

Beato v 608-610 Realty Corp.
2020 NY Slip Op 30062(U)
January 2, 2020
Supreme Court, New York County
Docket Number: 161197/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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EDDY BEATO,

Index No. 161197/2013

Plaintiff

- against -

DECISION AND ORDER

608-610 REALTY CORP and HEIGHTS
MANAGEMENT CO.,

Defendants

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LUCY BILLINGS, J.S.C.:

I. PLAINTIFF'S MOTION

Plaintiff moves to substitute engineer Andrew Yarmus for plaintiff's previously disclosed expert Daniel Burdett and to permit Yarmus to inspect the stairs on defendants' premises where plaintiff claims she was injured. Defendants oppose the substitution based on the absence of admissible medical evidence supporting Burdett's claim that he is incapacitated from testifying at the trial scheduled for January 15, 2020.

To support the substitution for Burdett it is enough that plaintiff has shown his unavailability through his affidavit that he is obeying his physician's instructions not to testify or engage in other professional endeavors, without requiring his physician to lay bare the details of Burdett's medical condition. Since plaintiff has adequately supported Burdett's unavailability, the court grants her motion to substitute Yarmus as her expert. Ramsen A. v. New York City Hous. Auth., 112 A.D.3d 439, 439 (1st Dep't 2013); Mateo v. 83 Post Ave. Assoc, 12

A.D.3d 205, 205-206 (1st Dep't 2004). Because the trial is imminent, however, the court grants this relief on the conditions that Yarmus's theory of defendants' liability will be substantially the same as Burdett's theory, as plaintiff assures it will be, and that plaintiff serves Yarmus's expert disclosure sufficiently in advance of the scheduled trial. C.P.L.R. § 3101(d)(1)(i).

Yarmus needs to inspect the premises to allow plaintiff to serve a complete expert disclosure. While the inspection may be of limited use, given that plaintiff's injury occurred seven years ago, plaintiff claims the unsafe condition of the stairs that caused her injury was inherent in the construction of their winding steps and risers, which may have remained unchanged since her injury. To provide a relevant opinion about the stairs' condition, plaintiff of course must show that the condition Yarmus inspected was the same as when plaintiff was injured. Serrano v. TED Gen. Contr., 157 A.D.3d 474, 474 (1st Dep't 2018); Santana v. New York York City Hous, Auth., 128 A.D.3d 564, 565 (1st Dep't 2015); Green v. Gracie Muse Rest. Corp., 105 A.D.3d 578, 579 (1st Dep't 2013); Alston v. Zabar's & Co., Inc., 92 A.D.3d 553, 553 (1st Dep't 2012). Defendants are entitled to Yarmus's expert disclosure sufficiently before the trial scheduled for January 15, 2020, C.P.L.R. § 3101(d)(1)(i), yet insist that the substitution of plaintiff's expert is not a reason to postpone the trial. Therefore, as set forth on the record December 18, 2019, the court permits Yarmus to inspect the

stairs on defendants' premises December 23, 2019, and permits his substitution on the condition that plaintiff serves his expert disclosure by December 27, 2019. This relief is without prejudice to defendants' objections to Yarmus's testimony at trial.

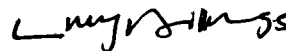
II. DEFENDANTS' CROSS-MOTION

Defendants cross-move to compel plaintiff's authorizations for defendants' attorneys to communicate with plaintiff's treating physicians. The court denies this relief because defendants seek it a year and a half after plaintiff filed the note of issue. The fact that defendants' prior attorneys did not seek these authorizations does not amount to the "unusual or unanticipated circumstances" required after the note of issue to permit further disclosure of evidence not previously requested. 22 N.Y.C.R.R. § 202.21(d). See Arons v. Jutkowitz, 9 N.Y.3d 393, 411 (2007); Cuevas v. 1738 Assoc., L.L.C., 111 A.D.3d 416, 416-17 (1st Dep't 2013); Bermel v. Dagostino, 50 A.D.3d 303, 304 (1st Dep't 2008). Defendants' need now to conduct further disclosure is occasioned only by their current attorney's perception that the former attorney did not seek all the disclosure that may be useful and not by any recent, unexpected disclosure by another party or other development attributable to another party. Madison v. Sama, 92 A.D.3d 607, 607 (1st Dep't 2012); Schroeder v. IESI NY Corp., 24 A.D.3d 180, 181 (1st Dep't 2012). See Stowlowski v. 234 E. 178th St. LLC, 104 A.D.3d 569, 570 (1st Dep't 2013); Parato v. Yagudaeu, 46 A.D.3d 332, 332-33 (1st Dep't

2007); Colon v. Yen Ru Jin, 45 A.D.3d 359, 359-60 (1st Dep't 2007); Pannone v. Silberstein, 40 A.D.3d 327, 328 (1st Dep't 2007). Defendants possess all the medical records of plaintiff's treating physicians and may subpoena them to testify at trial.

Finally, defendants cross-move to compel Burdett to produce his file relevant to this action. The court denies this relief as well, because defendants fail to show that they served either the subpoena or the cross-motion on Burdett. Even if defendants served the subpoena, it allowed him only 11 days rather than the minimum 20 days to respond, C.P.L.R. § 3120(2), and failed to notify him of "the circumstances or reasons such disclosure is sought or required." C.P.L.R. § 3101(a)(4); Kapon v. Koch, 23 N.Y.3d 32, 39 (2014). As a nonparty, Burdett is entitled to know the parties' claims or defenses to which his disclosure may be relevant. Kapon v. Koch, 23 N.Y.3d at 37, 39; Ledonne v. Orsid Realty Corp., 83 A.D.3d 598, 599 (1st Dep't 2011); Reyes v. Riverside Park Community (Stage I), Inc., 47 A.D.3d 599, 599-600 (1st Dep't 2008); Velez v. Hunts Point Multi-Serv. Ctr., Inc., 29 A.D.3d 104, 110 (1st Dep't 2006).

DATED: January 2, 2020



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