

Boutin v Skates

2019 NY Slip Op 35191(U)

April 3, 2019

Supreme Court, Queens County

Docket Number: Index No. 716692/2017

Judge: Salvatore J. Modica

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 37

-----X
JEAN BOUTIN,

Plaintiff,

-- against --

DECISION AND ORDER

Index No. 716692/2017

HON. SALVATORE J. MODICA

KENNETH SKATES, et al.,

Motion Sequence Number 2

Defendants.
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The following enumerated NYSCEF Document Numbers were read on this motion by defendants to compel plaintiff to provide discovery pursuant to CPLR 3124 and 3126; and the cross motion by plaintiff to compel defendants to produce a Central Index Bureau (hereinafter "CIB") report, or to strike defendants's answer for failure to provide the same, pursuant to CPLR 3124.

Papers Numbered

Notice of Motion - Affidavits - Exhibits.....	EF15- EF25
Notice of Cross Motion - Affidavits - Exhibits	EF26
Answering Affidavits - Exhibits.....	EF34-EF58
Reply Affidavits.....	EF28-EF33

FILED
APR 18 2019
COUNTY CLERK
QUEENS COUNTY

SALVATORE J. MODICA, J.:

The plaintiff, in this negligence action, seeks damages for personal injuries allegedly sustained in a motor vehicle accident on May 6, 2017, on Linden Boulevard near Elmont Road, in Elmont, Nassau County, New York. The defendant's motion to compel the plaintiff to provide discovery pursuant to CPLR 3124 and 3126 is granted in accordance with this decision and order. The plaintiff's motion is denied.

Plaintiff alleges injury to, *inter alia*, his neck, back, left shoulder, right hip, chest, head and right knee. Plaintiff further alleges that he aggravated multiple pre-existing conditions, and that he was unable to work as he was totally disabled for five months. Plaintiff further claims that he is partially disabled at the present time, and that he incurred medical expenses in the sum total of \$750,000. Finally, the complaint expressly states that "Plaintiff has suffered and/or in the future will necessarily suffer additional loss of time and earnings from employment; and Plaintiff will be unable to pursue the usual duties with the same degree of efficiency as prior to this accident, all to

Plaintiff's great damage." See EF Doc. No. 1.

On April 18, 2018, a Preliminary Conference was held in this matter. Pursuant to the Preliminary Conference Order, depositions were to be conducted on August 7, 2018. On August 6, 2018, defendants were advised that the depositions would be plaintiff-only and damages-only since the motion for summary judgment on liability was granted in plaintiff's favor. Plaintiff requested that the plaintiff's deposition on damages-only be adjourned to October 17, 2018. The deposition was then adjourned on consent to October 17, 2018.

On May 10, 2018, defendants served upon plaintiff a Supplemental Notice of Discovery and Inspection dated May 8, 2018. This demand requested that plaintiff provide certain and specific items of discovery related to claims alleged in the Bill of Particulars, dated April 16, 2018, that plaintiff incurred medical expenses in the sum total of \$750,000; that plaintiff lost five months from work; and concerning the pre-existing "symptomatic and/or asymptomatic spondylitic changes, osteoporosis, arthritis, hypertrophic vertebral changes, narrowing of vertebral spaces, degenerative vertebral or disco changes" which plaintiff specifically claims in the bill of particulars to have aggravated in the subject accident. Additionally, the demand requested authorizations for medical records, collateral source records and the non-privileged portion of any legal files relating to plaintiff's prior accident of August 13, 2003.

On June 29, 2018, defendants served plaintiff a Supplemental Notice for Discovery and Inspection dated June 28, 2018. This Demand requested authorizations for medical records, collateral source records, and the non-privileged portion of any legal files relating to plaintiff's prior accidents that occurred on June 26, 1992, July 26, 1994, January 1, 1995, May 4, 2002, August 13, 2003, and a subsequent accident that occurred on January 10, 2018.

In short, plaintiff has a history of similar injuries as a consequence of being involved in prior accidents. Defendants seek discovery pertaining to those injuries, contending that since the plaintiff is seeking damages for loss of the enjoyment of life as a result of the accident on May 6, 2017, the nature and extent of the prior injuries may be relevant on the issue of damages.

The plaintiff, upon the foregoing papers, opposes the motion and cross moves to compel defendants to produce a Central Index Bureau, "CIB" report, or to strike defendants's answer for failure to provide the same.

Well-settled law dictates that a party waives the physician-patient privilege by

affirmatively placing his or her physical condition in issue (see, *Dillenbeck v Hess*, 73 NY2d 278 [1989]; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]). CPLR 3101(a), moreover, requires full disclosure of all evidence material and necessary to the prosecution or defense of an action, regardless of the burden of proof (see *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403).

“[A] party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue” (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983] [citation omitted]; see, CPLR 3121(a); *O'Rourke v Chew*, 84 AD3d 1193, 1194 [2d Dept 2011]). Here, the plaintiff affirmatively placed his entire medical condition in controversy through the broad allegations of physical and mental injuries that were contained in the complaint and bill of particulars (see *O'Rourke v Chew*, 84 AD3d at 1194; *DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d 1092, 1093 [2d Dept 2010]; *Abdalla v Mazl Taxi, Inc.*, 66 AD3d 803, 804 [2d Dept 2009]; *Avila v 106 Corona Realty Corp.*, 300 AD2d 266, 267 [2d Dept 2002]; *St. Clare v Cattani*, 128 AD2d 766, 767 [2d Dept 1987]).

The nature and extent of his previous injuries and medical conditions are material and necessary to his claims of having sustained a serious injury within the meaning of Insurance Law section 5102(d), as well as any claims for loss of enjoyment of life (*Bravo v Vargas*, 113 AD3d 577, 578 [2d Dept 2014]; see *Cristiano v York Hunter Servs., Inc.*, 99 AD3d 751 [2d Dept 2012]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d at 1093). The nature and severity of the plaintiff's previous injuries may have an impact upon the amount of damages, if any, recoverable for a claimed loss of enjoyment of life because of his current injuries. See *Coma v City of New York*, 97 AD3d 715 (2nd Dept. 2012); *Ocampo v Pagan*, 68 AD3d 1077, 1079 (2nd Dept. 2009); *Bowers v Johnson*, 26 AD2d 552 (1966). Therefore, the requested records and reports are material and necessary to the defense (see, CPLR 3101 [a]; *Dillenbeck v Hess*, *supra*; *Allen v Crowell-Collier Publ. Co.*, *supra*). Thus, the branches of the motion by defendants which seek to compel the authorizations for medical records, collateral source records, and the non-privileged portion of any legal files relating to plaintiff's prior accidents that occurred on June 26, 1992, July 26, 1994, January 1, 1995, May 4, 2002, August 13, 2003 and a subsequent accident that occurred on January 10, 2018, are granted. See *Montalto v Heckler*, 113 A.D.3d 741, 741-42 (2nd Dept. 2014). The plaintiff is directed to execute the requisite medical authorizations compliant with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d et seq.).

The branch of the motion seeking to compel the plaintiff to provide work and tax

records is granted to the extent that the plaintiff is directed to execute authorizations allowing the defendant to obtain copies of the income tax returns the plaintiff filed with the federal government and New York State in 2017, and 2018, and 2019.

In granting this application, the Court notes that there appears to be an implicit disagreement between the Court of Appeals and all four Departments of the Appellate Division as to the appropriate standard to be applied before a trial court may order the disclosure of a litigant's income tax returns. All four departments of the Appellate Division have essentially held that tax returns are generally not discoverable in the absence of a strong showing that the information is indispensable to the litigations and cannot be obtained from other sources. *See McMahon v Manners*, 158 A.D.3d 616 (2nd Dept. 2018); *see also Katz v Castlepoint Ins. Co.*, 121 A.D.3d 948 (2nd Dept. 2014); *Norddeutsche Landesbank Girozentrale v Tilton*, 165 A.D.3d 447 (1st Dept. 2018); *Weingarten v Braun*, 158 A.D.3d 519 (1st Dept. 2018); *DG&A Mgmt. Servs., LLC v. Sec. Indus. Ass'n Compliance & Legal Div.*, 78 A.D.3d 1316 (3rd Dept. 2010); *Has K'Paw Mu v Lyon*, 158 A.D.3d 1084 (4th Dept. 2018).

By contrast, the New York Court of Appeals has held that "Section 3101 (a)(4) [of the CPLR] imposes no requirement that...[a] party demonstrate that it cannot obtain the requested disclosure from any other source." *Matter of Kapon v Koch*, 23 NY3d 32, 38 (2014); *see also Smile Train, Inc. v. Ferris Consulting Corp.*, 117 A.D.3d 629 (1st Dept. 2014). In addition, the Court rejected any distinctions between disclosure required of parties and nonparties under CPLR 3101(a). The Court of Appeals held that the appropriate standard to be applied in seeking disclosure under CPLR 3101(a) is whether the requested items are "material and necessary" to the prosecution and defense of an action. *Id* at 37. "The words "material and necessary" as used in section 3101 must '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.'" *Id* at 38. In sum as "long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." *Id* at 38.

The Court notes that, although tax returns are confidential, they are not privileged and, thus, do not come within the protection of CPLR 3101(b). *See D.A. Bennett LLC v Cartz*, 113 A.D.3d 945, 948 (3rd Dept. 2014)(dissenting opinion.).

Until the Second Department rules to the contrary, this Court is bound by the standard it has set for the release of a litigant's tax records. The Court finds that the defendants met his burden of showing that the plaintiff's tax records are indispensable to their defense to the prosecution of this action and cannot be obtained by another source. In addition, the defendants met their burden of showing that the tax returns are material

and necessary to their defense. *See Gitlin v Chirinkin*, 71 A.D.3d 728 (2nd Dept. 2010). Here, the plaintiff's deposition testimony demonstrated that he is self-employed; in addition, contrary to the claim by plaintiff's attorney, the complaint reveals that he is claiming damages for earnings lost as a result of the alleged injuries at issue in this case (*see, Singh v Singh*, 51 A.D.3d 770, 771 [2nd Dept 2008]; *see, Myrie v Shelley*, 237 A.D.2d 337 [2d Dept 1997]; *Huntington Tobacco Co., Inc. Money Pension & Profit Sharing Fund v Fromer*, 193 A.D.2d 718 [2nd Dept 1993]; *Lane v D'Angelos*, 108 A.D.2d 727, 728 [2nd Dept 1985]).

In that respect, the Court rejects the plaintiff's contention that his "attendance sheets" for work will suffice as a substitute. Tax returns are the best indicator of a person's employment and income. Accordingly, the Court finds that the defendant cannot obtain evidence of the plaintiff's income and employment from any other source. Given that these tax records are indispensable and material and necessary to the defense of this case and evidence of the plaintiff's income and employment cannot be obtained by any other source, the Court directs the plaintiff to furnish the demanded tax records for the tax years set forth in this opinion.

The branch of the motion by defendants seeking to extend the time to conduct the plaintiff's examination before trial until sixty (60) days after the plaintiff provides the discovery requested herein, is also granted (*see, CPLR 2004*).

Plaintiff, on the cross motion, as stated above, demands production of a CIB report. As explained by one treatise:

The Central Index Bureau and regional indexes were established by the American Insurance Association to compile a record of all claims, allowing insurers and other members to submit an inquiry. Members must post information on any new claims reported to them. If the index finds a match of name, address, Social Security number, or other identifying data, it advises the inquiring insurer of the match, showing the other insurer(s) and the claim number(s). The record often also shows the type of accident (auto, fall down, etc.), the treating physician and the representing attorney.

Prior to the passage of the Health Insurance Portability and Accountability Act (HIPAA), requiring privacy of medical records and authorization to release such records, insurers would freely share information from their files. Today, under HIPAA rules, the insurer must have a signed authorization to obtain the prior records. But having knowledge of prior injuries can be of assistance in the investigation of the pending claim, and

where the claimant is represented by counsel, either records of the prior accident or a signed authorization to obtain them can be requested.

1 Casualty Insurance Claims § 15:8 15:8, “Investigation of claims involving fraud—Index bureaus (4th ed.)” This Court’s independent legal research has one case where a court approved the furnishing of a CIB report to plaintiff’s counsel since it was consented to by defendants. *See, Greenberg v General Motors Corp.*, 1988 WL 1602796 (Sup. Ct. Nassau County 1988).

This Court, however, denies the plaintiff’s cross motion to compel defendants to produce a CIB report or to strike defendants’s answer for failure to provide the same is denied. CPLR 3101(a), directs that there shall be “full disclosure of all evidence material and necessary in the prosecution or defense of an action.” The statute embodies the policy and determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility of ambush and unfair surprise (*see* 3A Weinstein–Korn–Miller, N.Y. Civ. Prac. §§ 3101.01–3101.03; *Spectrum Systems International Corp. v Chemical Bank*, 78 N.Y.2d 371, 376 [1991]).

However, concomitantly, the CPLR also established protection for common law privileged matter in CPLR 3101(b) (attorney-client privilege), CPLR 3101(c) work product, and CPLR 3101(d) material prepared for litigation. To obtain privileged material prepared in anticipation of litigation, plaintiff must demonstrate a substantial need for those materials and show that the materials cannot be obtained without undue hardship by other means (CPLR 3101[d][2]). Plaintiff has not made any showing of the same.

Accordingly, defendants’ motion to preclude plaintiff from offering evidence at trial regarding disability, future damages, pain and suffering, limitation of activities, loss of enjoyment of life, and any category of serious injury under the No-Fault law, is granted, unless within 60 days of service of this order with notice of entry, plaintiff complies with defendants’ discovery demands.

Specifically, plaintiff is directed to provide authorizations for medical records, collateral source records, and the non-privileged portion of any legal files relating to plaintiff’s prior accidents that occurred on June 26, 1992, July 26, 1994, January 1, 1995, May 4, 2002, August 13, 2003, and a subsequent accident that occurred on January 10, 2018. Plaintiff is also directed to provide work within 60 days of service of this order with notice of entry. In addition, the plaintiff is directed to execute authorizations allowing the defendant to obtain copies of the income tax returns the plaintiff filed with

the federal government and New York State in 2017, and 2018, and 2019 within 60 days of service of this order with notice of entry

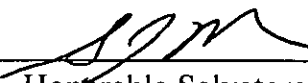
The branch of the motion which is to extend defendants' time to conduct the examination before trial of plaintiff until sixty (60) days after plaintiff provides the discovery requested herein, is also granted.

The cross-motion to compel defendants to produce a CIB report, or to strike defendants's answer for failure to provide the same is denied.

The Court further reminds plaintiff that the note of issue is due on June 7, 2019.

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: Jamaica, New York
April 3, 2019



Honorable Salvatore J. Modica
J.S.C.

FILED
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QUEENS COUNTY