

Baker v Toro

2019 NY Slip Op 35200(U)

January 11, 2019

Supreme Court, Queens County

Docket Number: Index No. 717623/2017

Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

TASHIA BAKER,

Index No. 717623/2017

Plaintiff,

Motion

Date: November 28, 2018

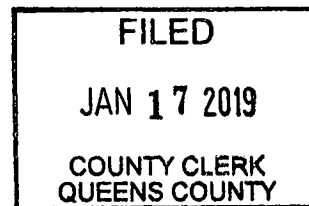
-against-

Motion Cal. No.: 3

TIBERIO TORO and ANFLO CONSTRUCTION, LLC,

Motion Sequence No.: 2

Defendants.



The following efile papers numbered 19-28 and 30-34 submitted and considered on this motion by defendants Tiberio Toro and Anflo Construction, LLC (hereinafter referred to as "Defendants") seeking an Order pursuant to, the New York City Rules and Regulations (hereinafter referred to as "NYCRR"), 22 NYCRR 202.21(e) vacating plaintiff Tashia Baker's (hereinafter referred to as "Plaintiff") Note of Issue and Certificate of Readiness and striking this case from the trial calendar. Also, the Defendants are seeking an Order directing Plaintiff to respond to Defendants' post-deposition demands, directing Plaintiff to submit to independent medical examination(s), and extending the time to move for summary judgment to 120 days following the completion of discovery. Finally, Defendants are seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 8303-a awarding Defendants' costs.

Papers
Numbered

- Notice of Motion -Affidavits-Exhibits..... EF 19-28
- Affirmation in Opposition-Affidavits-Exhibits..... EF 30-31
- Reply Affirmation-Affidavits-Exhibits..... EF 32-34

This is a negligence action arising out of a car accident between Plaintiff and defendant Tiberio Toro while he was allegedly operating a motor vehicle allegedly owned by defendant Anflo Construction, LLC with Anflo's consent. In her deposition (EF 33) Plaintiff alleges she suffered injuries to her back, hips, arm and neck (Page 99 lines 11-12). In their Affirmation in Support, (EF 20) the Defendants contend that Plaintiff has prematurely filed a Note of Issue and Certificate of

Readiness because discovery is not complete. According to Defendants, Plaintiff has failed to comply with their post-deposition demands sent October 31, 2018 (EF 22).

Motion To Compel

Defendants' post-deposition demands are as follows: (EF 22).

1. A duly executed and acknowledged HIPAA compliant authorization for plaintiff's primary care physician, Dr. Gauganie.
2. All colored photographs taken of plaintiff's vehicle showing damage allegedly sustained to the front driver's side of her vehicle, that plaintiff testified to having in her possession.
3. A duly executed and acknowledged HIPAA compliant authorization for all medical records pertaining to plaintiff's stabbing.
4. A duly executed and acknowledged HIPAA compliant authorization regarding plaintiff's prior automobile accident.
5. Provide all authorizations, claims, records, police reports, and all other documentation pertaining to the theft of plaintiff's Mercedes in August 2017.
6. Provide the full name and last known address and phone number of Kareem Miller.

Plaintiff's responded as follows on November 27, 2018: (EF 31)

1. The plaintiff objects to this demand as Ms. Baker did not treat with her primary care physician for this accident or ever treat with them for a body part injured in this accident.
2. Annexed hereto are two color copy photographs that's in plaintiff's possession.
3. The plaintiff objects to this demand as plaintiff's stabbing is not related to the accident and does not involve the same body parts injured in this case.
4. Objection: plaintiff's prior automobile accident does not relate to this case as plaintiff is not claiming the same injuries in the current accident. See plaintiff EBT transcript for reference.
5. This demand is totally improper as the theft of her motor vehicle is irrelevant to this action. The within lawsuit is a claim for personal injuries and not property damages and therefore totally irrelevant.
6. Plaintiff is unaware of Kareem Miller whereabouts as they are not in communication.

