

Gonzalez v Jakaitis

2019 NY Slip Op 34374(U)

April 8, 2019

Supreme Court, Westchester County

Docket Number: Index No. 58842/2017

Judge: Joan B. Lefkowitz

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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
JULIO GONZALEZ and VIOLETA PAZ,

Plaintiffs,

-against -

KURT J. JAKAITIS, HUDSON VALLEYSITE MANAGEMENT CORPORATION and LUIS MIGUEL ESTEVEZ,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 58842/2017

Motion date: April 8, 2019

Motion Seq. 2

The following papers were read on this motion by defendants Kurt J. Jakaitis (“Jakaitis”) and Hudson Valleysite Management Corporation (“Hudson”) (collectively “movants”) for an order pursuant to CPLR 3124 compelling co-defendant Luis Miguel Estevez (“Estevez”) to fully comply with movants’ Demands for Discovery and Inspection dated November 9, 2018 and December 11, 2018.

Order to Show Cause; Affirmation in Support; Exhibits A-G
Affirmation in Opposition by Estevez Exhibits A-D

Upon the foregoing papers and the proceedings held on April 8, 2019, the motion is decided as follows:

Plaintiffs commenced this action on or about June 9, 2017 seeking damages for personal injuries suffered as a result of a motor vehicle accident which occurred on June 1, 2016. Movants served their answer, with a cross-claim against Estevez and discovery demands with respect to plaintiffs, on or about December 12, 2017. Estevez served his answer, with cross-claims against movants, on or about February 9, 2018.

It is undisputed that the accident occurred on Route 6 in Somers, New York, a two-lane road, with one lane in each direction separated by a double yellow line. Plaintiffs’ vehicle was driven by plaintiff Julio Gonzalez (“Gonzalez”). Jakaitis was driving a van going in the same direction as plaintiffs, behind plaintiffs’ vehicle. Estevez was driving on the other side of Route 6 in the opposite direction of the other vehicles. Plaintiffs contend that Estevez crossed the double yellow line, entered the opposite lane causing Gonzalez to move to the right and apply the brakes.

Jakaitis testified at his deposition on December 10, 2018 that he attempted to avoid plaintiffs' car by also moving to the right but the front of his car ultimately hit plaintiffs' car. Gonzalez appeared for his deposition on November 1, 2018 and Estevez appeared for his deposition on November 6, 2018. On or about November 9, 2018 movants served a demand for Discovery and Inspection on Estevez and a Supplemental Demand for Discovery and Inspection dated December 11, 2018. On or about February 14, 2019 Estevez served his responses to movant's November 9, 2018 demand and movants' Supplemental Demand for Discovery and Inspection.¹ In his responses Estevez objected to producing, inter alia, the names and addresses for any physicians and authorizations for his medical records as well as authorizations for his cell phone records.²

Movants contend that during Estevez's deposition "it was learned that the co-defendant [Estevez] was suffering from multiple conditions and was on medication for those conditions which may have affected his ability to operate a motor vehicle." Movants contend that Estevez has affirmatively placed his medical condition at issue by testifying that he could not recall if he crossed the double yellow lines. Movants argue that this testimony opened the door to discovery concerning Estevez's medical condition. Movants argue that they are entitled to Estevez's medical information.

Movants also contend, based on Jakaitis's deposition testimony, that Estevez stated at the scene of the accident that he crossed the double yellow lines because he was texting. Movants argue that this deposition testimony entitles them to discovery of Estevez's cell phone records.

Estevez contends that he did not affirmatively put his medical condition at issue and that he only provided information concerning medications he was taking at the time of the accident in response to questions by movants' counsel.³ Estevez argues that other than Jakaitis's testimony, there is nothing else which substantiates movants' assertions that Estevez stated that he was texting immediately prior to the accident. Additionally, Estevez contends that Jakaitis's testimony is inconsistent with Estevez's own testimony and is not corroborated by the police report or Gonzalez's testimony. Estevez argues that the self-serving, unsubstantiated testimony of one of the movants does satisfy the threshold necessary to allow disclosure of cell phone records.

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

¹ The Supplemental Demand for Discovery and Inspection is not included among the papers before the court however, based upon the papers submitted in connection with this motion and the NYSCEF file for this action it appears that those demands are the demands dated December 11, 2018 and seek Estevez's cell phone records.

² On this motion, movants limit their arguments to Estevez's medical information and cell phone records.

³ Estevez's counsel objected to this question and has reserved the right to object to the use of Estevez's responses at trial.

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 [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” (*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” (*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 (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Movants’ application seeking Estevez’s medical information must be denied. Citing *Dillenbeck v Hess* (73 NY2d 278 [1989]) and *Koump v Smith* (25 NY2d 287 [1969]), the Second Department made the following observations in *Lombardi v Hall* (5 AD3d 739, 739-740 [2d Dept 2004] [citations omitted]):

“A party seeking to inspect a defendant’s medical records must first demonstrate that the defendant’s physical or mental condition is ‘in controversy’ within the meaning of CPLR 3121 (a). Even where this preliminary burden has been satisfied discovery may still be precluded where the information requested is privileged and thus exempted from disclosure pursuant to CPLR 3101 (b). Once the privilege is validly asserted, it must be recognized and the information sought may not be disclosed unless it is demonstrated that the privilege has been waived.

