Campbell v City of New York
2020 NY Slip Op 31909(U)
June 18, 2020
Supreme Court, New York County
Docket Number: 161354/2013
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART 5**

Justice

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CAROLYN CAMPBELL,
Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, NYCHA PUBLIC HOUSING PRESERVATION I, LLC,NYCHA I HOUSING DEVELOPMENT FUND CORPORATION, NEW YORK CITY HOUSING DEVELOPMENT CORPORATION,
Defendants.

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INDEX NO. 161354/2013

MOTION DATE 2/11/20

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS .

Plaintiff Carolyn Campbell commenced this action against Defendants (collectively the "City")[1] to recover for injuries sustained in a June 22, 2013 fall on the sidewalk abutting 2660 Frederick Douglas Boulevard, New York, New York. Plaintiff moves, pursuant to CPLR 2304, for a protective order and/or to quash the City's November 7, 2019 post-note of issue subpoenas to: (1) North General Hospital; (2) Tarek Mardem Bey, MD; (3) Hermant Patel, MD; (4) Columbus Circle Imaging; and (5) Bronx Lebanon Hospital. Plaintiff also argues for costs and sanctions, arguing that the City misled the Court and violated court rules and HIPAA.[2]

The City opposes and cross-moves: (1) to compel Plaintiff to produce HIPAA-compliant authorizations and *Arons* authorizations for all prior treating physicians for the subject incident; all record relied upon by those physicians; and all record pertaining to pre-existing conditions in Plaintiff's "lower back/legs/any related body part," including records from the subpoenaed entities plus records from Sebastian Lattuga and any records cited to in Plaintiff's 2001 action relating to pre-existing arthritis (*Campbell v $1 Depot*, Index No. 111158/2001); (2) to compel production of Plaintiff's applications to disability carriers, including SSD/SSI, and related records;[3] (3) to strike Plaintiff's Complaint; and, in the alternative, (4) to preclude at trial any

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[1] Though the City of New York and NYCHA are distinct entities, Corporation Counsel represents all Defendants in this action (*NYSCEF 128*).
[2] Plaintiff withdrew the request for sanctions on November 12, 2019 (*NYSCEF 118* 10).
[3] Plaintiff conceded in reply that disclosure of the social security disability records was justified; accordingly, the relevant branches of the motion and cross-motion are moot (*NYSCEF 167* ¶ 23).

evidence pertaining to Plaintiff's injuries. For the reasons below, Plaintiff's motion is granted in part and the City's cross-motion is denied.

BACKGROUND FACTS AND PROCEDURAL HISTORY

In an October 3, 2013 50-h hearing held by Defendant NYCHA, Plaintiff testified that she injured her lower back and left hip in the subject incident, which prompted her primary care physician to refer Plaintiff for pain management treatment (*NYSCEF 109* 13-16). Plaintiff also testified that she hurt her back in a 2000 slip and fall incident, and again in either 2008 or 2009 when she fell off a chair and suffered a lower back sprain (*NYSCEF 109 25-27*). In the years since the subject 2013 incident, Plaintiff underwent years of pain management procedures, including surgery and a trial placement of a spinal cord stimulator (*NYSCEF 106* ¶ 4). On April 3, 2014, Plaintiff served a Bill of Particulars and response to the City's Demand for Discovery and Inspection detailing, in relevant part, an L4-L5 disc bulge and soft tissue back injuries necessitating injections and possible surgery (*NYSCEF 126, 127*). Defendants waived Plaintiff's court-ordered deposition (*NYSCEF 119* [*City Affirm in Opp*] ¶ 11).

Plaintiff served supplemental bills of particulars on September 12, 2014 and January 7, April 27, and October 4, October 10, and November 15, 2017, and February 14, May 9, and August 14, 2018, each time detailing additional treatment (*NYSCEF 129-131, 133-138*). The City's expert Dr. Jeffrey M. Passick performed an exam on September 15, 2016. On August 9, 2018, the parties stipulated to a further EBT on damages and an IME "to be limited to new conduct alleged in [supplemental bill of particulars]" (*NYSCEF 139*).[4] On October 22, 2018, Plaintiff appeared for a further deposition concerning continuing treatment for her lower back (*NYSCEF 140*). On November 1, 2018, Plaintiff filed the note of issue (*NYSCEF 69*).

On November 16, 2018, the City filed post-EBT demands for HIPAA and *Arons*-compliant authorizations for Holy Name Hospital, pharmacy records, and radiology records (*NYSCEF 143*). On November 19, 2018, the City filed a motion to vacate the note of issue (sequence 003), arguing that Plaintiff failed to appear for a further IME and respond to the City's post-EBT demand; the motion did not seek any discovery related to, or even mention, Plaintiff's prior back issues (*NYSCEF 72, et seq.*). Plaintiff appeared for the exam on January 17, 2019 and provided authorizations on January 21, 2019, though the City denied having received the latter. The parties resolved the motion by stipulation dated April 23, 2019 which did not mention Plaintiff's back, but directed Plaintiff to provide "fresh hard copy HIPAA-compliant authorizations … as [the City] has not received the … responses to date" (*NYSCEF 100*). On April 25, 2019, Plaintiff re-served the authorizations. On June 4 and September 12, 2019, Plaintiff served additional Bills of Particulars.

