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| <b>Goldman v Chop't Creative Salad Co., LLC</b>  |
| 2019 NY Slip Op 33497(U)   |
| October 4, 2019  |
| Supreme Court, Bronx County  |
| Docket Number: 22716/2017  |
| Judge: Laura G. Douglas  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
PART 11

Index No. 22716/2017

ALLISON GOLDMAN,

Plaintiff,

**DECISION/ORDER**

-against-

**Present:**  
**Hon. Laura G. Douglas**  
**J.S.C.**

CHOP'T CREATIVE SALAD COMPANY, LLC  
and CHOPT UES, LLC,

Defendants.

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to compel and impose sanctions and cross-motion to impose sanctions:

| <u>Papers</u>  | <u>Numbered</u> |
|--|-----------------|
| <b>Defendants' Notice of Motion, Good Faith Affirmation of Elizabeth J. Streelman, Esq. dated April 24, 2019, Affirmation of Elizabeth J. Streelman, Esq. dated April 24, 2019 in Support of Motion, and Exhibits ("A" through "K").....</b>   | <b>1</b>        |
| <b>Plaintiff's Notice of Cross-Motion, Memorandum of Law by Ryan Weiner, Esq. dated May 16, 2019 in Opposition to Motion and in Support of Cross-Motion, Affirmation of Ryan Weiner, Esq. dated May 16, 2019 in Opposition to Motion and in Support of Cross-Motion, and Exhibits ("1" through "9").....</b> | <b>2</b>        |
| <b>Affirmation of Elizabeth J. Streelman, Esq. dated June 13, 2019 in Reply and in Opposition to Cross-Motion.....</b>   | <b>3</b>        |

*This motion and cross-motion are consolidated for purposes of Decision/Order and, upon the foregoing papers and after due deliberation, the Decision/Order on this motion and cross-motion is as*

*follows:*

The defendants seek an order compelling the plaintiff to answer certain questions at a deposition and awarding costs and attorney's fees pursuant to 22 NYCRR 130-1.1. The plaintiff cross-moves for an order imposing sanctions against the defendants pursuant to 22 NYCRR 130-1.1. The motion is granted solely as ordered below and is denied in all other respects. The cross-motion is denied in its entirety.

The plaintiff seeks monetary damages for injuries allegedly sustained as a result of consuming a contaminated sandwich purchased at the defendants' establishment on April 18, 2015. At her continued deposition on February 19, 2019, the plaintiff refused to answer certain questions on advice of her attorney. These included questions regarding her medical history, medical treatment, text messages, and bank statements. The plaintiff voluntarily submitted to this second deposition, since it appeared that certain of her medical records were unavailable at the time of her initial deposition.

The plaintiff's contention that this motion should be denied because the defendants did not set forth their good faith efforts to resolve this dispute is unavailing, since the affirmations in this case suggest that attempts to resolve these issues without resorting to court intervention would have been futile (*see Suarez v. Shapiro Family Realty Associates, LLC*, 149 AD3d 526 [1<sup>st</sup> Dept 2017]). It is doubtful that the plaintiff would have voluntarily submitted to yet another deposition.

The argument that a further deposition should be denied because the defendants' deposition notice for the plaintiff's continued deposition stated that its scope would be "limited to issues arising from these medical records" is also unavailing. While the plaintiff correctly declined to answer certain questions unrelated to the medical records, in keeping with the defendants' own defined parameters, that notice does not bar the defendants from seeking a further deposition at this time.

At the plaintiff's initial deposition, she testified that she did not recall when she first presented at the hospital with any sort of complaints or symptoms, but was informed of the date by her mother (*see* plaintiff's deposition transcript, October 4, 2017, pp. 31-33). Similarly, she learned what her initial complaints were through text messages between her and a couple of friends (*see* plaintiff's deposition transcript, October 4, 2017, p. 33). The plaintiff admitted that she retained those text messages and the defendants made a demand for same (*see* plaintiff's deposition transcript, October 4, 2017, pp. 33-34). The plaintiff also testified that she had been able to recreate some of where she was, what she did, and what she ate on the date in question by using information obtained from other individuals (*see* plaintiff's

deposition transcript, October 4, 2017, pp. 39 - 41). For example, her mother told her that she had “finished half [of the sandwich] and the other half was taken home” and that she had later “[thrown] out the other half” (*see* plaintiff’s deposition transcript, October 4, 2017, pp. 42 - 43). A text message between the plaintiff and a friend mentions that the plaintiff ate a soup later that evening (*see* plaintiff’s deposition transcript, October 4, 2017, p. 44) and that the following day she took a walk with some friends and might have stopped at a wine bar (*see* plaintiff’s deposition transcript, October 4, 2017, pp. 46-47). The plaintiff could not recall where she had been or where she had eaten during the week prior to the subject date and that her text messages from that week do not reveal any such information (*see* plaintiff’s deposition transcript, October 4, 2017, p. 47). However, the plaintiff did identify by name and location several restaurants where she would typically eat breakfast and lunch during workdays, as well as restaurants near her home where she would typically have dinner.

Given the nature of the plaintiff’s claims, the information sought is material and necessary to a proper defense. The plaintiff bears the burden of proving that the defendants’ sandwich was defective and that her injury was caused by its consumption, beyond mere speculation (*see Brown v. City Sam Restaurants, Inc.*, 246 Ad2d 301 [1<sup>st</sup> Dept 1998] and *Valenti v. Great Atlantic & Pacific Tea Company*, 207 AD2d 340 [2<sup>nd</sup> Dept 1994]). Moreover, it appears that the defendants did not possess the text messages or health department report at the time of the plaintiff’s second deposition. Therefore, the plaintiff should submit to questioning regarding the text messages contained in Exhibit “E” to the Strelman Affirmation in Support and the Hemolytic Uremic Syndrome Surveillance material contained in Exhibit “F”. However, the questioning is limited to these subject matters - other issues that were not covered at the initial deposition cannot now be used to compel the plaintiff to submit to yet another deposition. The Court notes that no mention of bank records or phone applications such as Ritual, Seamless, or Postmates, was made by defendants’ counsel at the plaintiff’s first deposition. In addition, the defendant does not now seek production of any other disclosure. Any alleged inconsistencies in the plaintiff’s deposition testimony may be explored at trial through cross-examination. In light of the defendants’ own limitation set forth in its deposition notice, this Court cannot conclude that counsel’s instructions to decline to answer other questions constituted frivolous conduct in violation of 22 NYCRR 130-1.1. With respect to the propriety of the subpoenas issued by the plaintiff to The Hain Celestial Group, Inc. and L Catterton and in the absence of motions to quash the subpoenas, this Court cannot conclude that they are frivolous.

The plaintiff’s application for sanctions pursuant to 22 NYCRR 130-1.1 is denied. She has not demonstrated that any of the positions taken by the defendants rise to the level of frivolous conduct

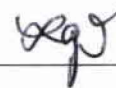
required to sustain an award under Part 130 of the Rule of the Chief Administrator nor has she shown that the defendants' actions have caused her to incur any meaningful prejudice.

Accordingly, it is hereby

ORDERED that the plaintiff shall appear for a further deposition limited to questions regarding the text messages contained in Exhibit "E" to the Streehman Affirmation in Support and the Hemolytic Uremic Syndrome Surveillance material contained in Exhibit "F" no later than 30 days following service of a copy of this Order with notice of entry.

The foregoing constitutes the Decision and Order of this Court.

DATED:       October 4, 2019  
                  Bronx, New York

  
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HON. LAURA G. DOUGLAS  
J.S.C.