Blauvelt v Craft Chiropractic Assoc., PC
2019 NY Slip Op 31589(U)
January 29, 2019
Supreme Court, Ulster County
Docket Number: 13-2454
Judge: Christopher E. Cahill

STATE OF NEW YORK
SUPREME COURT **ULSTER COUNTY**
RICHARD BLAUVELT and DONNA BLAUVELT,

Plaintiff,

-against-

Decision & Order
Index No.: 13-2454

CRAFT CHIROPRACTIC ASSOCIATES, PC, RICHARD H. CRAFT, D.C., and MARK RICHARD CRAFT, D.C.,

Defendant.

Supreme Court, Ulster County
Motion Return Date: August 21, 2018
RJI No. 55-13-02341

Present: Christopher E. Cahill, JSC

Appearances: EDGAR P. CAMPBELL, ESQ.
Attorney for Plaintiffs
2 Madison Avenue
Valhalla, New York 10595

LAW OFFICE OF STEPHEN P. HABER
Attorney for Defendants
81 Main Street Suite 304
White Plains, New York 10601

Cahill, J.:

In this personal injury action alleging chiropractic malpractice, defendants Craft Chiropractic Associates PC and Mark Richard Craft, DC, and the plaintiffs, have each moved for various form of pre-trial relief in anticipation of the February 25, 2019 trial date. The defendants, by motion dated July 3, 2018, have moved for an order dismissing the complaint because of plaintiffs' failure to establish a prima facie case "based upon the

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limitations of their expert exchanges as to their injury/causation position." In the alternative, they seek: an order directing plaintiff, Richard Blauvelt, to specify whether the case at issue caused "an aggravation of a pre-existing disc herniation condition of the cervical spine or created the cervical disc herniation condition in the first instance"; an order precluding the plaintiff from claiming the need for future surgery to his C6-7 disc as such need is unsupported by treatment records and expert opinions; precluding plaintiff from offering, through his expert radiologist and expert internal medicine physician, opinions with regard to the defendants' care of Mr. Blauvelt as to "the nature and extent of any causally related injury or conditions" based upon their lack of chiropractic competence; an order precluding plaintiff from offering any evidence concerning the physical examination of Mr. Blauvelt made by plaintiffs' chiropractor, Andrew Rodgers, D.C., as no report has been exchanged which contains details of what occurred during the examination; and an order precluding plaintiffs from offering any evidence of permanent injury because of "an absent and/or tardy and/or incompetent medical exchange on this issue".

In addition, by subsequent motion dated July 17, 2018, the defendants move for an order directing the plaintiff to comply with defendants' Notice to Admit dated June 18, 2018 and denying plaintiffs' request for a protective order against the notice, and they seek a protective order against plaintiffs' Notice to Admit dated July 6, 2018.

The plaintiffs' oppose, and by motion in limine dated July 12, 2018, seek an order

precluding the introduction of any videotaped recording of plaintiff Richard Blauvelt obtained by Aaron Hefner, Adam Crowe and O'Rourke Investigation Associates in the State of Delaware, and precluding any mention of it at trial.

After reviewing the parties' submissions, the court concludes that, first, the plaintiffs' motion to preclude the videotaping of Mr. Blauvelt must be denied. The plaintiffs present no probative evidence that the videographers actually committed trespass while making the video, as the videographers' statements that they only filmed Mr. Blauvelt from public locations and, in fact, notified local law enforcement of their activity and locations, are basically unrefuted. In this court's opinion, plaintiffs have shown insufficient grounds to preclude the videotape, and, in any case, this court should not have to determine under the Delaware trespass statute whether the videographers committed a criminal offense in the state of Delaware in videotaping Mr. Blauvelt. The court also notes that the plaintiffs do not deny that it is Mr. Blauvelt who appears in the tape.