The Defendants contend the following regarding Plaintiff's response to each demand (EF 32):

1. Defendants contend that within Plaintiff's deposition (EF 33) she states she cannot remember whether or not she saw Dr. Guaganie for treatment in relation to this accident. Therefore, Defendants contend Plaintiff's conflicting accounts requires a HIPPA authorization. The Court's reading of the

Plaintiff's transcript (EF 33) conflicts with the Defendants' reading of the same. On page 41 line 19 of Plaintiff's deposition, she definitively states she did not see Dr. Guaganie for treatment of the injuries sustained in this accident. It seems Plaintiff is only unsure as to whether or not she informed Dr. Gauganie about the accident. There is no discrepancy between what the Plaintiff asserted during her deposition and what she stated in response to Defendants' demands. While it is well settled case law "that 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". (see *Romance v. Zavala*, 98 A.D.3d 726, 727 [2nd Dept], quoting *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 NYS.2d 452, 456-457 [2012]). According to Plaintiff, Dr. Gauganie did not treat her for the relevant injuries to this accident. Therefore, this Court finds Dr. Gauganie's records of Plaintiff irrelevant to this case as Dr. Gauganie would not have pertinent medical records to the alleged injuries. Plaintiff is not ordered by this Court to turn over a HIPPA authorization for Plaintiff's primary care physician Dr. Guaganie.

2. The Plaintiff attached two photographs taken by her cellular phone in response to Defendants' second post-deposition demand. (EF 31). In its Affirmation in Reply, Defendant argues the Plaintiff has failed to provide photos of the driver side that she testified was in her possession. This Court finds that Plaintiff is to turnover to Defendant all photos taken at the accident in her possession within 30 days of the date of this order.

3. The Defendant contends that since Plaintiff contends she is unable to work as a hairstylist due to the accident medical records related to Plaintiff's prior hand injury is relevant. In her deposition transcript (EF 33) Defendant asks "What injuries from this accident are preventing you from going to work?" (Page 99 line 13-15). To which Plaintiff responds "I'm a hairstylist and my job, is standing on your feet for a number of hours. And I'm holding a blow dryer and a brush at the same time, so it's kind of hard to do that if I'm in pain" (Page 99 line 16-20) Plaintiff on the same page alleges the pain she experienced from the accident occurs in her back, hips, arm and neck. (Page 99 line 11-12) Furthermore, throughout the deposition Plaintiff only flags the aforementioned body parts as where she experienced injuries from the accident. Defendants' failure to attach Plaintiff's response to its Bill of Particulars leaves this Court with only Plaintiff's deposition in determining what injuries Plaintiff alleges she sustained from this accident. This Court finds that Plaintiff did not "affirmatively place in controversy" her right hand. (*Romance* at 727) Therefore, Plaintiff is not compelled by this Court to turn over to the Defendants a duly executed and acknowledged HIPPA compliant authorization for all medical records pertaining to Plaintiff's stabbing.

4. The Defendant contends that documentation related to Plaintiff's prior motor vehicle accident is relevant because it speaks to Plaintiff's contention that she has trouble walking upstairs. Furthermore, a prior knee injury speaks to Plaintiff's contention that she has trouble standing. Therefore, Plaintiff must turnover to the Defendants a duly executed and acknowledged HIPAA compliant authorization regarding Plaintiff's prior automobile accident within 30 days of the date of this order.

5. The Defendants contend that they are entitled to documentation related to the theft of Plaintiff's car. While Plaintiff does not claim property damage any evidence related to the state the vehicle was in is relevant to this case as it aids in an understanding of how severe the accident may have been. Therefore, the Plaintiff must turn over any and all documentation related to the theft of her car subsequent to the accident, to the Defendants within 30 days of the date of this order.

