

Naula v Utokilen LLC
2019 NY Slip Op 33917(U)
March 11, 2019
Supreme Court, Queens County
Docket Number: 709320-2016
Judge: Leslie J. Purificacion
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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

VICTOR NAULA,

x Index
Number 709320 2016

Plaintiff,

Motion
Date September 20, 2018

-against-

UTOKILEN LLC, ADAPT CONSTRUCTION,
LLC AND NANCY MARIN-ROJAS, D.D.S.,
P.C.,

Motion Seq. No. 5

Defendants

UTOKILEN LLC AND NANCY MARIN-ROJAS
D.D.S., P.C.,

Third-Party Plaintiffs,

-against-

SPECIALIZED DENTAL CONSTRUCTION INC.,

Third-Party Defendants.

FILED
MAR 20 2019
COUNTY CLERK
QUEENS COUNTY

The following numbered papers read on this motion by third-party defendant Specialized Dental Construction Inc. (Specialized) pursuant to CPLR 3025 (b) for leave to amend its answer and counterclaims dated March 6, 2018, to add affirmative defenses of lack of standing, lack of capacity to sue, lack of subject matter jurisdiction and that the third-party complaint dated February 2, 2018, filed by defendants/third-party plaintiffs Utokilen LLC (Utokilen) and Nancy Marin-Rojas D.D.S., P.C. (Rojas) is barred by a mandatory arbitration clause in the contract dated December 20, 2015, between defendants/third-party plaintiffs Utokilen and Rojas and third-party defendant Specialized; pursuant to CPLR 3101, 3115 and

3126 (3) to dismiss the complaint dated August 2, 2016, of plaintiff Victor Nuala for refusal to answer certain questions third-party defendant Specialized posed at plaintiff's deposition on May 1, 2018; pursuant to CPLR 3101, 3115 and 3126 (3) to preclude plaintiff from offering any liability or damages evidence or testimony at the time of trial or in dispositive motion practice for refusing to answer certain questions third-party defendant Specialized posed at plaintiff's deposition on May 1, 2018; or in the alternative, pursuant to CPLR 3101, 3115, 3124 and 22 NYCRR Section 221.2, to compel plaintiff to appear for a further deposition, solely at plaintiff's expense, on a mutually agreeable date within thirty days, to respond to the questions third-party defendant Specialized posed and plaintiff's counsel refused to allow plaintiff to answer at the deposition on May 1, 2018; and pursuant to CPLR 3126 (3), to dismiss plaintiff's complaint dated August 2, 2016, for failure to produce the materials in Demand No. 1 in third-party defendant Specialized's Notice to Produce, dated June 4, 2018; pursuant to CPLR 3126 (3), to preclude plaintiff from offering any liability or damages evidence or testimony at the time of trial or in dispositive motion practice for failure to produce the materials in Demand No. 1 in third-party defendant Specialized's Notice to Produce, dated June 4, 2018; or, in the alternative, pursuant to CPLR 3124, to compel plaintiff to produce the materials in Demand No. 1 in third-party defendant Specialized's Notice to Produce, dated June 4, 2018, within thirty days of the date of any order, and on this cross-motion by plaintiff pursuant to CPLR 3126 to strike the answers of defendant Adapt Construction LLC (Adapt) and third-party defendant Specialized for failing to appear for court-ordered depositions and to produce court-ordered discovery; or, in the alternative to preclude defendant Adapt and third-party defendant Specialized from testifying at trial unless said defendant and third-party defendant appear for their examinations before trial within 30 days of the return date and produce all outstanding discovery as set forth herein.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits EF 78-92
 Notice of Cross Motion - Affidavits - Exhibits..... EF 96-106
 Answering Affidavits - Exhibits EF 107-109;113;
 117-120
 Reply Affidavits EF 114-116

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Generally, leave to amend or supplement a pleading “shall be freely given” (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party. (*See Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *see also Gitlin v Chirinkin*, 60 AD3d 901 [2009]; *Matter of Salon Ignazia, Inc.*, 34 AD3d 821 [2006].)

In support of this unopposed branch of its motion, third-party defendant Specialized submits, among other things, the proposed amended third-party answer with counterclaims and the affidavit of service of the motion.

The proposed affirmative defenses and counterclaims cannot be characterized as palpably insufficient or totally devoid of merit on their face. In addition, as defendants/third-party plaintiffs Utokilen and Rojas do not oppose this branch of third-party defendant Specialized’s motion, there is no showing of prejudice or surprise sufficient to deny it. Moreover, defendants/third-party plaintiffs Utokilen and Rojas will not be prejudiced by the proposed amendments since this case is not on the trial calendar, and discovery has not been completed.