On November 6, 2019, the City, for the first time, requested authorizations for medical records concerning Plaintiff's prior back pain complaints. According to Plaintiff's counsel, when he communicated directly with City counsel, City counsel admitted to having failed to request the requested authorizations before trial was looming (*NYSCEF 106* [*Pl Affirm*] ¶ 12). Plaintiff's

[4] The City incorrectly characterizes the document as an order rather than a so-ordered stipulation (*City Affirm in Opp* ¶ 22 ["… a new deposition was ordered to be limited…"]). If the City disagreed with its text, and believes it to have been incorrect, the City could have appealed or moved to reconsider.

counsel memorialized rejection of the City's new demands in a November 8, 2019 email, arguing in sum and substance that the City's failure, despite Plaintiff's 2013 50-h testimony regarding her prior back pain complaints, to request relevant records precluded post-note production (*NYSCEF 114*). After the City subpoenaed the records anyway, Plaintiff's motion to quash followed, to which the City responded by cross-moving to compel production.

DISCUSSION

As an initial matter, to the extent that the City argues that the subpoenas were so-ordered, that fact does not preclude the Court from reviewing the subpoenas on a motion to quash. More importantly, though framed as a motion to quash, the motion and cross-motion are, in actuality, motions relating to post-note discovery and are thus analyzed under that framework.

A party seeking new post-note discovery, including service of subpoenas, has two options: timely move to vacate the note of issue pursuant to 22 NYCRR 202.21(e) or move under 22 NYCRR 202.21(d) (*Singh v Finneran*, 100 AD3d 735, 736 [2d Dept 2012] [affirming Supreme Court's decision quashing post-note non-party subpoenas which defendant claimed were "newly discovered witnesses"]). As the City acknowledges in reply, it does not seek vacatur of the note of issue (*NYSCEF 186* at 4); thus, its requested relief must fall under 22 NYCRR 202.21(d), which provides that

> [w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings.

In order to justify post-note discovery, a defendant must demonstrate "unusual or unanticipated circumstances" that arise *subsequent* to the filing of the note of issue (*Colon v Yen Ru Jin*, 45 AD3d 359, 359-60 [1st Dept 2007]). "Unusual or unanticipated" circumstances do *not* include a lack of diligence, additional injuries alleged months before the filing of the note of issue, and substitution of counsel (*Orr v Yun*, 74 AD3d 473 [1st Dept 2010] ["A lack of diligence in seeking discovery does not constitute such circumstances," and post-note discovery denied where it could have been sought before the note of issue was filed], citing *Marks v Morrison*, 275 AD2d 1027 [4th Dept 2000] ["A belated realization that an IME had not been conducted cannot be considered 'good cause.'"]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181-82 [1st Dept 2005]; *Soto-Maroquin v Mellett*, 32 Misc 3d 1208(A) [Sup Ct NY County 2010] [denying post-note discovery where defendants discovered were alerted to plaintiff's prior treatment several months before the note of issue, and thus the failure to obtain disclosure "may not be attributed to plaintiffs' nondisclosure"]; *Miller v Metro. 810 7th Ave.*, 50 AD3d 474, 474-75 [1st Dept 2008] [affirming denial of post-note discovery where party seeking discovery was aware of the nonparty witness several years prior to the note of issue and only made motion "5 months after [learning of] the purported discrepancy between the witness's statements to [an] investigator and those he subsequently made in an affidavit"]; *cf Bermel v Dagostino*, 50 AD3d 303, 304 [1st Dept 2008] [permitting post-note discovery where "...prior to and following the

filing of the note of issue, defendant made numerous unanswered requests for medical records documenting plaintiff's preexisting condition from plaintiff's treating physician."]).

The City argues that several facts support its position. First, the City argues that Plaintiff pleaded the existence of pre-existing injuries that were exacerbated by the subject incident (*NYSCEF 118* at 4). While true, this argument does not acknowledge the operative fact: *when* the City knew of the pre-existing injuries—2013, at the 50-h hearing—and why the City waited until years later, and after the note of issue had been filed, to request specific records pertaining to the injuries. On this record, there are no "unusual or unanticipated circumstances" justifying post-note discovery; rather, as the City concedes in reply, "... additional good faith efforts could have been taken and would have made a better record here ..." (*City Reply Affirm* ¶ 187).

