

Fernandez v City of New York

2019 NY Slip Op 35232(U)

December 17, 2019

Supreme Court, Queens County

Docket Number: Index No. 706967/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

Index No.: 706967/2018

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ROBERTO FERNANDEZ,

Plaintiff,

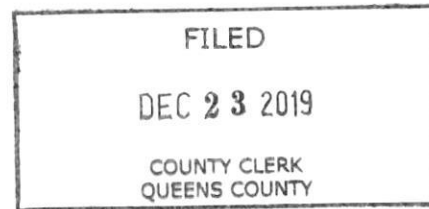
Motion
Date: December 11, 2019

-against-

Motion Cal. No.: 28

Motion Sequence No.: 3

THE CITY OF NEW YORK, NEW YORK
CITY BOARD OF EDUCATION, NEW YORK
CITY DEPARTMENT OF EDUCATION, NEW
YORK CITY SCHOOL CONSTRUCTION
AUTHORITY, EXPRESSWAY SHOPPING
LIMITED PARTNERSHIP and
INDEPENDENCE CARTING INC.,



Defendants.

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The following efile papers numbered 52-70, 79 submitted and/or considered on this motion by defendant Expressway Shopping Limited Partnership seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3126 dismissing plaintiff's complaint for failure to comply with prior Orders or this Court; or alternatively for an Order pursuant to CPLR 3124 ordering plaintiff's compliance with the prior Court Order and staying depositions until such time as plaintiff has done so.

Papers
Numbered

- Notice of Motion-Affidavits-Exhibits..... EF 52-64
- Affirmation in Opposition-Affidavits-Exhibits..... EF 65-70
- Reply Affirmation-Affidavits-Exhibits..... EF 79

Plaintiff Roberto Fernandez commenced this action against Defendants The City of New York, New York City Board of Education, New York City Department of Education, New York City School Construction Authority, Expressway Shopping Limited Partnership and Independence Carting Inc. alleging that he was injured in the course of his employment on June 30, 2017. According to moving defendant Expressway Shopping Limited Partnership, at a Preliminary Conference held in this matter held on January 2, 2019, Plaintiff represented to the Court that he had

served a verified bill of particulars three days earlier. The Preliminary Conference Order, inter alia, required Plaintiff was directed to provide authorizations for his medical treatment. In the verified bill of particulars, Plaintiff claimed that as a result of the occurrence he sustained injury to his right index finger, both knees, his neck and back.

On February 6, 2019, a demand was made on Plaintiff's counsel to provide an authorization for the release of lumbar and cervical MRI studies conducted in 2016, as well as one for Dr. Serrano, the doctor who referred plaintiff for those studies performed in 2016. On or about April 29, 2019, plaintiff served a supplemental bill of particulars in which plaintiff alleged that the accident exacerbated a prior lumbar injury. On June 24, 2019 a Compliance Conference was held wherein Plaintiff was directed, among other things, to provide medical reports and authorizations, as directed by 22 NYCRR 202.17. Plaintiff did provide authorizations for films taken in 2016, however, instead of providing an authorization for the release of records from Dr. Serrano from the time he referred Plaintiff for those studies, the authorization provided by plaintiff was limited to the "medical record from 6/30/2017" (the date of the accident.) Counsel for moving Defendant stated that he immediately wrote to Plaintiff's counsel, requesting a proper authorization for Dr. Serrano and a demand for authorizations that would allow for the disclosure of medical records related to Plaintiff's prior lumbar treatment. Instead of providing the authorization, Plaintiff's counsel insisted that he had provided same and that the parties proceed with depositions. Moving Defendant argues that it cannot move forward with Plaintiff's deposition without the medical records relating to Plaintiff's pre-existing condition/treatment, which is relevant and material to the defense of this action. (See CPLR 3101; *Dillenbeck v Hess*, 73 NY2d 278 [1989]; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456 [1983]; *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d 768 [2d Dept 2007]). Defendant seeks authorizations for all medical providers, including Dr. Serrano, who treated Plaintiff for his neck, back, either knee or his right index finger prior to this accident. Therefore, either Plaintiff should comply or the case should be dismissed. Defendant asserted that it is unable to conduct an informed deposition without the relevant discovery sought herein.

