Tashman v Tejeda
2019 NY Slip Op 34375(U)
May 6, 2019
Supreme Court, Westchester County
Docket Number: Index No. 63830/2017
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
JOSEPH TASHMAN,

Plaintiff,

-against-

JUAN TEJEDA,

Defendant.
---x

DECISION and ORDER
Index No. 63830/2017
Motion Date: May 6, 2019
Seq. No. 4

LEFKOWITZ, J.

The following papers were read on defendant's motion for an order: 1) pursuant to CPLR 3126 dismissing plaintiff's complaint; or in the alternative, 2) pursuant to CPLR 3126 precluding plaintiff from giving or offering any evidence or testimony in support of his claims; or in the alternative, 3) pursuant to CPLR 3124 compelling plaintiff to provide all outstanding discovery on a date certain; and 4) for such other, further and different relief as this court may deem just, proper and equitable:

Order to Show Cause; Affirmation in Support; Exhibits A-L;
Affirmation of Good Faith; Memorandum of Law in Support
Affirmation in Opposition;[1] Exhibits A-C
NYSCEF File

Upon the foregoing papers and the proceedings held on May 6, 2019, this motion is determined as follows:

Plaintiff commenced this personal injury action by the filing of a summons and verified complaint on September 12, 2017. Issue was joined by the service of defendant's verified answer dated December 8, 2017. Plaintiff alleges that on February 11, 2017 he slipped and fell on the sidewalk owned/maintained by the defendant. As relevant here, at the December 19, 2018 Compliance Conference the parties were directed to complete all party depositions on January 29, 2019. Plaintiff appeared for his deposition on January 29, 2019 at which time defendant reserved its right to a supplemental deposition of plaintiff due to outstanding discovery. At his deposition,

[1] The court notes that plaintiff's opposition papers were filed one day after the deadline provided for by the Order to Show Cause. The court has, in its discretion, considered these papers in the determination of this motion.

plaintiff testified to having health insurance coverage provided through Fidelis Insurance ("Fidelis"). Plaintiff also testified that his friend Alex Khoury ("Khoury") took pictures with his phone of the area where plaintiff states he fell. Plaintiff testified that the accident occurred in front of two non-party witnesses, Khoury and Khalil Moughawech ("Moughawech").

On or about January 31, 2019, defendant served a Post-Deposition Notice for Discovery and Inspection. The demands sought, inter alia, the full names and addresses of Khoury and Moughawech; copies of any photographs of the accident location taken by Khoury, and an authorization for plaintiff's Fidelis insurance records. On or about January 31, 2019, plaintiff served responses to defendant's demands, wherein plaintiff objected to the demand for an authorization to obtain plaintiff's Fidelis insurance records as "privileged information, overbroad and unduly burdensome." Plaintiff provided addresses for the non-party witnesses and copies of the photographs taken by Khoury.

On February 6, 2019 defendant sent a good faith letter to plaintiff concerning the authorization for the Fidelis insurance records. Defendant argued that the Fidelis records were relevant because during his deposition plaintiff had testified that in addition to having injured his back and neck as a result of the present accident, he had a pre-existing history of injuries to the same body parts resulting from prior car accidents.

On or about February 7, 2019, plaintiff once again objected to providing an unlimited authorization for Fidelis. Plaintiff stated that pursuant to this Court's (Lefkowitz, J.) November 19, 2018 Decision and Order, he had already provided authorizations for all medical providers for prior accidents, as well as authorizations for all current physicians for two years prior to the accident. Plaintiff argued that as a result, defendant had all of the information concerning any of his pre-existing injuries.

On February 7, 2019 defendant replied to plaintiff's letter of the same date,[2] stating that he had served subpoenas upon the non-party witnesses using the addresses provided by plaintiff but that neither of these addresses was good.[3] Defendant sought additional contact information for the non-parties from plaintiff.

On March 21, 2019, defendant served a second Post-Deposition Notice for Discovery and Inspection seeking authorizations permitting defendant to obtain plaintiff's Fidelis insurance records, correct contact information for the non-party witnesses, and digital copies of the Khoury photographs previously provided by plaintiff because of the poor quality of the photos previously produced. Defendant states that plaintiff has not responded to defendant's requests.

