

Rosario v Port Auth. of N.Y. & N.J.
2020 NY Slip Op 32910(U)
September 3, 2020
Supreme Court, New York County
Docket Number: 150040/2018
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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MIGUEL ROSARIO,

Plaintiff,

-against-

DECISION AND ORDER

Index No. 150040/2018

THE PORT AUTHORITY OF NEW YORK & NEW
JERSEY, ONE WORLD TRADE CENTER LLC, BP
MECHANICAL CORP., WTC TOWER1 LLC and
TOWER 5, LLC,

Defendants.

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BP MECHANICAL CORP.,

Third-Party Plaintiff,

-against-

ATLANTIC CONTRACTING & SPECIALTIES, LLC

Third-Party Defendant.

----- X
FRANK P. NERVO, J.S.C:

Third-party defendant Atlantic Contracting & Specialties Inc. (hereinafter
“Atlantic”) seeks an order, pursuant to CPLR § 3216, dismissing plaintiff’s claims against
defendants due to his alleged failure to comply with several orders of this Court.

Alternatively, Atlantic seeks to preclude plaintiff from presenting evidence at trial. As a
second alternative, Atlantic seeks to compel plaintiff to provide complete responses to
all outstanding discovery, in accordance with prior court order. Finally, Atlantic seeks
costs on this motion.

CPLR § 3101(a) directs that there “shall be full disclosure of all matter material
and necessary to the prosecution or defense of an action, regardless of the burden of
proof” (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is “one of

usefulness and reason” (*id.*). CPLR § 3126 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness and failure to comply with court orders, can give rise to an inference of willful and contumacious conduct (*see Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st Dept 2005]); *see also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]).

“A party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]). As the Court of Appeals has repeatedly underscored, “our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution” (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123

[1999]). Disregard of discovery deadlines will not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; see also *Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]).

Medical Authorizations

Here, three court orders directed plaintiff to respond to defendants' request for HIPAA compliant authorizations for his medical records (Preliminary Conference Order NYSCEF Doc. No. 56; Compliance Conference Order NYSCEF Doc. No. 57; Status Conference Order NYSCEF Doc. No. 63). Notwithstanding, plaintiff has failed to provide complete authorizations. Plaintiff, in opposing this motion, does not contend that all proper authorizations have been served, instead he contends that authorizations were served in response to a March 2019 demand. Plaintiffs' motion is entirely silent with respect to medical authorizations sought in Atlantic's May 26, 2020 demand.

It is beyond cavil that medical authorizations for plaintiff's medical records for all medical providers who treated plaintiff as a result of the injuries alleged in this action, including EMT/ambulance reports, are necessary to this action. Likewise necessary are authorizations for plaintiff's medical records for treatment of his prior motor vehicle accident approximately one year before this action, which resulted in injuries delaying plaintiff's return to work, as well as his prior treatment of "low vision." Plaintiff shall provide authorizations for same as directed below. Failure to provide authorization as below shall result in the striking of plaintiff's complaint, and additional sanctions under CPLR § 3126, as the Court finds appropriate.

Employment and Tax Records

Similarly, plaintiff was ordered to provide authorizations for his employment and tax records (Compliance Conference Order NYSCEF Doc. No. 57; Status Conference Order NYSCEF Doc. No. 63). Plaintiff failed to provide these authorizations or records. In opposing this motion, plaintiff contends that his employment records “should” be available from his union, Local 12, and thus he argues he need not provide employment records. Plaintiff further argues that his tax returns are not discoverable because he is not self-employed.

As a general principle, the discovery of tax returns is disfavored absent a showing of necessity (*Four Aces Jewelry Corp. v. Smith*, 256 AD2d 42 [1st Dept 1998]; *Berger v. Fete Cab Corp.*, 57 AD2d 784 [1st Dept 1977]). However, certain circumstances may require their production, including where wage information is lacking or unreliable (*Berger v. Fete Cab Corp.*, 57 AD2d at 784, *see also Coleman v. Myers*, 29 AD2d 727 [3d Dept 1968]). A nomadic employment record and the failure to disclose the names of employers amount to special circumstances requiring the discovery of a party’s tax returns (*id.*). The party seeking to compel disclosure of tax returns must identify the particular information the return will contain and establish the material sought therein is “indispensable” (*Nanbar Realty Corp. v. Pater Realty Co.*, 242 AD2d 208, 209 [1st Dept 1997] *citing Briton v. Knott Hotels Corp.*, 111 AD2d 62, 63 [1st Dept 1985]). Finally, documentary evidence, such as W-2 forms, is required to establish a plaintiff’s past earnings award (*Martinez v. Royal-Pak Sys.*, 300 Ad2d 198 [1st Dept 2002]; *DelValle v. White Castle Sys.*, 277 AD2d 13 [1st Dept 2000]).