In opposition, Plaintiff maintained that it provided an authorization for Plaintiff's prior medical records regarding Plaintiff's prior lumbar spine treatment on April 22, 2019. Plaintiff responded to the Compliance Conference Order by providing medical reports and authorizations on May 14, 2019, prior to the conference which was held on June 24, 2019. Additionally, on September 9, 2019, Plaintiff again responded to Defendant's request dated June 13, 2019, exchanging multiple authorizations, including an unlimited authorization so that Defendant's could obtain records relating to plaintiff's prior lumbar treatment; and on October 17, 2019, responded to Defendant's letter, advising that properly dated and HIPPA compliant authorizations had been exchanged, and Defendant could ask Plaintiff if he treated with any providers at some dates earlier than those indicated on the authorizations. Despite same, Defendant has refused to conduct depositions and examinations of the Plaintiff, therefore the deposition should be waived as Plaintiff has at no time agreed to any adjournment of Plaintiff's deposition. Plaintiff also annexed unrestricted authorizations for Dr. Serrano and for New Millennium for films. Therefore, as Plaintiff has fully complied with demands and Court directives, the motion is moot.

In response, Defendant reiterated its earlier arguments, stating it is undisputed that Plaintiff failed to provide proper authorizations, and has provided authorizations limited to records from after the accident date, although a date unrestricted authorization was provided for Dr. Serrano, it does not obviate Plaintiff's obligation to provide authorizations for all medical providers who previously treated his back. Defendant has also provided the name of the facilities, and should provide proper authorizations with the addresses of the facilities he attended. It is not Defendant's obligation to discover the address of Plaintiff's medical providers.

DISCUSSION

CPLR 3101(a) requires, in relevant part, "full disclosure of all matter material and necessary in the prosecution or defense of an action. Material and necessary information is that which is required to be disclosed because it bears upon the controversy at issue and will assist the requesting party in preparing for trial" (*see M.C. v Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]). "In order to comply with the liberal discovery provisions of the CPLR, a party who affirmatively places his or her medical condition into issue must provide duly executed and acknowledged written authorizations for the release of pertinent medical records." (*See Kakharov v Archer*, 166 AD3d 746 [2d Dept 2018].)


Pursuant to CPLR §3126, (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering judgment by default against the disobedient party." The drastic remedy of striking a pleading is inappropriate absent a clear showing that the failure to comply with discovery demands or orders was willful or contumacious. (*See Empire Enters. I.J.J.A., Inc. v Daimler Buses of North America, Inc.*, 172 AD3d 819 [2d Dept 2019]; *Hunghui Kuang v Melife*, 159 AD3d 878 [2d Dept 2018]; *Teitelbaum v Maimonides Med. Ctr.*, 144 AD3d 1013 [2d Dept 2016].) Willful and contumacious conduct can be inferred from a party's repeated noncompliance with court-ordered discovery, coupled with either no excuses or inadequate explanations. (*See Mears v Long*, 149 AD3d 823 [2d Dept 2017]; *Lucas v Lawrence Stam*, 147 AD3d 921 [2d Dept 2017]; *Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201 [2d Dept 2012].) The Court finds that Defendant failed to demonstrate that under the circumstances, Plaintiff's conduct herein constituted "willful and contumacious" conduct requiring drastic relief under CPLR §3126. However, the Court will grant Defendant relief under CPLR §3124 to compel the plaintiff to comply with defendant's discovery demand for authorizations (*see CPLR §3124; Kamanou-Goune v Swiss Intern. Airlines*, 100 AD3d 968 [2d Dept 2012]). The Plaintiff is required to provide authorizations for the release of medical records pertaining to his pre-existing injuries as the discovery sought by authorizations pertaining to the prior treatment of plaintiff's is material and necessary to defendant's defense of this action (*see Brito v Gomez*, 33 NY3d 1126 [2019]; *Amoroso v City of New York*, 66 AD3d 618 [2d Dept 2009].) Defendants are permitted through discovery process to determine if Plaintiff's injuries as alleged in his verified bill of particulars are attributable to his prior accident and not the accident at issue (*see McGlone v Port Auth. Of N.Y. & N.J.*, 90 AD3d 478 [1st Dept 2011]). Therefore, based upon the foregoing, it is

ORDERED, that Defendants' motion is granted only to the extent that Plaintiff is directed, to the extent not already provided, to provide unrestricted duly executed HIPAA compliant authorizations for all medical providers, including Dr. Serrano, who previously treated Plaintiff for his neck, back, either knee or his right index finger prior to this accident within thirty (30) days of the filing of this Order; and it is further

ORDERED, that plaintiff's failure to comply with this Order may result in his preclusion from offering any evidence or testimony at the time of Trial.

This constitutes the decision and Order of the Court.

Dated: December 17, 2019



Hon. Chereé A. Buggs, JSC

FILED
DEC 23 2019
COUNTY CLERK
QUEENS COUNTY