

<b>Leon v City of New York</b>
2019 NY Slip Op 33419(U)
November 14, 2019
Supreme Court, New York County
Docket Number: 451578/2016
Judge: Gerald Lebovits
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

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INDEX NO. 451578/2016

RUBEN LEON and MARTHA CULCAY,

MOTION DATE 10/18/2019

Plaintiffs,

MOTION SEQ. NO. 007

- v -

CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, and JAY SHAPIRO & ASSOCIATES,

DECISION + ORDER ON MOTION

Defendants.

-----X

NEW YORK CITY HOUSING AUTHORITY

Third-Party Index No. 595667/2016

Plaintiff,

-against-

TECHNICO CONSTRUCTION SERVICES, INC. and JAY SHAPIRO AND ASSOCIATES,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 241, 242, 243, 244

were read on this motion to DISMISS

Silberstein, Awad & Miklos, P.C. (Daniel P. Miklos of counsel), for plaintiffs. Newman Myers Kreines Gross Harris, P.C. (Abraham A. Friedman of counsel), for defendant New York City Housing Authority. Fuchs Rosenzweig PLLC (Alicia Sklan of counsel), for third-party defendant Technico Construction Services, Inc.

Gerald Lebovits, J.:

This discovery motion arises out of a personal-injury action brought by a construction worker (plaintiff Ruben Leon) injured while on a construction project renovating a city-owned building, for which defendant New York City Housing Authority was the general contractor.

Defendant NYCHA, and third-party-defendant Technico Construction Services, Inc. (defendants), each sought various authorizations from Leon for medical and employment-related

information, along with copies of certain construction-related licenses that Leon testified at his deposition that he held as part of his employment. Leon did not object to defendants' demands for authorizations and documents. He nonetheless undisputedly failed to provide the requested items. His failure to produce led NYCHA (supported by Technico) to file the current motion to dismiss the action as a discovery sanction under CPLR 3126. During the pendency of the motion, Leon provided defendants with authorizations and copies of licenses. He now argues that in light of his production, the motion to dismiss should be dismissed as academic. NYCHA and Technico, on reply in support of the motion, challenge the sufficiency of Leon's production.

As an initial matter, this court agrees with NYCHA and Technico that Leon's discovery-related production does not moot the motion to dismiss, because the production does not fully address defendants' demands—to which, as noted above, Leon has not objected. There remain questions, however, as to what additional information and documentation Leon still must provide. The discussion below addresses those issues, and some other discovery-related matters raised in the motion.

## **A. NYCHA's Discovery Demands**

### **1. Notice to Produce Dated July 25, 2018**

This notice demanded HIPAA-compliant authorizations for a number of physicians and medical providers who provided treatment to Leon following his accident. NYCHA correctly notes that although their demands sought authorizations for Leon's entire medical record, including test results and films, Leon provided authorizations only to release a more-limited medical record. Leon therefore must, within 21 days of service of a copy of this order with notice of its entry, provide complete HIPAA authorizations permitting release of his entire medical record. The court does not, however, agree with NYCHA's contention that Leon must permit release of his entire medical record without any date restriction. All but one of the authorizations demanded in NYCHA's notice to produce plainly are limited to the period from the date of loss to present. (*See* NYSCEF No. 182, at 1.)

Accordingly, Leon must within 21 days provide HIPAA-compliant authorizations for: (1) the entire medical record of Dr. Mangoos without date restrictions; (2) Leon's entire medical record from Pain Physicians, NY, from the date of loss to present; (3) Leon's entire medical record from Metropolitan Medical & Surgical from the date of loss to present; (4) Leon's entire medical record from Prompt Medical Spine Care from the date of loss to present. Each of these authorizations should also be initialed to permit the release of alcohol/drug-treatment, mental-health, and HIV-related information.