Second, the City argues that "[o]n the date [the] note of issue was filed, and as of the date of this affirmation, medical discovery was incomplete and ongoing, including an I.M.E. by Dr. Jeffrey Klein" (*id.*). The basis for this statement is unclear, as the City acknowledges that "Plaintiff appeared for her exam with Dr. Jeffrey Klein" on January 17, 2019 (*id.* at 7). To the extent that the City appears to argue that Dr. Klein's exam is incomplete because Dr. Klein, as set forth in the April 4, 2019 exam report, could not examine Plaintiff's prior medical records (*id.*). This does not explain, however, why Plaintiff waited 7 months to seek the records—first from Plaintiff directly, then via subpoena.

The argument also disregards both the fact that Defendant already had the benefit of a prior expert exam, and the reason that Dr. Klein did not have the records available for review: because the City, through no fault of Plaintiff and despite having had knowledge, as early as 2013, of Plaintiff's pre-existing injuries, did not request the records. To the extent that the City argues, for the first time in reply, that it *did* request the records and that the initial case scheduling order directed production of records related to "exacerbation of injury," (*City Reply Affirm* ¶¶ 7-9; *NYSCEF 189*), those documents are broad; if the City felt that Plaintiff's responses were deficient or obstructive, the City had the opportunity, over the years-long course of this litigation and numerous conferences and motions—including, and this cannot be emphasized enough, a prior motion to vacate the note of issue—to request such information, not to mention that the City was armed with Plaintiff's initial 50-h testimony and myriad case law, much of it cited by the City here, justifying discovery of records related to relevant prior injuries. Instead, the City waived Plaintiff's initial deposition in 2014 and, for years thereafter, pursued discovery regarding other matters.

Third, the City also argues that the parties have continued to engage in post-note discovery. As the City recognizes, however, the disclosure does not relate to the pre-existing injuries for which Defendant seeks records.

The City's citations are unpersuasive. For example, while the City correctly argues that *Brito v Gomez*, (33 NY3d 1126, 1127 [2019]), holds that pre-existing injuries are "material and necessary," that action does not relate to post-note discovery. Similarly, while the City is correct that the First Department permitted post-note discovery relating to a prior car accident in *Hickey v City of New York*, (159 AD3d 511 [1st Dept 2018]), the discovery was permitted in response to a motion to vacate the note of issue; here, the City already had one such motion, and resolved it

without addressing Plaintiff's existing injuries. The City also cites *Calabro v The City of New York*, 2017 NY Slip Op 30787[U], 3 [Sup Ct, NY County], *affd sub nom. In re 91 St. Crane Collapse Litig.*, 159 AD3d 511, 512 [1st Dept 2018]).[5] In that action, however, the Court (Mendez, J.) found that "[p]laintiff's willingness to provide authorizations, and the parties proceeding to exchange discovery long after the note of issue was filed, demonstrates a lack of prejudice for the exchange of authorizations," but more importantly that authorizations were missing from an earlier response. Here, it is evident that the City, for reasons unknown, simply did not ask for records pertaining to Plaintiff's pre-existing injuries until well after the time to do so had lapsed. The most important difference between the City's citations and the situation here is that in those actions, the defendants seeking discovery exercised one of the permitted methods of post-note discovery set forth in 22 NYCRR 202.21(e).

To the extent that the City argues that "the importance of the medical discovery sought was learned many months after note of issue was filed" (*City Affirm in Opp* ¶ 14), the City essentially asks the Court to accept that Corporation Counsel was not aware that previous injuries to the only area of Plaintiff's body at issue could be relevant until their second expert stated so in a report six years after Plaintiff filed this action. Because Corporation Counsel has proven otherwise on numerous occasions and because the Court holds Corporation Counsel's attorneys in high esteem, that argument simply cannot be credited.

Finally, the Court notes that sanctions are not appropriate for either party. The Court denies Plaintiff's sanctions request for the City's post-note subpoenas and discovery requests, as the City's motion was clearly not frivolous in its entirety; indeed, Plaintiff conceded to provide a portion of the discovery sought. Nor can the Court accept the City's argument that Plaintiff's Complaint should be stricken for the *City's* failure to timely seek relevant discovery (*City Affirm in Opp* at 17).

CONCLUSION/ORDER

For the above reasons, it is

ORDERED that Plaintiff's motion to quash (004) is GRANTED with the exception of the branch of the motion seeking sanctions, and the subpoenaed parties need not respond to Defendants' November 7, 2019 subpoenas; and it is further

ORDERED that Defendants' cross-motion is DENIED; and it is further

ORDERED that Plaintiff shall, within 30 days of receipt of this order, serve a copy of this order upon all parties and the subpoenaed parties who are the subject of these motions; and it is further

ORDERED that the City shall, within 30 days of receipt of this order, e-file and serve, by certified mail, return receipt requested, a copy of this order with notice of entry upon Plaintiff at all known addresses; and it is further

[5] The City states that the First Department affirmed this holding (*City Affirm in Opp* 12); while accurate, the relevant portion of the Supreme Court order had not been appealed.

ORDERED that any records already produced in response to the subpoenas shall not be admissible at trial; and it is further

ORDERED that any relief not explicitly addressed in this decision has been considered and denied.

This constitutes the decision and order of the Court.

6/18/20
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE