

Locastro v City of New York
2019 NY Slip Op 32534(U)
July 29, 2019
Supreme Court, Richmond County
Docket Number: 150268/2013
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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FRED LOCASTRO,

HON. THOMAS P. ALIOTTA

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 150268/2013
Motion No.: 006 & 007

THE CITY OF NEW YORK, ZWICKER ELECTRIC
CO., AND JACOBS ENGINEERING NEW YORK, INC.,

Defendants.

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JACOBS PROJECT MANAGEMENT CO. i/s/h/a
JACOBS ENGINEERING NEW YORK, INC.,

Third-Party Plaintiff,

-against-

DELRIC CONSTRUCTION INC.,

Third-Party Defendant.

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Recitation, as required by CPLR 2219(a) of the following papers numbered were fully
submitted on the 24th day of July 2019.

**Papers
Numbered**

Notice of Motion and Affirmation by Third-Party Defendant with Exhibits (NYSCEF DOC. 128 through 152).....	1, 2
Notice of Cross Motion and Affirmation by Defendant, THE CITY OF NEW YORK (NYSCEF DOC. 153 through 154).....	3
Plaintiff's Affirmation in Opposition (NYSCEF DOC. 155 through 163).....	4
Reply Affirmation by Third-Party Defendant (NYSCEF DOC. 164 through 165)	5

Upon the foregoing papers, the motion by third-party defendant, DELRIC CONSTRUCTION, INC. (MS_006), and the cross-motion by defendant, THE CITY OF NEW YORK (MS_007), are granted as follows:

This is an action for personal injuries allegedly sustained by plaintiff on January 28, 2013 at the Staten Island Courthouse project, located at 26 Central Avenue, Staten Island, New York. Plaintiff alleges that while working at the project site, he allegedly tripped over electric piping that was protruding from the ground.

A recitation of the facts and entire procedural history are omitted since the current motions are premised upon plaintiff's purported failure to provide authorizations as per two prior orders of this Court dated April 9 and 30, 2019. The discovery at issue in both orders was demanded by defendants City and Delric in their initial discovery demands served in 2013 and 2015, respectively (Delric Ex. "C" and "F"). Delric served an additional discovery demand in August 2017 (Delric Ex. "G").

Specifically, it is alleged that plaintiff has failed to provide properly executed authorizations for the following: 1) Social Security Administration; 2) Blue Cross/Blue Shield; 3) Medicare; 4) Mark Idles, Esq [non-privileged workers compensation legal file]; 5) Unemployment Records; and 6) Workers Compensation Board. It is also alleged that plaintiff has failed to provide in accordance with said orders the medical records for Stephen Barth, PT; Richard Melville, DPT; Dr. Laamberto Florese; Dr. Perry Drucker; Richmond Orthopedic; Dr. Lauren Immatteo; Medicare; and Seaview Hospital.

Each order directed plaintiff to permit the release of pre-accident records relating to his application for Social Security Retirement and Disability Benefits and Medicare. The basis for this request by defendants on April 9th and 30th was plaintiff's deposition testimony that he

applied for benefits at the age of 62. The accident which forms the basis of this litigation occurred when plaintiff was 63 years of age, which was after plaintiff started to receive retirement benefits (*See* Delric Ex. "I", pp.81-82). Plaintiff also testified that he had applied for Social Security Disability benefits as well (*id.*). Plaintiff opposes the motion and takes the position that he has complied with this Court's Orders.

In reply, Delric argues that while plaintiff provided the Social Security Administration Consent to Release Form, the wording remains deficient as per the SSA guidelines for the release of information and plaintiff has limited the Medicare portion of the SSA form to the year of the accident [2013]. Delric further argues that an authorization specifically addressed to Medicare remains outstanding as it was never received by counsel's office. Moreover, the alleged proof of compliance submitted by plaintiff reveals that the purported Medicare authorization was not properly executed. Next, the replacement Blue Cross/Blue Shield authorization also has not been provided. The Blue Cross/Blue Shield authorization attached to plaintiff's opposition was previously rejected as was the unemployment authorization. Lastly, with respect to the authorizations, plaintiff has objected to providing the authorization for Mark Idles, Esq. in contravention of the two Court orders. Finally, the opposition concedes that medical records were not provided.

Delric and City have moved this Court for an order pursuant to CPLR § 3126 (3) dismissing this action, or in the alternative, pursuant to CPLR § 3101, § 3021, § 3124 compelling plaintiff to provide the discovery as outlined in the Court Orders dated April 9 and 30, 2019. CPLR § 3126 states as follows:

§ 3126. Penalties for refusal to comply with order or to disclose

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully 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:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

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 a judgment by default against the disobedient party.

“It is well settled that the nature and degree of the penalty to be imposed pursuant to CPLR 3126 for a party’s failure to disclose lies within the sound discretion of the trial court” (*Ordonez v. Guerra*, 295 AD2d 325, 326 [2d Dept. 2002]). Such penalties are drastic in nature and should only be employed where there is “a pattern of willful disobedience of a specific notice for discovery” (*id.*). Here, the Court finds that plaintiff has engaged in a pattern of willful disobedience of discovery notices and Court Orders.