### **2. Notice to Produce Dated March 18, 2019**

This notice demanded HIPAA-compliant authorizations for the records of additional treating physicians, authorizations for tax returns and certain employment records, and copies of employment-related licenses and certificates. With respect to certain of the medical authorizations, NYCHA demanded authorization for the release of Leon's entire medical record (including test results and films), but Leon provided permission only for the release of a more

limited set of records. Leon therefore must provide authorizations for his entire medical records from the specified physicians and providers.

NYCHA also is correct that although the notice to produce demanded an authorization for the IRS to release Leon's 1099s and W2s from 2012 to the present, the authorization that Leon furnished to NYCHA does not specify the years for which Leon's tax information is to be provided. (*See* NYSCEF No. 198, at 11.) This court notes that to the extent that Leon intended to authorize the IRS to mail the requested tax information directly to NYCHA's counsel, the form that he gave to NYCHA does not list counsel's name, address, and telephone number in Box 5 of the form, as required.

Leon provided NYCHA with a HIPAA authorization for medical records maintained by his union. (*See* NYSCEF No. 198, at 2 [¶ 16], 13.) NYCHA objects on the ground that they sought (and are entitled to) authorization for "employment history and benefits" records maintained by Leon's union, not medical records. (NYSCEF No. 203, at 2.) This court notes that NYCHA's demand was somewhat ambiguous about which type of authorization it was seeking from Leon. (*See* NYSCEF No. 184, at 2 [¶ 16] [seeking a "HIP[AA] compliant authorization to plaintiff's Union for records where plaintiff worked from January 1, 2012 to the present"].) Regardless, though, the court agrees with NYCHA that it is entitled to an authorization permitting Leon's union to release his employment history and his wage and benefit information from January 1, 2012, to the present. Leon shall provide such an authorization to NYCHA within 21 days.

With respect to the demands for Leon's OSHA certificates, his scaffolding licenses and his State and City asbestos-removal licenses, NYCHA correctly points out that Leon has provided only his *current* licenses and 8-hour certificate—not, as demanded, copies of his licenses and certificates for the full period in which he testified at his deposition that he was employed in these fields (*i.e.*, 1999 to present) (*see* NYSCEF No. 184, at 1-2).

Accordingly, Leon must within 21 days provide a HIPAA-compliant authorization for (1) his entire medical record from Servicio Medico Hispano from the date of loss to present; (2) the entire medical record from NY Spine Specialist from date of loss to present; and (3) his therapist's entire medical records. These authorizations should also be initialed to permit the release of alcohol/drug-treatment, mental-health, and HIV-related information.

Leon must also within 21 days provide an authorization for his union to release his employment history and wage and benefit records from January 1, 2012, to present; and provide authorization for the release of 1099 and W2 tax information from 2012 to present to counsel for NYCHA. Leon must within 30 days provide copies of his OSHA, scaffolding, and asbestos-removal licenses and certificates from 1999 to present to the extent available. If such licenses and certificates are not available, Leon shall provide an affidavit of diligent search.

## **B. Technico's Discovery Demands**

### **1. Post-EBT Demand Dated March 19, 2019**

This demand sought HIPAA-compliant authorizations for a number of physicians and medical providers who provided treatment to Leon following his accident, records from Leon's union and some of his prior employers, and certain tax information. With respect to the medical authorizations, Leon again provided authorizations only to release a limited medical record, rather than his entire medical record including test results and films. Leon therefore must within 21 days provide complete HIPAA authorizations permitting release of his entire medical record.

Technico correctly points out that the employer authorizations that Leon provided them cover only the period from the date of loss (July 14, 2015) to present, though Technico is entitled to obtain information about Leon's hourly wage and earnings *before* he was injured in the underlying accident. Leon therefore within 21 days must provide authorizations for his prior employers permitting release of information from July 14, 2012, to present (the same as the authorizations requested by NYCHA); and he must provide an authorization from the union permitting release of information from January 1, 2012, to present (the same as the authorization requested by NYCHA).

