of Particulars, dated May 10, 2017, includes allegations that plaintiff Vaccaro "sustained injury to his neck and back ... and [his] knee including ligament damage, sprains and strains." The Bill of Particulars alleges cervical disc disorders, cervical sprain and strain, "acceleration of a pre-existing injury," "left arm tingling and numbness," "left leg impaired gait, sciatic pain, restricted motion, muscle weakness [and] tenderness," and left knee "contusion, sprain, pain, swelling, tenderness, restricted motion, buckling with traumatic aggravation, precipitation and acceleration of a pre-existing knee injury." These and other injuries, plaintiff alleges, impair plaintiff's "enjoyment of the normal fruits of life and its daily activities (including but not limited to physical, social, educational, recreational and economic) and the enjoyment of life has been permanently and substantially impaired, impeded, diminished, and reduced" to extents (*sic*) that are "chronic and protracted" and "permanent," and that are "solely" attributable to defendants' alleged negligence. Plaintiff's Bill of Particulars specifically concedes a prior injury dated June 18, 2003, allegedly arising from a motor vehicle accident.

The instant discovery dispute was brought before the Court at a Compliance Conference on February 8, 2018. At that time, the Court overruled plaintiffs' objection to complying with the Lesch defendants' Notice of Discovery and Inspection dated October 12, 2017, and the Anderson defendant's Notice of Discovery and Inspection dated December 18, 2017, demanding authorizations for certain no-fault and workers' compensation claims. Defendants then took the position – and now re-assert in motion papers– that their entitlement to such authorizations arose from an Insurance Services Office ("ISO") ClaimSearch report of plaintiff Vaccaro's prior insurance claims. Defendants aver that this ISO report supports a reasonable inference that plaintiff Vaccaro was involved in four prior accidents and six claims involving injuries to the same or similar body parts that plaintiffs' complaint alleges Vaccaro injured in the accident at issue in this action. After a hearing on this matter, the Court issued on such date a Compliance Conference Order overruling plaintiffs' objection and directing plaintiff Vaccaro to comply by February 22, 2018 (NYSCEF Doc. 62).

Thereafter, plaintiffs demanded a further immediate conference indicating their refusal to comply and their intention to move to vacate the foregoing Compliance Conference Order. Pursuant to a briefing schedule, plaintiffs move to vacate such Compliance Conference Order, enter a protective order against the discovery ordered therein, and compel defendants to produce

discovery responses in relation to their proofs of plaintiff's conversations or other submissions to the insurance claim representatives; and defendants move to compel compliance.

In support hereof, defendants plead and prove the foregoing. They attach to their motion papers the discovery demands and plaintiff Vaccaro's objections. They also attach the ISO report that defendants allege show plaintiff Vaccaro's six prior insurance claims for motor vehicle accidents and workplace injuries, as follows:

- August 18, 1995 – a no-fault claim alleging whiplash and related neck injuries;
- September 21, 1997 – a no-fault claim alleging a “sore neck”;
- June 18, 2003 – a workers' compensation claim alleging “strain of multiple body parts,” including neck, back and “left side” injuries;
- June 19, 2003 – two no-fault claims alleging disc herniation and bilateral knee injuries; and
- May 29, 2013 – a no-fault claim alleging head, neck and back injuries.

In opposition to defendants' motions and in support of plaintiffs' own motion, plaintiffs aver that defendants are not entitled to authorizations for the above incidents because they did not result in injury and any workers compensation claims were “unrelated to medical treatment,” and that defendants proffered no factual basis to the contrary. Accordingly, plaintiffs assert that defendants are on a fishing expedition. Plaintiffs also aver that such records contain financial, income and employment information not relevant to the instant litigation, and thus a protective order against such discovery should be issued. To the extent that the Compliance Conference Referee Report and Order determined otherwise after the proceedings of February 8, 2018, plaintiffs argue that such Referee Report and Order should be vacated. Moreover, plaintiffs allege a defense proffer that Vaccaro made a “claim” to an insurance adjuster, and that any such claim constitutes a party statement that is discoverable in this action.