Defendant argues that plaintiff has placed his medical condition at issue. Defendant states

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[2] Although denominated as a second good faith letter, defendant's February 7, 2019 letter appears to be identical to defendant's February 6, 2019 letter.

[3] Defendant states that the address for Khoury was for vacant property and that the address for Moughawech did not exist.

that the Fidelis authorization is necessary in order to properly gauge plaintiff's damages and verify that all treatment alleged was actually rendered. Defendant contends that plaintiff's failure to provide the authorization has hindered defendant's ability to defend against the claims.

Plaintiff opposes the motion contending that he has complied with each of defendant's discovery demands and has properly objected to the request for plaintiff's Fidelis insurance information. Plaintiff includes his response dated January 31, 2019 to the first post-deposition demand which includes, inter alia, addresses for Khoury at 85 Ash Street, Yonkers, New York, 10701 and Moughawech at 157 Wallace Avenue, Bronx, New York, 10462 and indicates that this information was previously provided to defendant on August 21, 2018. Also, included in that response are copies of the photos taken by Khoury. Plaintiff also includes his response dated March 26, 2019 to the second post-deposition wherein he states that he is not in possession of any digital copies of the photographs taken by Khoury and provides addresses for Khoury at 127 Oak Street, 1st Floor, Yonkers, New York, 10701 and for Moughawech at 728 East 221st Street, Apt. 1B, Bronx, New York, 10467. That response includes plaintiff's objection to providing an authorization for his Fidelis insurance information.

Plaintiff argues that defendant has already been provided with authorizations for all relevant medical records. Plaintiff additionally argues that the demand for the Fidelis information in order to obtain records for plaintiff's entire medical history is patently overbroad and burdensome. Plaintiff contends the defendant has failed to make any showing that the authorization is relevant to any injury or illness complained of.

Pursuant to CPLR 3101(a), a party is entitled to "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" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]; *see Matter of Kapon v Koch*, 23 NY NY3d 32 [2014]). The party seeking disclosure has the burden 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*, 74 AD3d at 1140). The 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 (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "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 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v Mullen*, 70

AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

With respect to the photographs, plaintiff has provided defendant with the photographs in his possession and has stated that he does not possess the photographs in digital format. It is axiomatic that a party may be required to produce only those items which are in his possession, custody or control (CPLR 3120; *Rosado v Mercedes-Benz of North America*, 103 AD 2d 395 [2d Dept 1984]). Additionally, contrary to defendant's assertion, plaintiff has provided updated addresses for the non-party witnesses.

In plaintiff's verified bill of particulars he alleges, inter alia, "[i]mpairment of recreational, family, avocational, and social activities." As noted in this Court's Decision and Order dated November 19, 2018 plaintiff has affirmatively placed his entire medical condition in controversy, thereby entitling defendant to plaintiff's Fidelis insurance information *(see DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d 1092 [2d Dept 2010]. In light of plaintiff's partial compliance with his discovery obligations dismissal of the complaint is not warranted at this time.

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:

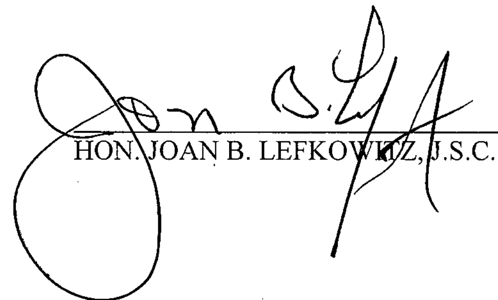
ORDERED that defendant's motion is granted to the limited extent that on or before May 13, 2019, plaintiff shall provide defendant with an authorization for plaintiff's Fidelis Insurance file; and it is further

ORDERED that all parties shall appear for the a conference in the Compliance Part, Courtroom 800, on May 20, 2019 at 9:30 a.m.; and it is further;

ORDERED that defendant shall serve a copy of this Decision & Order, with notice of entry, upon plaintiff within three (3) days of entry.

The foregoing constitutes the Decision & Order of this court.

Dated: White Plains, New York
May 6, 2019



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

To:
Service Upon All Counsel Via NYSCEF

cc: Compliance Part Clerk