

Quan v Peghe Deli Inc.
2019 NY Slip Op 32422(U)
June 6, 2019
Supreme Court, Queens County
Docket Number: 7763/2017
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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CARMEN QUAN,

Index No.: 7763/2017

Plaintiff,

Motion
Date: April 24, 2019

-against-

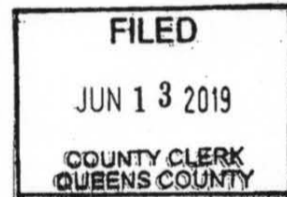
Motion Cal. No.: 41

Motion Sequence No.: 3

PEGHE DELI INC., PEGHE'S DELI &
GROCERY INC., PEGHE DELI and JAMES
MILONIS,

Defendants.

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The following papers numbered 1-12 submitted and considered on this motion by defendants Peghe's Deli & Grocery Inc. i/s/h/a Peghe's Deli & Grocery Inc and Peghe Deli and James Milonis seeking an Order dismissing plaintiff's complaint for failure to sufficiently comply with defendants' various notices/demands for discovery and demand for bill of particulars; or precluding the plaintiff from giving any evidence in support of the allegations and matters set forth in the complaint; compelling plaintiff to provide supplemental responses by a date certain; and the cross-motion of plaintiff Carmen Quan seeking a protective order pursuant to Civil Practice Law and Rules ("CPLR") section 3103(d) regarding defendants' Demand to Plaintiff Regarding Litigation Funding Company dated December 19, 2017.

Papers
Numbered

- Notice of Motion-Affidavits-Exhibits..... 1-5
- Cross-Motion-Affidavits-Exhibits..... 6-8
- Affirmation in Opposition-Affidavits-Exhibits..... 9-10
- Reply Affirmation-Affidavits-Exhibits..... 11-12

This action was commenced by plaintiff Carmen Quan (hereinafter "Quan") to recover damages for personal injuries which she sustained on July 3, 2017 as a result of falling in defendants Peghe's Deli & Grocery Inc. i/s/h/a Peghe's Deli & Grocery Inc and Peghe Deli and James Milonis

(hereinafter "defendants") premises. Defendants seek an Order dismissing Quan's complaint for failure to sufficiently comply with defendants' various notices/demands for discovery and demand for bill of particulars; or precluding Quan from offering any evidence in support of the allegations and matters set forth in the complaint, compelling Quan to provide supplemental responses by a date certain. Defendants maintain that Quan never responded to the Preliminary Conference Order dated January 3, 2018; inappropriately objected to defendants' settlement funding demand on January 18, 2018; failed to provide the following: a supplemental bill of particulars at to paragraphs 2, 14, 15, 16, 17 and 18; failed to provide unrestricted as to time authorizations for plaintiff's medical providers in relation to loss of enjoyment claims; unrestricted as to time authorizations for EMS, Medicare, NY Presbyterian Hospital and her health insurance; the address and contact information for non-party witness Aliyah Avius; unrestricted as to time authorizations related to plaintiff's prior left knee injury, treatment, surgery and any potential lawsuits.

Defendants sent a good faith letter to Quan's attorney on or about May 11, 2018 regarding the outstanding discovery, however, plaintiff's counsel did not respond to the letter. Thereafter, the Court issued a Compliance Conference Order on June 18, 2018 wherein the Court directed Quan to provide the supplemental bill of particulars and discovery responses as listed in the Preliminary Conference Order and the May 11, 2018 correspondence, as well as the last known contact information for non-party witness Aliyah Avius within twenty (20) days. Defendants claimed that did not provide a response to the Compliance Conference Order.

Counsel for the parties herein, according to defendants, spoke on the telephone about the discovery issues on October 3, 2018, and defense counsel was advised that the outstanding discovery would be forthcoming and thus Court intervention was unnecessary. Despite the conversation, plaintiff did not provide a response to Court Orders and discovery demands, thus defense counsel sent an e-mail to Quan's counsel in a good faith attempt to resolve the discovery issues, and also spoke on the telephone with plaintiff's counsel on October 30, 2018 in a good faith attempt to resolve the discovery issue again.

Plaintiff objected to providing an authorization for plaintiff's loan company information. Defendants stated that they are seeking an authorization for plaintiff's loan funding company, the Promissory Note associated therewith and other relevant documents because plaintiff's counsel verbally conceded during the October 30, 2018 telephone conversation with defense counsel that a settlement loan funding company was involved in this lawsuit and that the settlement loan funding company needed to know whether or not there was excess insurance coverage before it would fund an alleged surgery for the plaintiff.