Here, plaintiff has worked for several employers in the period leading up to the alleged accident but he has not provided authorizations for those records, nor identified the employers. Plaintiff contends, in essence, that his union, Local 12, sent him to various worksites and he does not have records for each employer or site he worked at. However, plaintiff is unsure whether Local 12 will have his employment records, repeatedly contending it “should” maintain such records or “maybe” another defendant could identify plaintiff’s employers based on Local 12’s records (Plaintiff’s Opposition at ¶ 4 and 5, NYSCEF Doc. No. 85). Such circumstances require the disclosure of plaintiff’s tax returns (*Berger v. Fete Cab Corp., supra*; *Coleman v. Myers, supra*).

Prior Accident

Movants further seek the non-privileged portion of plaintiff’s file related to a no-fault prior car accident on November 29, 2015. Plaintiff has not addressed this portion of the motion in his opposition. Plaintiff must provide authorizations for his no-fault records as the back and neck injuries plaintiff suffered as a result of that accident impeded his return to work. The nature of these prior injuries, and result on plaintiff’s ability to return to work, are germane to this action alleging a workplace injury approximately 13 months following the motor vehicle accident.

Conclusion

This Court finds authorizations for plaintiff’s medical records, plaintiff’s tax returns and employment records, and plaintiff’s prior motor vehicle accident are relevant and necessary to this action. Furthermore, the Court finds that discovery of the majority of this material was previously ordered by this Court, repeatedly. Plaintiff has failed to proffer a reasonable excuse for his noncompliance. The Court finds plaintiff’s nondisclosure amounts to willful and contumacious conduct; however, in the Court’s

discretion it will not dismiss the action, at this time. Notwithstanding, failure to comply with this order shall result in the sanctions below, as appropriate. The Court finds that plaintiff has been on notice that the above material would be sought by defendants/third-party plaintiff for more than one year, and the production of same within 20 days of notice of entry of this order is appropriate. The Court declines to impose costs, at this time, as a matter of discretion.

Accordingly, it is

ORDERED that the motion is granted to the extent of conditionally striking plaintiff's pleading should he fail to provide, within 20 days of notice of entry of this decision and order, authorizations requested in movant's demand of May 26, 2020 and prior court orders (Preliminary Conference Order NYSCEF Doc. No. 56; Compliance Conference Order NYSCEF Doc. No. 57; Status Conference Order NYSCEF Doc. No. 63), to wit: medical authorizations for treating medical providers for injuries alleged in this matter, including EMTs and physical therapy; tax returns for filing years 2012 to present; employment records for 2014 to present; authorizations for non-privileged portions of plaintiff's file at Harmon Linder, & Rogowsky related to the November 29, 2015 no-fault motor vehicle accident; and authorizations for plaintiff's no-fault records regarding the November 29, 2015 accident; and it is further

ORDERED that plaintiff shall provide authorizations for his medical records at Dr. Catalano's office related to his treatment of "low vision," within 20 days of notice of entry of this decision and order; and it is further

ORDERED that to the extent plaintiff is dispossessed of the material above, he shall serve duly completed authorizations for such material and an affidavit attesting to the efforts undertaken to secure the material, within 20 days of notice of entry of this decision and order; and it is further

ORDERED that in light of this discovery dispute, and the impact of COVID-19, plaintiff's examination before trial shall occur on or before November 30, 2020 and all other depositions shall occur on or before December 31, 2020. Depositions shall proceed either in-person or by electronic means; and it is further

ORDERED that the independent medical exam of plaintiff shall occur on or before January 31, 2021 and report of same shall be exchanged within 45 days of exam; and it is further

ORDERED the deadline to file the Note of Issue is extended to March 31, 2021.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: September 3, 2020

ENTER:



Hon. Frank P. Nervo, J.S.C.