

Anderson v Singh

2019 NY Slip Op 34209(U)

February 26, 2019

Supreme Court, Westchester County

Docket Number: 58229/2016

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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
MAXINE BENT ANDERSON and HEATHER BENT-TAMIR,

Plaintiffs,

-against-

DECISION and ORDER
Index No. 58229/2016
Motion Date: Feb. 26, 2019
Seq. Nos. 7 & 8

GURMEET SINGH, NISHAN SINGH, BERNARD MORCHELES, and JOHN DOES 1-5, (hereinafter "JOHN DOE") a fictitious name for the individuals or entities which hired, employed or otherwise contracted with Defendant(s) at the time of the subject incident and is responsible by way of vicarious liability, respondeat superior or otherwise for the acts and omissions alleged herein and/or negligently repaired, managed, maintained, controlled, entrusted, and/or owned the subject vehicles described below and involved in the subject incident and whose identity is presently known only to the Defendant(s),

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on the motion of defendant Bernard Morcheles ("Morcheles") (Seq. No. 7) for an order: pursuant to 22 NYCRR §130-1.1(a) directing plaintiffs' counsel and/or plaintiffs to pay to Morcheles's counsel reimbursement for actual expenses and attorney's fees resulting from their frivolous conduct; pursuant to 22 NYCRR §130-1.1(b) imposing financial sanctions upon plaintiffs' counsel and/or plaintiffs in the amount of \$10,000.00; and for such other and further relief as this court may deem just and proper under the circumstances.

Order to Show Cause; Affirmation in Support of Debora J. Dillon, Esq.; Exhibits A-Q
Affirmation in Opposition of Peter DeFilippis, Esq.; Exhibit List; Exhibits A-I;
Certificate of Merit
Affidavit of Service
NYSCEF File

The following papers were read on plaintiffs' motion (Seq. No. 8) for an order pursuant to

CPLR 3103 and CPLR 2304 quashing the subpoena duces tecum and ad testificandum dated December 13, 2018 seeking the deposition of Meryl Arbisfeld (“Arbisfeld”) of IME Advocates, Inc.; pursuant to CPLR 3103 for a protective order concerning the part of Morcheles’s demand for IME Witness Disclosure, dated January 4, 2019, seeking the actual business and residential addresses for Michael Lilien (“Lilien”) of IME Watchdog and production of all photographs, digital images, moving images/video and recordings made by Lilien concerning the May 8, 2018 vocational rehabilitation assessment conducted by Alan L. Getreu (“Getreu”); sanctions pursuant to 22 NYCRR §130-1; and granting such other and further relief as may be just, proper and equitable.

- Order to Show Cause; Affirmation in Support of Peter DeFilippis, Esq.; Exhibits A-J; Certificate of Merit
- Affirmation in Opposition of Paul Kovner, Esq.
- Affirmation in Opposition of Debora J. Dillon; Exhibits A-R
- Affidavits of Service
- NYSCEF File

Upon the foregoing papers and the proceedings held on February 26, 2019, these motions are determined as follows:

Plaintiffs commenced this action to recover damages for personal injuries allegedly stemming from a 2013 automobile accident.¹ By Decision and Order dated October 25, 2018 this court denied the motion by Morcheles which sought, inter alia, notes and reports created by Arbisfeld when she accompanied plaintiffs to their independent medical examinations (“IMEs”). In so doing, this court determined that Arbisfeld was acting as an agent of plaintiffs’ counsel and that the notes taken by her during the course of the IMEs were subject to the attorney work product privilege.

On or about December 13, 2018 Morcheles served plaintiffs with a notice of non-party deposition and a copy of a subpoena duces tecum and ad testificandum for Arbisfeld.² The subpoena directed Arbisfeld to appear for her deposition on January 24, 2019 and sought: all photographs, digital images, moving images/video and audio recordings made by Arbisfeld during the: May 7, 2018 IMEs of plaintiff by Dr. Rene Elkin (“Elkin”), May 9, 2018 IMEs of plaintiffs by Dr. Richard Weinstein (“Weinstein”), and May 8, 2018 vocational rehabilitation assessment of plaintiffs by Getreu. Plaintiffs’ counsel contacted Morcheles’s counsel requesting that she withdraw the subpoena served on Arbisfeld on the grounds that her notes and reports had

¹ The factual and procedural history has been previously set forth in detail in this court’s September 13, 2018 Decision and Order.

² Morcheles’s counsel states that service upon Arbisfeld was attempted multiple times. An affidavit of service filed to NYSCEF indicates that service of the subpoena duces tecum and ad testificandum was made on January 25, 2019.

been determined by the court to be non-discoverable attorney work product. When Morcheles's counsel refused to withdraw the subpoena plaintiffs' counsel requested an immediate conference.

On or about January 4, 2019 Morcheles served a demand for witness disclosure on plaintiffs seeking the business and residential addresses for Lilien and all photographs, digital images, moving images/video and audio recordings made by him concerning the May 2018 vocational rehabilitation assessment of plaintiffs conducted by Getreu. Plaintiffs responded on January 16, 2019 objecting to the demand for any notes or reports created by Lilien arguing that this issue had been determined by the October 25, 2018 Decision and Order. Plaintiffs further advised that no photographs, digital images, moving images/video and audio recordings were made by Lilien concerning the assessment by Getreu. Plaintiffs additionally stated that they would call Lilien as a rebuttal witness should his recollection of the assessment differ from Getreu's. Plaintiffs further objected stating that since the court did not find a basis for directing plaintiffs to provide Arbisfeld's home address in the October 25, 2018 Decision and Order, plaintiffs were not obligated to provide a business or residential address for Lilien.