6. Plaintiff must turnover to Defendants the full name and last known address for Kareem Miller that Plaintiff is aware of. Kareem Miller is a witness of the accident and therefore, he may have information that is "material and necessary". (CPLR 3101). "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." (CPLR 3101 [a]). In fact, the commentary in the CPLR 3101 states "It is clear today, however, that each party is entitled to obtain from another the names of all witnesses known by that party, whether the witness was a participant in the event, an eyewitness to it, a witness with knowledge of any of the facts connected with it, a witness who can say whether the defendant had "notice" of a condition that caused an accident". (Patrick M. Connors, 2018 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101:41). Therefore, Plaintiff must turn over to the Defendant the full name and last known address for Kareem Miller that Plaintiff is aware of within 30 days of the date of this order.

22 NYCRR 202.21 (e)

Upon motion the court has discretion to vacate a Note of Issue if the moving party demonstrates through affidavit that the case is not ready for trial and/or if it appears that a material fact in the Certificate of Readiness is incorrect. Here, the Note of Issue was filed on November 6, 2018, 1 day after the Compliance Conference (EF 26) was held at which both parties agreed Plaintiff would turnover all outstanding discovery. The Court notes that the Plaintiff had until April of 2019 to file the Note of Issue, and IME's have not been completed. This Court grants Defendants' motion to vacate the Note of Issue and Certificate of Readiness pursuant to 22 NYCRR 202.21 (e).

Independent Medical Examination

The Defendants have 20 days from receipt of all outstanding discovery to select the physician(s) who will complete the independent medical examination(s). Plaintiff must within 30 days from the date they receive notice of the Defendants physician selection(s), complete all independent medical examinations. The Court notes that within Plaintiff's affirmation in opposition Plaintiff has expressed a willingness to appear for an independent medical examination (EF 30).

CPLR 8303-a

CPLR 8303-a states in relevant part "(a) If in an action to recover damages for personal injury, ...and such action or claim is commenced or continued by a plaintiff ...and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees". In order to find an action frivolous the court must find that the non-moving party either acted in bad faith or the non-moving party had no reasonable basis in law or fact to support his/her action. Here, the Court does not find that the Plaintiff acted in bad faith or that Plaintiff's actions were not grounded in reasonable basis.

Therefore, Defendants' motion for attorney's fees to be granted pursuant to CPLR 8303-a is denied; therefore it is

ORDERED, that Defendants' motion to vacate the Note of Issue and Certificate of Readiness pursuant to 22 NYCRR 202.21 (e) is granted. Upon completion of discovery, the parties are directed to cooperate in stipulating to place the case back on the trial calendar pursuant to the Trial Scheduling Part rules, and it is further

ORDERED, that Plaintiff is directed to respond to Defendants' request for any colored photographs of the front driver's side of Plaintiff's vehicle that Plaintiff has in her possession within 30 days of the date of this order; and it is further

ORDERED, that Plaintiff is directed by this Court to turnover to the Defendants a duly executed and acknowledged HIPPA compliant authorization regarding her prior automobile accident within 30 days of the date of this order; and it is further

ORDERED, that Plaintiff is directed by this Court to turnover all claims, records, police reports and all other documentation pertaining to the theft of her Mercedes in August 2017 within 30 days of the date of this order; and it is further

ORDERED, that Plaintiff is to turnover the full name, last known address and phone number of Kareem Miller that Plaintiff has in her possession within 30 days of the date of this order; and it is further


ORDERED, that the Defendants shall select the IME physician(s) within 20 days after receipt of all outstanding discovery. Plaintiff is to complete all independent medical examination(s) within 30 days of Defendants' selection of a physician; and it is further

ORDERED, that the branch of Defendants' motion seeking attorney's fees pursuant to CPLR 8303-a is denied; and it is further

ORDERED, that the failure of any party to comply with this Order may result in preclusion of offering any testimony and/or evidence at the time of trial.

This constitutes the decision and Order of the Court.

Dated: January 11, 2019



Hon. Chereé A. Buggs, JSC

FILED
JAN 17 2019
COUNTY CLERK
QUEENS COUNTY