A waiver of the privilege occurs when, in bringing or defending a personal injury action, a litigant affirmatively places his or her mental or physical condition in issue. This waiver does not occur whenever a party is forced to defend an action in which his or her mental or physical condition is in controversy. Rather, in order to effect a waiver, a defendant must do more than simply deny the allegations in the complaint. He or she must affirmatively assert the condition ‘either by way of counterclaim or to excuse the conduct complained of by the plaintiff.’”

Here, Estevez does not seek to use his medical condition to excuse or defend his actions. Estevez’s use of medication only appears in response to questions asked during his deposition. Additionally, movants have mischaracterized Estevez’s testimony. At no point was it “learned that the co-defendant [Estevez] was suffering from multiple conditions and was on medication for those conditions which may have affected his ability to operate a motor vehicle.” In fact, Estevez specifically denies in his testimony that the medications made him tired, or affected his reflexes. Moreover, contrary to movants’ assertions, Estevez’s testimony that he could not recall whether he crossed the double yellow lines does not open the door to discovery of his medical condition. Notably, movants have not submitted any evidence, such as a sworn affidavit by a medical

professional which would link the medications in question to any behavior which might impair Estevez's ability to operate a motor vehicle.

The standard to be applied in determining the discoverability of information regarding a party's cell phone usage is whether the information is material and necessary in the prosecution or defense of the action (*Page v Napier*, 2009 WL 434607 [Sup Ct, Nassau County, 2009]; *Morano v Slattery Skanska, Inc.*, 18 Misc3d 464, 474 [Sup Ct, Queens County, 2007]). The mere fact that Estevez may have been in the possession of a cell phone at the time of an accident, without any witness testimony as to it being used at that time, does not entitle movants to discovery of Estevez's cell phone records. Such a discovery request would amount to nothing more than a fishing expedition (*Morano*, 18 Misc3d at 475; see *Carpio v Leahy Mechanical Corp.*, 30 AD3d 554 [2d Dept 2006]).

In the present case Estevez states that he received a cell phone call before leaving his home and that he used his phone to call his father after the accident. He has denied using his phone for calling or texting at the time of or immediately preceding the accident. Gonzalez's testimony recounts Estevez coming over to plaintiffs after the accident to see if they were okay and that "[h]e [Estevez] said it was his fault." However, when questioned further Gonzalez stated that Estevez said nothing more about the accident or its cause. There is no nonparty evidence that Estevez was texting immediately preceding the accident (see *Detraglia v Grant*, 68 AD3d 1307 [3d Dept 2009]). Nor are there expert affidavits regarding accident analysis and reconstruction (see *D'Alessandro v Nassau Health Care Corp.*, 14 Misc3d 1210(A)[Sup Ct, Nassau County, 2014]) which substantiate that he was texting. Additionally, although Jakaitis testified that Estevez told the police officer at the scene of the accident that he had been texting, there is nothing in the police report which mentions this. It is only Jakaitis's own testimony which supports movants' application for these records. Nonetheless, in light of the contradictory testimony between the co-defendants the court cannot say that movants' application is a fishing expedition. Accordingly, Jakaitis's own deposition testimony is sufficient evidence to raise an issue of fact as to whether Estevez was distracted by texting on his cell phone at the time of the accident. Estevez's cellular telephone use records limited to records of any texts that may have been sent by Estevez immediately preceding the accident, therefore, may contain information which is material and relevant to that issue. In light of the privacy interests relating to cell phone records (see *Moran*, 18 Misc3d at 471), the court will review the relevant records as set forth hereinbelow.

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

In view of the foregoing, it is

ORDERED that the motion by defendants Kurt J. Jakaitis and Hudson Valleysite Management Corporation compelling co-defendant Luis Miguel Estevez to respond to movants' Demands for Discovery and Inspection dated November 9, 2018 and December 11, 2018 is granted to the limited extent that Luis Miguel Estevez shall, within 30 days of entry of this order, provide

this court with his cellular telephone use records only with respect to text messages sent by him, for the period of one hour before and one hour after the subject accident, which occurred on June 1, 2016 for in camera review; and it is further

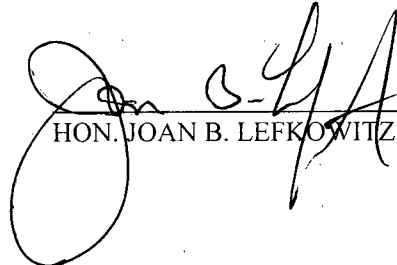
ORDERED that all other relief requested and not decided herein is denied; and it is further

ORDERED that counsel for all parties are directed to appear for the previously scheduled conference in the Compliance Part, Courtroom 800, on April 10, 2019 at 9:30 a.m.; and it is further

ORDERED that movants shall serve a copy of this order with notice of entry upon all parties within 7 days of entry.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York
April 8, 2019


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

To all counsel via NYSCEF
CC: Compliance Part Clerk