The Order dated April 9, 2019 refers to a prior order of this Court dated March 21, 2019 (NYSCEF DOC. 125).¹ The March 21, 2019 Order directs that, “*Plaintiff to serve records and*

¹ The Court is taking judicial notice of the Order dated March 21, 2019 (see *Samuels v. Montefiore Medical Center*, 49 AD3d 268 [2d Dept. 2008]).

reports pursuant to 22 NYCRR 202.17[b]² by 4/2/2019...The failure to comply with this order shall result in an order pursuant to § 3126 of the CPLR upon further order of this Court.” On April 2, 2019, plaintiff was granted an additional opportunity to serve the medical records and the disputed authorizations. On April 30, 2019, plaintiff was granted one final opportunity to comply and upon plaintiff’s failure to comply, defendants were granted permission to serve the current motions.

The correspondence annexed to Delric’s motion reveals that the dispute with the SSA authorization dates back to 2016. Upon a further review, plaintiff has consistently modified the necessary language and improperly limited the authorizations, i.e., changed the Medicare authorization from 2011 to 2013 and included generic language “Retirement Benefits” rather than itemize the information sought as required by the instructions on the SSA form. Plaintiff continued to do so despite this Court’s Orders to the contrary. This accident occurred in January 2013, six months prior to plaintiff’s 64th birthday.³ Plaintiff testified that he applied for benefits when he was 62. Therefore, plaintiff will re-submit the authorizations for Medicare permitting the release of records for *the period of 2011 through the present*. The SSA authorization shall specifically set forth, *“The release of all applications for Social Security Retirement Benefits and Social Security Disability Benefits, including consultative examinations, awards and denial notices, benefit applications, appeals, questionnaires, doctors’ reports, determinations, and re-submissions from 2011 through the present.”*

² Section 202.17 of the Uniform Rules of Supreme Court governs the exchange of medical reports in personal injury. The Court, prior to an independent medical examination, may direct plaintiff to serve copies of the medical reports of those medical providers who have previously treated or examined plaintiff (202.17 [b][1]).

³ The various authorizations annexed as Exhibits indicate plaintiff’s birthday as July 1949.

With respect to the authorization for Mark Idles, Esq., plaintiff has failed to come forward with documentary evidence that he served timely objections to the production of the non-privileged portions of Mr. Idles' legal file (§17, Affirmation in Opposition). Therefore, absent proof of a timely objection and challenge to defendants' discovery demands (CPLR § 3122 [a] [1]), any inquiry into the propriety of the information demanded is foreclosed (*Recine v. City of New York*, 156 AD3d 836 [2d Dept. 2017]). Next, and more importantly, once the demand for this authorization, as well as the authorizations for Blue Cross/Blue Shield, Workers Compensation and Unemployment, were incorporated into two separate Court Orders, any objections or disputes regarding compliance were waived upon plaintiff's failure to seek an order of this Court vacating the orders and obtaining relief from the terms thereof (*Piedmonte v. JFS Realty, LLC*, 140 AD3d 1145, 1146 [2d Dept. 2016]). Any assertion by plaintiff that the information was previously provided is to no avail as the March 21, 2019, April 9, 2019 and April 30, 2019 Orders do not contain qualifying language, i.e., "to the extent not previously provided."

Accordingly, upon plaintiff's failure to provide the outstanding medical records pursuant to 22 NYCRR § 202.17 [b], the outstanding SSA and Medicare authorizations with the Court ordered language, the authorizations for Blue Cross/Blue Shield, Unemployment, and Mark Idles, Esq., plaintiff will be precluded pursuant to CPLR § 3126 [2], without a further order of this Court, from offering evidence at the trial of this action with respect to loss of earnings, past and future medical expenses, and loss of enjoyment of life as the outstanding authorizations and medical reports/records support these specific items of special damages (see CPLR § 3126[2]). In such event, the damages portion of the trial shall be limited to pain and suffering of the affected areas. Plaintiff is cautioned that this conditional order of preclusion is self-executing

and that it's failure to comply herewith will render it absolute (*Piedmonte v. JFS Realty, LLC*, 140 AD3d 1146, *Gibbs v. St. Barnabas Hospital*, 16 NY3d 74, 78 [2010] and *Wilson v. Galicia Contracting & Restoration Corp.*, 10 NY3d 827, 830 [2008]). Based upon the foregoing, it is hereby

ORDERED, that the motion by third-party defendant, DELRIC CONSTRUCTION, INC. (MS_006), and the cross-motion by defendant, THE CITY OF NEW YORK (MS_007), are granted; and it is further

ORDERED, that plaintiff shall provide to all defendants and third-party defendant the outstanding medical records pursuant to 22 NYCRR § 202.17 [b], the Social Security and Medicare authorizations in accordance with the terms of this Order, and authorizations for Blue Cross/Blue Shield, Workers Compensation Board, Unemployment and Mark Idles, Esq. within 60 days of entry in NYSCEF of this Order; and it is further

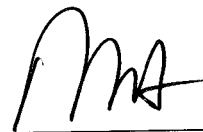
ORDERED, that upon failure to comply with the terms of this Order within 60 days of entry in NYSCEF, plaintiff will be precluded pursuant to CPLR § 3126 [2], without a further order of this Court, from offering evidence at the trial of this action with respect to loss of earnings, past and future medical expenses, and loss of enjoyment of life and the damages portion of the trial shall be limited to issue of pain and suffering of the affected areas only; and it is further

ORDERED, that this Order is self-executing.

This constitutes the decision and order of this Court.

Dated: July 29, 2019

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.