The parties appeared for a conference on January 7, 2019 at which time Morcheles's counsel provided case law, including inter alia, *Santana v Johnson* (154 AD3d 452 [1st Dept 2017]), which she contended provided authority for Arbisfeld's deposition. Plaintiffs contend that the cases presented by Morcheles are inapplicable. Plaintiffs seek sanctions on the grounds that Morcheles's subpoena is frivolous and has created unnecessary motion practice. Morcheles has also moved for sanctions on the grounds that plaintiffs have moved for sanctions and have sought to quash the subpoena despite having been provided with, what Morcheles contends, is persuasive case law entitling Morcheles to Arbisfeld's deposition.

Plaintiffs argue that Morcheles has not presented any cases in which a court has directed the deposition of an IME observer, in this case Arbisfeld, where the notes of that IME observer have been judicially determined to constitute attorney work product. Plaintiffs argue that there is no distinction between the observations recorded in Arbisfeld's report concerning the IMEs and her observations about the IMEs. Plaintiffs argue that Morcheles has failed to explain how a deposition of Arbisfeld would not involve questions concerning the very notes/reports which were deemed attorney work product in this court's October 25, 2018 Decision and Order. Plaintiffs rely on *Loose v Penfield Volunteer Emergency Ambulance Service, Inc.* (222 AD2d 1080 [4th Dept 1995]), where the court denied the depositions of employees whose notes were shielded from discovery as materials prepared in anticipation of litigation because plaintiffs had failed to establish how the depositions of those employees "would not provide the substantial equivalent of the information contained in them."

Morcheles³ argues that this court is bound, pursuant to the doctrine of stare decisis, by the First Department's decision in *Santana* which defendants contend allowed defense counsel to

³ Defendants Gurmeet Singh and Nishan Singh have submitted an affirmation in support of Morcheles's opposition to quash the subpoena served on Arbisfeld.

depose IME observers, like Arbisfeld. Plaintiffs argue that *Santana* is inapplicable to the facts of this case. Plaintiffs state that the First Department in *Santana* merely affirms a short-form order of the trial court which plaintiffs contend provides no reasoning or facts of the underlying decision.

The court observes, and the parties do not dispute, that this is an area upon which the courts have been divided. Insofar as the Appellate Division of the Second Department has yet to issue a decision on this issue, this court is required to follow precedent set by the Appellate Division of other departments (*Mount View Coach Lines v Storms*, 102 AD2d 663 [2d Dept 1984]). However, the decision in *Santana* and the underlying handwritten short-form order of the trial court provide no details concerning the facts of the underlying case making it impossible to determine whether the decision in that case is applicable to the facts of the present case. Accordingly, this court cannot consider *Santana* controlling authority. Consistent with the decision in *Loose*, and in the absence of controlling authority by the Appellate Division of the Second Department, Morcheles is not entitled to the deposition of Arbisfeld. Additionally, and as was clearly set forth in the October 25, 2018 Decision and Order of this court, Morcheles is not entitled to the additional discovery sought by the subpoena dated December 13, 2018. The court notes that although Morcheles has not presented any arguments in opposition to the branch of plaintiffs' motion seeking a protective order for the January 4, 2019 demand for witness disclosure served upon Lilien, the demand, which was served almost eight months after the examination which Lilien attended, is untimely. In any event, for the reasons set forth in the October 25, 2018 Decision and Order, Morcheles is not entitled to the discovery sought from Lilien.

Turning to counsel's respective demands for sanctions the court finds that insofar as the main impetus for these motions arises from whether Morcheles is entitled to Arbisfeld's deposition, neither counsel was acting frivolously and that sanctions are not warranted.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is hereby:

ORDERED that the motion (Seq. No. 7) by defendant Bernard Morcheles is denied; and it is further,

ORDERED that plaintiffs' motion (Seq. No. 8) is granted to the extent that the subpoena duces tecum and ad testificandum seeking discovery from, and the deposition of, Meryl Arbisfeld is quashed and that plaintiffs are granted a protective order with respect to the January 4, 2019 demand for witness disclosure served upon Michael Lilien by defendant Morcheles; and it is further

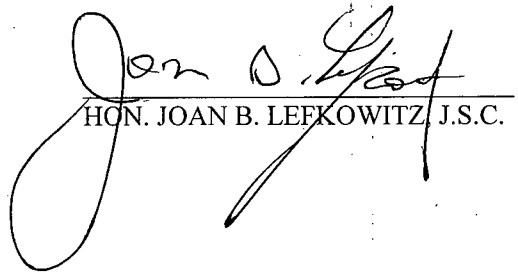
ORDERED that any applications not decided are herewith denied; and it is further,

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on March 13, 2019 at 10:30 a.m. at which time it is anticipated that a Trial Readiness Order will be issued; and it is further;

ORDERED that plaintiffs shall serve a copy of this Decision and Order, with notice of entry, upon all defendants within five days of entry.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York
February 26, 2019



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

To:

All Counsel Via NYSCEF

cc: Compliance Part Clerk