

Rubin v Town Sports Intl., LLC
2019 NY Slip Op 34166(U)
October 28, 2019
Supreme Court, Westchester County
Docket Number: 71659/2014
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
MARK RUBIN,

Plaintiff,

DECISION & ORDER

-against-

Index No. 71659/2014
Motion Date: 10/28/19

TOWN SPORTS INTERNATIONAL, LLC, TSI CLUB, LLC,
TSI EAST 9A, LLC, NEW YORK SPORTS CLUBS,
YORKVILLE TOWERS ASSOCIATES, LLC, INTER-
COUNTY MECHANICAL CORP., THE RUPPERT YORK-
VILLE TOWERS CONDOMINIUM and RY MANAGEMENT
CO., INC.,

Seq Nos. 7, 8, 9

Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on these motions (1) by plaintiff for a protective order pursuant to CPLR §3103, denying defendants' demand for authorizations for records from plaintiff's alleged prior lawsuits and for his primary care physician records, and for such other and further relief this court deems just and proper (MS 7); (2) by defendants Town Sports International, LLC, TSI Club, LLC, TSI East 91, LLC, New York Sports Clubs, and Yorkville Towers Associates, LLC, (hereinafter Town Sports Defendants collectively) for an order (a) dismissing plaintiff's complaint or, in the alternative, precluding plaintiff from offering any evidence at the time of trial pursuant to CPLR §3126 for plaintiff's failure to provide outstanding discovery; or (b) compelling plaintiff to provide responses to all outstanding discovery, with the failure to do so resulting in a self-executing order of dismissal; and (c) pursuant to 22 NYCRR 130-1.1(a), awarding defendants costs for making this cross motion to compel court-ordered discovery and opposing plaintiff's order to show cause; and (d) for such other and further relief as to this court deems just and proper (MS 8); and (3) by plaintiff for an order pursuant to CPLR §3124, compelling the Town Sports Defendants to properly and adequately respond to plaintiff's demands for discovery and inspection, and for such other and further relief as this court deems just and proper (MS 9):

- MS 7: Order to Show Cause - Affirmation in Support - Exhibits
Affirmation in Opposition - Exhibits
- MS 8: Notice of Cross-Motion¹-Affirmation in Support - Exhibits
- MS 9: Order to Show Cause - Affirmation in Support - Exhibits

¹ This technically unauthorized cross motion was permitted by the Court.

Affirmation in Opposition - Exhibits
NYSCEF File

Upon the foregoing papers and proceedings held on October 28, 2019, these motions are determined as follows:

Procedural History/Facts

The within action seeks damages for personal injuries allegedly sustained by plaintiff on October 5, 2014, when he slipped and fell at the premises of defendant New York Sports Club located at 1637 Third Avenue, New York, New York. The action was commenced on December 25, 2014 by the filing of a summons and verified complaint. On or about October 21, 2016, plaintiff filed his second supplemental summons and second amended verified complaint as against the Town Sports Defendants. On November 15, 2016, the Town Sports Defendants interposed their verified answer to plaintiff's second amended verified complaint. On or about December 31, 2016, plaintiff served a verified bill of particulars.

The parties appeared for a preliminary conference on April 2, 2015. Thereafter, supplemental bills of particulars were served by plaintiff on February 24, 2016, June 12, 2016, January 18, 2018, and February 25, 2018. Compliance conferences were held on January 26, 2016, July 22, 2016, August 31, 2016, November 1, 2016, December 15, 2016, and February 15, 2017.

Plaintiff filed a note of issue and certificate of readiness for trial on April 17, 2017. By Order to Show Cause filed May 17, 2018, the Town Sports Defendants sought to vacate the note of issue and to compel the production of discovery including trial authorizations. Plaintiff supported the motion to vacate the note of issue and stated that plaintiff had not served the authorizations due to counsel's recent illness. On May 24, 2018, this court ordered, upon the consent of the parties, to vacate the note of issue. The matter was marked off the trial calendar.

On or about June 18, 2018, the Town Sports Defendants served a demand for authorizations. On July 27, 2018, the Town Sports Defendants sent plaintiff a good faith letter concerning the trial authorizations. On August 3, 2018, the Town Sports Defendants served a supplemental notice for discovery and inspection, which sought, *inter alia*, discovery concerning plaintiff's prior automobile accidents. On August 16, 2018, plaintiff served a response to the supplemental notice for discovery and inspection. On November 21, 2018 the Town Sports Defendants sent plaintiff a good faith letter concerning further responses to the supplemental notice for discovery and inspection. On March 5, 2019, the Town Sports Defendants served a second supplemental notice for discovery and inspection concerning plaintiff's prior personal injury actions.