### Analysis

It is axiomatic that under CPLR 3101(a)(1), there must be full disclosure of all matter “material and necessary” in the prosecution or defense of an action. The phrase “material and necessary” is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Trial courts have broad discretion to supervise discovery and enter appropriate remedies to ensure the fair and efficient conduct of discovery (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

It is beyond cavil that plaintiff Vaccaro placed his medical condition in controversy. It is also beyond cavil that the Bill of Particulars admitted that Vaccaro sustained, at minimum, a June

2003 motor vehicle accident on a date that matches the ISO report defendants submit for such plaintiff. The Bill of Particulars alleges aggravation of injuries arising from a prior accident, and yet pleads that Vaccaro's instant injuries arise "solely" from defendants' alleged negligence. The ISO report and Bill of Particulars also appear to bear substantial overlap in body part and nature of injury. Additionally, plaintiffs' Bill of Particulars makes sweeping claims for loss of enjoyment of life. Based on the foregoing, under CPLR 3101(a)(1), defendants established a sufficient record basis to seek all no-fault authorizations and non-privileged portions of claim files arising therefrom.

Plaintiffs' arguments to the contrary, and plaintiffs' generic and speculative concerns about potential overbreadth or irrelevance of some aspects of the claim file, are entirely without merit. Plaintiffs' strain credulity to suggest that the claims specified in the ISO Report did not arise as a result of injury, given that the ISO expressly states otherwise. Even if there is a factual dispute concerning the matter, CPLR 3101(a)(1) entitles defendants to discovery that reasonably may bear on that question. Plaintiffs' claim of privilege is entirely speculative and unsupported. Moreover, it is immaterial that plaintiffs tendered certain medical authorizations: defendants also are entitled to Vaccaro's authorizations to obtain his no-fault and workers compensation files from the four prior accidents positively identified in the ISO report. To allow Vaccaro to obstruct this discovery, on this record, would unduly prejudice the defense of this action. Thus, defendants' motions to compel are granted, and the reciprocal branches of plaintiffs' motion to vacate the Referee Report and enter a protective order against this discovery are denied.

Turning to the remaining branch of plaintiffs' motion, which seeks to compel defendants to tender what plaintiffs deem "party statements" in the form of plaintiff claims to any insurance carrier, this branch likewise is entirely without merit. Plaintiffs offer no authority to support the relief they seek. Accordingly, this remaining branch of plaintiffs' application is denied.

Consistent with CPLR 8202, counsel for plaintiffs shall pay \$100 in motion costs to each defense counsel for each motion decided herewith. Plaintiffs are admonished to comply herewith and proceed diligently in discovery. Counsel for plaintiffs are cautioned that further obstruction, or submission of papers that are facially meritless, will not be tolerated. Accordingly it is hereby

ORDERED that plaintiffs' motion (Motion Sequence #7) is denied; and it is further

ORDERED that defendants' motions (Motion Sequence #5 and Motion Sequence #6) are granted to the extent that plaintiff Vaccaro shall serve on defense counsel, so as to be received by March 30, 2018, authorizations for the no-fault and workers compensation files specified in defendants' Notices of Discovery and Inspection enumerated herein; provided that if plaintiff fails to comply, defendants may upload to NYSCEF by April 6, 2018, an affirmation of noncompliance and proposed order, with notice of settlement, dismissing plaintiffs' complaint, upon which this action shall be subject to dismissal pursuant to CPLR 3126; and it is further

ORDERED, that by March 30, 2018, counsel for plaintiffs shall pay CPLR 8202 motion costs in the amount of \$300 to each defense counsel; and upload to NYSCEF by such date an

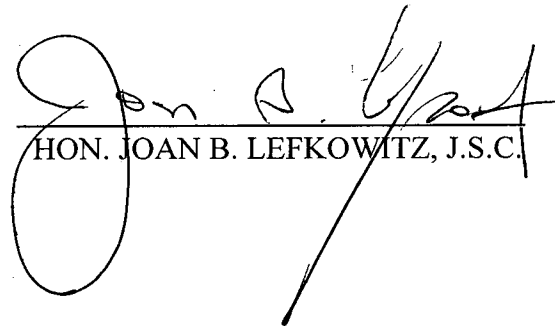
affirmation of such payment; and it is further

ORDERED that counsel for the first-named defendant shall cause this Decision and Order, with Notice of Entry hereof, to be served on all parties by NYSCEF by March 23, 2018; and it is further

ORDERED that all counsel shall appear in the Compliance Part, Room 800 of this Courthouse, at 9:30 a.m. on April 11, 2018, for further proceedings consistent herewith.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
March 19, 2018



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

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