Turning to defendants' motion dated July 3, 2018, defendants assert in support that all of plaintiffs' expert exchanges are defective in that they alternatively contend that defendants either created the disc herniation from which Mr. Blauvelt claims he suffers or exacerbated pre-existing conditions. This court disagrees. CPLR § 3014 clearly provides that a party can plead alternative and even inconsistent theories of recovery, such as plaintiffs are pleading here. Moreover, the questions of what theory of recovery, if any,

shall appear on the verdict sheet, is an issue which must abide the proof at trial. In addition, to the extent defendants argue that Dr. Rodgers' reports and the medical exchanges of Drs. Schwartz and Rubin are contradictory on the issue of causation v. aggravation, the court views this as a credibility issue which is fertile ground for cross-examination. Accordingly, this branch of defendants' motion is denied.

As to defendants' motion to preclude the plaintiff from claiming that he may need future C6-7 surgery, defendants contend that the need is speculative and unsupported by the plaintiff's treatment records and expert opinion. In support, defendants point out that the first time further surgery is mentioned in any medical record of plaintiff is in Dr. Rodgers' report dated June 25, 2018, when he states that plaintiff "may require further surgical intervention". Again, the court finds that Dr. Rodgers' assertion concerning further surgery is not subject to preclusion, but in light of the fact that no previous mention had been made of surgery, it is a credibility issue and, thus, another fertile ground for cross-examination.

Next, with regard to defendants' contention that plaintiffs' expert radiologist and expert internal medicine physician should be precluded from testifying as to care and causation based upon their lack of chiropractic competence, again this court disagrees. The testimony of a medical expert testifying out of his or her specialty goes to the weight of that testimony and, thus, is an issue of credibility which the defense will undoubtedly raise at trial when these experts testify (Prime, Richardson on Evidence, 11th ed., 7-315 p.

482). Accordingly, the motion to preclude their testimony is denied.

The court reaches a similar conclusion as to defendants' request that Mr. Blauvelt be precluded from introducing any evidence at trial that his claimed injuries are permanent. Again, defendants rely on the fact that the diagnosis of permanence is raised for the first time in Dr. Rodgers' June 25, 2018 report; but yet again, this raises a credibility issue for Dr. Rodgers given the prior lack of reference to permanence in plaintiff's medical records. Accordingly, the motion to preclude his testimony is also denied. The court reaches the same conclusion with regard to defendants' motion to preclude Dr. Rodgers from offering evidence due to the lack of detail about his office examination of Mr. Blauvelt in his June 25, 2018 report.

In summary, the defendants' claim that plaintiffs have failed to establish a prima facie case must await the proof at trial.

Finally, however, the court agrees with defendants that their motion for a protective order striking plaintiffs' notice to admit must be granted on the basis of no opposition. In any case, for the multiple reasons stated in Mr. Haber's July 17, 2018 affirmation submitted in support of defendant's notice of motion dated July 17, 2018, plaintiffs' 192 paragraph notice to admit is improper. In addition, defendants' motion compelling plaintiffs to respond to defendants' notice to admit dated June 18, 2018 must be granted on the basis of no opposition. Even if plaintiffs had explicitly opposed the motion, the notice to admit, unlike plaintiffs' notice to admit, is brief, direct and focused

only on the contents of the videotape which the court has found to be admissible, and is, therefore, a proper notice to admit.

This decision/order is without costs to either party.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

FILED
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JAN 31 2019
Nina Postupack
Ulster County Clerk

Dated: Kingston, New York
Jan. 29, 2019

ENTER,

CHRISTOPHER E. CAHILL, JSC

Papers considered: Notice of motion dated July 3, 2018, Haber affirmation dated July 3, 2018 and annexed exhibits A to C; Campbell affirmation in opposition dated July 16, 2018; motion in limine dated July 12, 2018, with annexed exhibits; notice of motion dated July 17, 2018, Haber affirmation dated July 7, 2018 with annexed exhibits; Campbell affirmation dated August 13, 2018 with annexed exhibits A to G and Campbell affirmation dated August 13, 2018 with annexed exhibits A to N; Haber affirmation dated August 15, 2018 with annexed exhibits.