On April 17, 2019 plaintiff filed a second note of issue with certificate of readiness. Consequently the Town Sports Defendants moved for an order vacating plaintiff's note of issue and certificate of readiness, striking the matter from the court's calendar, permitting discovery to

proceed pursuant to court order, and extending the time to file a motion for summary judgment. In opposition, plaintiff simply objected to the Town Sports Defendants' demands for certain HIPAA authorizations, but failed to provide any further detail. Notably, plaintiff never raised any other outstanding discovery issues in his opposition.

By decision and order of this court dated July 1, 2019, the April 17, 2019 note of issue and certificate of readiness were vacated on consent due to plaintiff's counsel's health and in order to allow for additional discovery. However, because the underlying papers upon which the court rendered its decision were unclear, the court was unable to compel discovery and instead, referred the matter back to the compliance part for a further conference.

On July 30, 2019, a compliance conference was held and an order issued. Specifically plaintiff was ordered to respond to defendants' August 3, 2018 and March 5, 2019 notices for discovery and inspection and supplemental demand for authorizations on or before August 9, 2019. There is no evidence in the order that plaintiff requested the production of outstanding items of discovery from defendants.

Thereafter, on August 2, 2019, plaintiff first served a sixth notice of discovery and inspection and a letter demand for a further deposition of defendants' witness, Eric Tung. Plaintiff subsequently served a notice to take a non-party deposition on August 12, 2019, and a demand for a premises inspection on August 13, 2019. It is alleged that plaintiff's responses to defendants' August 3, 2018 and March 5, 2019 demands for discovery and inspection, served August 9, 2019, were wholly insufficient.

A further compliance conference was held on August 27, 2019. An order issued on September 5, 2019 as a result of that conference directing plaintiff to provide authorizations to defendants with regard to plaintiff's prior accidents, the non-privileged portion of relevant legal files, and plaintiff's primary care physician, Dr. Corst.

A further compliance conference was held on September 9, 2019 wherein plaintiff was granted a briefing schedule for motion sequence 7 herein. In addition, a compliance conference order was entered directing plaintiff again to fully comply with the September 5, 2019 court order within ten days.

The Parties' Contentions

Motion Seq. 7

Plaintiff seeks a protective order pursuant to CPLR §3103, denying defendants' demand for authorizations for records from plaintiff's alleged prior lawsuits and for his primary care physician records. Notably, these documents were requested in defendants' second supplemental notice for discovery and inspection of March 5, 2019, and have since been the subject of three court orders directing plaintiff's compliance.

Plaintiff submits a protective order is required because (1) the discovery demands at issue

were untimely; (2) defense counsel has failed to make any evidentiary showing that the prior lawsuits are related to plaintiff's claimed right hand injury; and (3) defendants have failed to establish that plaintiff placed body parts other than his right hand in controversy. With respect to the defendants' demand for an authorization for plaintiff's primary care physician records, plaintiff submits this demand was objected to as irrelevant when first made and defendants never sought relief to obtain this authorization.

The Town Sports Defendants oppose the motion. They first argue that plaintiff incorrectly has moved for a protective order with respect to the discovery at issue, instead of moving to renew, based upon alleged new arguments. Indeed, the court already has decided that the Town Sports Defendants are entitled to the discovery that plaintiff now seeks a protective order from, as evidenced by the orders cited above. In addition, the Town Sports Defendants submit that plaintiff had a full and fair opportunity to oppose production of the discovery in its opposition to the Town Sports Defendants' prior order to show cause, but failed to do so.

In addition, plaintiff now submits new facts never before proffered as reasons the discovery should not be produced. The Town Sports Defendants argue there is no reasonable justification for the failure to present these new facts in opposition to the prior motion. Plaintiff has been in possession of the relevant demand for over six months, and had ample time to produce a relevant affidavit in opposition to the Town Sports Defendants' order to show cause. Further, plaintiff does not attempt to provide a reasonable justification for his failure to submit the proffered affidavit in connection with the original opposition to the Town Sports Defendants' Order to Show Cause. As such, the Town Sports Defendants urge the Court to disregard plaintiff's newly submitted objections to the discovery.

The Town Sports Defendants further argue they are entitled to the discovery at issue because this court has ordered the production of such discovery on three separate occasions, including in its orders of July 30, 2019, August 27, 2019 and September 9, 2019.

Finally, notwithstanding plaintiff's new argument that the records sought are irrelevant and immaterial to plaintiff's claimed injury, plaintiff's bill of particulars alleges "all of the heretofore mentioned injuries have substantially prevented the plaintiff from enjoying the fruits of plaintiff's social and economic activities and from attending to plaintiff's usual and customary duties, avocations, and activities" (NYSCEF Doc. 258). Due to the foregoing, the Town Sports Defendants submit they are clearly entitled to records pertaining to the plaintiff's physical health, and the non-privileged portion of the legal files that clearly involve plaintiff's physical health.

Motion Sequence 8

Upon this motion, and incorporating the procedural and factual history above stated, the Town Sports Defendants move for an order dismissing plaintiff's complaint, or precluding plaintiff from offering any evidence at trial, or compelling plaintiff to provide responses to all

outstanding discovery, with the failure to do so resulting in a self-executing order of dismissal. Town Sports Defendants also seek an award of costs in connection with this motion practice.

In sum, the Town Sports Defendants argue that plaintiff's repeated failure to comply with three court orders directing the production of discovery which defendants deem to be material to the defense of this action constitutes a pattern of repeated neglect and willful and contumacious behavior warranting judicial intervention in the form of CPLR Article 31 relief. No written opposition to this motion was filed with the court.

Motion Sequence 9

Upon this motion, and incorporating the procedural and factual history above stated, plaintiff seeks an order pursuant to CPLR §3124, compelling the Town Sports Defendants to properly and adequately respond to plaintiff's sixth notice for discovery and inspection first served on August 2, 2019, his demand for a further deposition served August 12, 2019, and his demand for a premises inspection dated August 13, 2019.

Plaintiff seeks the discovery set forth in his sixth notice for discovery and inspection claiming that the records produced would indicate the time of day that the dance team "Shooting Stars" practiced at the accident site prior to plaintiff's accident. Plaintiff also seeks an address for Shooting Stars, contracts between Shooting Stars and the gym, and to perform an inspection of the gym. Plaintiff alleges defendants have failed to provide any response to his demands in this regard and argue they should be compelled to provide such responses.

The Town Sports Defendants oppose the motion on several grounds. First, they argue that plaintiff's sixth notice for discovery and inspection is untimely. The documents sought were not demanded when plaintiff filed the April 17, 2019 note of issue, when plaintiff opposed defendants' order to show cause to strike the note of issue, or at the initial compliance conference after the note of issue was stricken.

Second, the Town Sports Defendants argue that the information sought in the sixth notice for discovery and inspection seeks attorney-client privileged evidence as it (1) seeks notes, documents and records utilized in preparation and as a result of an investigation conducted by defendants' attorney with defendants' employees; (2) seeks irrelevant information in light of the deposition testimony; and (3) seeks privileged notes created in anticipation of litigation during the investigation into the matter by counsel.

Third, the Town Sports Defendants submit that plaintiff's demand for an inspection of defendants' premises must be denied. This demand first was served on August 13, 2019, more than four and one-half years after the filing of the summons and complaint. The Town Sports Defendants argue that plaintiff has waived his opportunity to conduct such an inspection through the filing of two notes of issue, and by failing to include this demand in plaintiff's opposition to

defendant's second order to show cause and the July 30, 2019 compliance conference order.

Finally, the Town Sports Defendants argue that plaintiff's request for a further deposition of defendant TSI is not warranted, as plaintiff failed to argue for this relief in this motion. Alternatively, it is argued that plaintiff is not entitled to a further deposition as there has been no showing of the existence of special circumstances that would justify a departure from the usual rule of practice that precludes a further deposition of the same witness after his deposition is concluded (citing *Purvin v Grey*, 275 AD 688 [2d Dept 1949]; *Matter of World Trade Center Bombing Litigation*, 298 AD2d 72, 79 [1st Dept 2000]).

Legal Analysis/Discussion

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "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" (see *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (see *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 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" (see *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). 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 *Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

"The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820, 821 [2d Dept 2007] [internal quotation marks omitted]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (see *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, ... coupled with either no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

The court system has an obligation to ensure that litigants' cases are not delayed to their prejudice. In February 2016, the Chief Judge of the State of New York, Hon. Janet DiFiore, announced the "Excellence Initiative" for the New York State Unified Court System. The Excellence Initiative seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on "standards and goals" as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge's Excellence Initiative and delivering justice to all that enter our courts in a timely

and efficient manner.