Accordingly, the unopposed branch of third-party defendant Specialized’s motion seeking leave to serve an amended third-party answer with counterclaims is granted.

Third-party defendant Specialized is directed to serve and file the amended third-party answer with counterclaims, in the form annexed to the moving papers, within 20 days of the date of entry of this order on all parties, and responsive pleadings, if any, shall be served within 20 days after such service. (*See CPLR 3025[d]*.)

Next, third-party defendant Specialized seeks dismissal of plaintiff’s complaint or to preclude plaintiff from offering any liability or damages evidence or testimony at the time of trial or in dispositive motion practice for failure to respond to Demand No. 1 in Specialized’s Notice to Produce, dated June 4, 2018, which seeks an authorization from plaintiff to view his cellular (cell) phone records and text messages on the date of the subject accident, May 30, 2016, and for the period thereafter from June of 2016 through July of 2016, or to compel plaintiff to provide said authorization.

CPLR 3101 (a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” “The words, ‘material and necessary’, are . . . to be interpreted liberally 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. The test is one of usefulness and reason.” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *see Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2010];

Friel v Papa, 56 AD3d 607 [2008].) “The standard to be applied in determining the discoverability of the requested cell phone records is whether such records are ‘material and necessary’ in the prosecution or defense of this action, which . . . really amounts to whether they are relevant.” (*Page v Napier*, 2009 NY Slip Op 30325 [U] [2009].)

Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure.” (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 [2009]; see *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2007].) “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” (*Foster v Herbert Slepoy Corp.*, *supra* at 1140.) The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter. (See *Conte v County of Nassau*, 87 AD3d 558 [2011]; see also *Auerbach v Klein*, 30 AD3d 451 [2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [1990].) A motion to compel responses to demands is properly denied where the demands seek information which is irrelevant, overbroad, or burdensome. (See *Merkos L’Inyonei Chinuch, Inc. v Sharf*, *supra*.)

In this case, third-party defendant Specialized has failed to demonstrate that any relevant evidence can be gleaned from plaintiff providing an authorization for his cell phone records and text messages. (See *Cavaliere v Gelb*, 2016 NY Slip Op 31835[U].) In addition, this demand is overbroad and burdensome. (Cf. *D’Alessandro v Nassau Health Care Corp.*, 137 AD3d 1195 [2016].) Moreover, to the extent that third-party defendant Specialized is looking to establish whether or not calls and texts were made by plaintiff to Specialized’s owner/principal, George Youseff, and its employee/foreman, Manuel, on the date of and for the two months following the subject accident, third-party defendant Specialized can obtain such information through the cell phone records and text messages of its owner/principal George Youseff, and employee/foreman, Manuel.

Accordingly, the branches of third-party defendant Specialized’s motion seeking to dismiss plaintiff’s complaint or to preclude plaintiff from offering any liability or damages evidence or testimony at the time of trial or in dispositive motion practice for failure to respond to third-party defendant Specialized’s demand for an authorization from plaintiff to view his cell phone records and text messages on the date of the subject accident, May 30, 2016, and for the period thereafter from June of 2016 through July of 2016, or to compel plaintiff to provide said authorization in response to its demand are denied.

The branches of third-party defendant Specialized’s motion seeking to dismiss plaintiff’s complaint or to preclude plaintiff from offering any liability or damages evidence

or testimony at the time of trial or in dispositive motion practice for alleged willful failure to answer certain questions at his examination before trial held on May 1, 2018, about the content of text messages between plaintiff and third-party defendant Specialized's owner/principal, George Youseff, are also denied.

The branch of third-party defendant Specialized's motion seeking to compel plaintiff to appear for a further examination before trial is denied without prejudice to renew upon disclosure by third-party defendant Specialized to plaintiff of the text messages upon which it seeks a further examination.

The branch of plaintiff's cross motion pursuant to CPLR 3126 to strike the answer of third-party defendant Specialized for failing to respond to plaintiff's Notice to Produce and Disclose and Notice for Discovery and Inspection, dated May 2, 2018, is denied as academic since third-party defendant Specialized demonstrated that it responded to these discovery demands.

The branches of plaintiff's cross motion seeking to strike the answers of defendant Adapt and third-party defendant Specialized and for a conditional order of preclusion for failure to appear for court-ordered examinations before trial are denied.

Defendant Adapt and third-party defendant Specialized, however, are directed to appear for examinations before trial which are to be held within 60 days of the date of service of a copy of this order with notice of entry.

Dated:

MAR 11 2019

Hon. Leslie J. Purificacion, J.S.C.

FILED
MAR 20 2019
COUNTY CLERK
QUEENS COUNTY