Quan cross-moves for a protective order pursuant to Civil Practice Law and Rules ("CPLR") section 3103(d) regarding defendants' Demand to Plaintiff Regarding Litigation Funding Company dated December 19, 2017. Quan argued that the demand was improper because the subject loan is not part of or relevant to her claims or the defense of the action. She does not have to satisfy the loan, thus any settlement or judgment in her favor in this case is not subject to any lien. Quan maintained that she is entitled to a protective order as defendants are improperly harassing her by

seeking discovery which is not material or necessary to the defense of this action under CPLR §3101. There is not an unfettered right to disclosure and the burden is upon defendant to demonstrate that the loan file will result in relevant evidence. Defendants' request for the loan file is improper and objectionable and is a fishing expedition. Thus, defendants are not entitled to this information; plaintiff is not making a claim for damages related to the loans she received, the loans are not a collateral source, and moreover she does not need to satisfy the loan if she recovers a settlement or judgment in her favor.

In response, defendants argued that plaintiff did not dispute the fact that the settlement loan funding company was playing an integral part in the medical treatment of the plaintiff and is relevant and discoverable. Defendants are entitled to the outstanding discovery it seeks. Additionally, the supplemental responses that were provided in Quan's opposition were still insufficient. For instance, Quan recently provided photographs which defendants alleged were most likely in Quan's possession since the beginning of the case.

LEGAL ANALYSIS

Civil Practice Law and Rules ("CPLR") 3101(a) "Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:(1) a party of the officer, director, member, agent or employee of a party...(2) a person possessed a cause of action or defense asserted in the action...". CPLR 3101(a) sets forth the criterion for disclosure under the CPLR, requiring "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is to be liberally interpreted 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" (*Allen v Crowell Collier Publishing Co.*, 21 NY2d 403, 406 [1969]). The test to determine if the information sought is material and necessary is one of usefulness and reason. (*Id*). The principle of full disclosure does not, however, give a party the right to uncontrolled and unfettered disclosure (*see Peluso v Red Rose Rest., Inc.*, 78 AD3d 802, 803 [2d Dept. 2010]). Matters relating to disclosure lie within the broad discretion of the trial court which is in the best position to determine what is material and necessary (*see Buxbaum v. Castro*, 82 AD3d 925 [2d Dept. 2011]).

Under CPLR 3124, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." Pursuant to CPLR §3126, "[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made...refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering judgment by default against the disobedient party." The drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with

discovery demands or orders was willful or contumacious. (*See Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016].) Willful and contumacious conduct can be inferred from a party's repeated noncompliance with court-ordered discovery, coupled with either no excuses or inadequate explanations. (*See Lucas v Lawrence Stam*, 147 AD3d 921 [2d Dept 2017]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012].)

The Court finds that defendants are entitled to certain outstanding discovery including authorizations, a response to its demand for a supplemental bill of particulars, but not disclosure related to the litigation funding company. Addressing Quan's cross-motion, in order for a protective order to be issued pursuant to CPLR §3103 the party seeking such an order must make a factual showing of 'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice (*see Cascardo v Cascardo*, 136 AD 3d 729 [2d Dept 2016] quoting *Hartheimer v Clipper*, 288 AD2d 263 [2d Dept 2001]). Under the circumstances herein, Quan's cross-motion is granted. The Court finds that disclosure of this information is not warranted because it such disclosure is not likely to result in relevant evidence or lead to information bearing on plaintiff's claims for damages. Plaintiff is not making a claim for damages in relation to the loans, and the loans are not a collateral source as defined under CPLR §4545 (*see Gomez v State of New York*, 106 AD3d 870 [2d Dept 2013]; *Cabrea v 1279 Morris LLC, et al.*, 2013 WL 5418611 [Sup Ct, NY County 2013]).

Therefore, based upon the Court's consideration of all papers submitted herein in support of and in opposition to the motion and the cross-motion, it is

ORDERED, that defendants' motion is granted to the extent that plaintiff is directed to provide the defendants within twenty (20) days of the filing of this Order with duly executed authorizations, which is unrestricted in time, in order for the defendants to obtain medical records related to plaintiff's prior knee injury; and it is further

ORDERED, that plaintiff is directed to provide the defendants within twenty (20) days of the filing of this Order authorizations for the defendants to obtain any non-privileged portions of any litigation file related to plaintiff's prior knee injury; and it is further

ORDERED, plaintiff is directed to provide a response to defendants demand for a Supplemental Bill of Particulars items 2, 14, 15, 16, 17, 18 within twenty (20) days of the filing of this Order; and it is further

ORDERED, that plaintiff's failure to comply with this Order shall result in plaintiff's preclusion from offering any evidence or testimony at the time of Trial on the issue of all matters addressed by defendant's discovery demands and notices pertaining to the matters for which discovery was sought and not provided; and it is further

ORDERED, that plaintiff's cross-motion for a protective order pursuant to CPLR §3103(d) regarding defendants' demand to Plaintiff Regarding Litigation Funding Company dated December 19, 2017 is granted.

This constitutes the decision and Order of the Court.

Dated: June 6, 2019



Hon. Chereé A. Buggs, JSC

FILED
JUN 13 2019
COUNTY CLERK
QUEENS COUNTY