The Court of Appeals has explained the importance of adhering to court deadlines as follows:

“As we made clear in *Brill*, and underscore here, statutory time frames - like court-ordered time frames - are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726–727 [2004]; internal citations omitted).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

“As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81[2010]; internal citations omitted).

Applying the foregoing to the motions at issue here, the court finds the following:

Plaintiff’s motion a protective order pursuant to CPLR §3103, denying defendants’ demand for authorizations for records from plaintiff’s alleged prior lawsuits and for his primary care physician records is denied (Motion Sequence 7). As stated above, these documents were requested in defendants’ second supplemental notice for discovery and inspection of March 5, 2019, and have since been the subject of three court orders directing plaintiff’s compliance.

In addition, plaintiff incorrectly moved for a protective order with respect to the discovery at issue, instead of moving to renew based upon allegedly new evidence. Plaintiff had a full and fair opportunity to oppose the discovery sought in its opposition to the Town Sports Defendants’ prior order to show cause, but failed to do so.

Finally, it is clear that defendants are entitled to the discovery sought notwithstanding

plaintiff's new argument that the records are irrelevant and immaterial to plaintiff's claimed injury. Because plaintiff's bill of particulars alleges that "all of the heretofore mentioned injuries have substantially prevented the plaintiff from enjoying the fruits of plaintiff's social and economic activities and from attending to plaintiff's usual and customary duties, avocations, and activities", defendants are entitled to examine records pertaining to the plaintiff's physical health, and the non-privileged portion of the legal files that clearly involve plaintiff's physical health.

The Town Sports Defendants motion for CPLR Article 31 relief is granted to the extent that plaintiff is precluded from offering evidence or testimony at trial for his willful and contumacious failure to respond to court ordered discovery unless plaintiff produces such discovery within 30 days of the date of this decision and order (Motion Sequence 8). To the extent the discovery is not provided as directed herein, the Town Sports Defendants are directed to upload to NYSCEF an affidavit of non-compliance and a proposed order of preclusion as hereinafter ordered. To the extent the Town Sports Defendants seek an award of costs, such request is denied without prejudice.

Plaintiff's motion to compel the Town Sports Defendants to respond to plaintiff's sixth notice for discovery and inspection first served on August 2, 2019, his demand for a further deposition served August 12, 2019, and his demand for a premises inspection dated August 13, 2019 is denied (Motion Sequence 9). The demands are untimely, seek privileged information, and are waived by virtue of plaintiff filing two notes of issue certifying that all discovery is complete. In addition, there has been no showing of the existence of special circumstances that would justify a departure from the usual rule of practice that precludes a further deposition of the same witness after his deposition is concluded.

Accordingly, it is

ORDERED that plaintiff's motion a protective order pursuant to CPLR §3103 is denied (Motion Sequence 7); and it is further

ORDERED that The Town Sports Defendants' motion for CPLR Article 31 relief is granted to the extent that plaintiff is precluded from offering evidence or testimony at trial for his willful and contumacious failure to respond to court ordered discovery unless plaintiff produces such discovery within 30 days of the date of this decision and order (Motion Sequence 8); and it is further

ORDERED that to the extent plaintiff fails to provide the discovery as directed herein, the Town Sports Defendants shall upload to NYSCEF an affidavit of non-compliance and a proposed order of preclusion on or before December 5, 2019; and it is further

ORDERED that the branch of the Town Sports Defendants' motion which seeks an award of costs, such request is denied without prejudice; and it is further

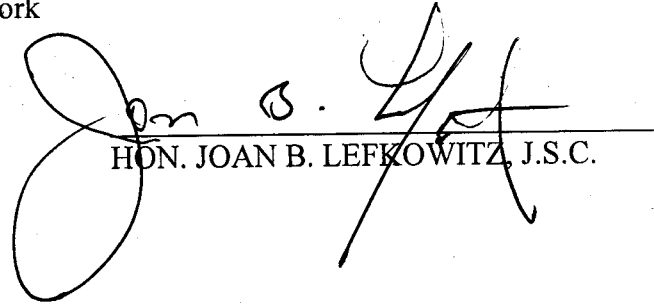
ORDERED that plaintiff's motion to compel the Town Sports Defendants to respond to

plaintiff's sixth notice for discovery and inspection, his demand for a further deposition, and his demand for a premises inspection is denied (Motion Sequence 9); and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Room 800, on October 31, 2019 at 9:30 A.M.; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order upon defendants with notice of entry within 10 days of entry.

Dated: White Plains, New York
October 28, 2019



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:
All Counsel by NYSCEF
cc: Compliance Part