Technico also is correct that although the notice to produce demanded an authorization for the IRS to release Leon's W2s from 2000 to the present, the authorization that Leon furnished to Technico is limited to the years 2013-2016. (*See* NYSCEF No. 201, at 18.) And, as with the authorization that Leon provided to NYCHA, the form that he gave to Technico does not list Technico's name, address, and telephone number in Box 5 of the form, as required.

Accordingly, Leon must within 21 days provide a HIPAA-compliant authorization for (1) his entire medical record from Servicio Medico Hispano from the date of loss to present; (2) his entire medical record from C.E. Robins Psychologist, PC from the date of loss to present; (3) his entire medical record from PR Medical from the date of loss to present; and (4) his entire medical record from Pain Physicians, NY, from the date of loss to present. These authorizations must also be initialed to permit the release of records about alcohol/drug treatment, mental-health information, and HIV-related information.

Additionally, Leon must within 21 days provide HIPAA-compliant authorizations permitting release of W2s, attendance records, and wage records from PAL Environment and Zoria Housing, from July 14, 2012, to present. And he must also provide HIPAA-compliant authorizations permitting release of union records from January 1, 2012, to present. Leon must also within 21 days provide an authorization permitting release of tax information from 2000 to present to counsel for Technico.

## **2. Court-Ordered Discovery**

In addition to the authorizations sought in Technico's post-EBT demands, Technico correctly notes that this court's May 1, 2019, conference order directed Leon to provide Technico's current counsel (the Fuchs Rosenzweig law firm) with provider authorizations that Leon previously gave to Technico's former counsel (the Wade Clark Mulcahy law firm). Leon therefore must within 21 days provide Fuchs Rosenzweig with HIPAA-compliant authorizations permitting the release of his entire medical record (including test results and films) from the date of loss to present for (1) Dr. Pervaiz Quereshi; (2) Dr. Kumar S. Reddy; (3) Dr. Anibal Romero;

Dr. Anibal Romero; and (4) Flushing Hospital. These authorizations must also permit the release of records about alcohol/drug treatment, mental-health information, and HIV-related information.

Additionally, Leon must also within thirty days serve Technico with a supplemental bill of particulars, as directed in this court's preliminary conference order of January 8, 2018, and this court's compliance conference order of May 1, 2019.

### C. Deposition and IME Deadlines

NYCHA and Technico also make the unopposed request, in light of the discovery that remains outstanding, for this court to extend the time for defendants to depose plaintiffs and to conduct an independent medical examination of Leon. Defendants' request for an extension of time is granted; the length of that extension shall be determined in consultation with the parties at the next status conference in this case, which is scheduled for Wednesday, November 20, 2019, at 10:00 a.m.

### D. Note of Issue

This court has recently become aware that on September 27, 2019, plaintiffs filed a note of issue and certificate of readiness because the note of issue deadline expired on that date—though as plaintiffs themselves acknowledge, substantial discovery remains outstanding and the case is *not* ready for trial. (*See* NYSCEF No. 193.) Plaintiffs' note of issue is thus plainly premature. This court hereby vacates the note of issue sua sponte, and extends the note of issue deadline nunc pro tunc. This court will determine the appropriate length of that, in consultation with the parties, at the scheduled November 20 status conference.

Accordingly, it is hereby

ORDERED that the branch of NYCHA's motion seeking to dismiss the complaint under CPLR 3126 is denied; and it is further

ORDERED that the branch of NYCHA's motion seeking in the alternative to preclude plaintiff from offering evidence as to the information sought but not provided is denied; and it is further

ORDERED that the branch of NYCHA's motion seeking in the alternative to compel plaintiffs to provide discovery to NYCHA and Technico under CPLR 3124 is granted in part and denied in part as described above; and it is further

ORDERED that the branch of NYCHA's motion seeking in the alternative to extend the deadline for defendants to conduct depositions of plaintiffs and an independent medical examination of Leon is granted to the extent described above; and it is further

ORDERED that plaintiffs' note of issue dated September 27, 2019, is vacated and plaintiffs' note of issue deadline is extended nunc pro tunc.

11/14/2019

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE