

Bain v 50 W. Dev., LLC
2020 NY Slip Op 33021(U)
September 15, 2020
Supreme Court, New York County
Docket Number: 160488/16
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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KENDELL BAIN,

Plaintiff,

-against-

50 WEST DEVELOPMENT, LLC and HUNTER
ROBERTS CONSTRUCTION GROUP, LLC.

Defendants.

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SHERRY KLEIN HEITLER, J.S.C.

Index No. 160488/16
Motion Sequence 04

DECISION AND ORDER

Defendants move pursuant to CPLR § 3124 to compel plaintiff Kendell Bain (“Plaintiff”) to provide certain outstanding discovery. This is a personal injury matter arising from a March 12, 2016 accident at a construction site located at 50 West Street in Manhattan. Plaintiff alleges that he was injured when a cart stacked with plywood sheets tipped over and fell on him. The construction site was owned by defendant 50 West Development, LLC and the general contractor was defendant Hunter Roberts Construction Group, LLC (together, “Defendants”). Plaintiff was employed by non-party Resource New Jersey, Inc. as a flooring carpenter.

Plaintiff’s accident occurred on a ramp located on the 25th floor of a residential building under construction. Plaintiff alleges that he was moving sheets of plywood on a cart in order to deliver them to various apartment units when one of the cart’s wheels became lodged in a gap in the side of a ramp. The cart allegedly tipped over and both the cart and the plywood sheets landed on Plaintiff. As a result, Plaintiff says that he sustained several disc herniations and other injuries to his leg and back.

Discovery has been ongoing since July of 2017 when the court issued a Preliminary Conference order. Since then there have been many conferences, orders and stipulations addressing discovery-related issues. By order dated October 3, 2019 the court denied Plaintiff's motion for summary judgment on his Labor Law 240(1) and Labor Law 241(6) claims, denied Defendants' motion to dismiss Plaintiff's complaint (with the exception of his Labor Law 200 and general negligence claims), and dismissed the third-party action. Thereafter, there were several conferences regarding discovery issues and the court authorized Defendants to file this motion. The focus of the current motion is Defendants' request for records to assess Plaintiff's work history both prior to and after the accident, as well as whether there were any pre-existing medical conditions.

Defendants' stated reason for expanding the scope of discovery is a pension document produced by Plaintiff's union, Local 926, which shows that Plaintiff worked zero hours in 2010 and in 2012.¹ The document also shows that Plaintiff worked fewer than 425 hours per year in 2009, 2011, 2013 and 2014. Defendants contend that the pension document demonstrates, despite Plaintiff's testimony to the contrary, that he must have had another injury which precluded him from working at times prior to the construction accident at issue in this case. Accordingly, Defendants seek an order compelling Plaintiff to provide the following:

- unrestricted Workers' Compensation Board authorizations;
- executed form SSA-7050-F4 (OMB No. 0960-0525) to obtain Social Security earning information from 2007 to the present;

¹ NYSCEF Doc. No. 117. On May 22, 2017, Plaintiff exchanged an authorization to retain records maintained by Plaintiff's union, Local 926. On February 28, 2018 Plaintiff exchanged an authorization for records maintained by the New York United District Council of Carpenters. Despite processing these authorizations, Defendant claims that neither entity responded. On October 18, 2019, Defendants served subpoenas on New York City District Council of Carpenters Benefit Funds which led to the discovery of a November 4, 2019 Pension Fund report.

- form 4506 and 4506-T to obtain Plaintiff's tax information from 2007 to the present;
- authorizations to obtain records related to prior employers from 2007 to the present, including names, addresses and applications for employment submitted by Plaintiff after the accident;
- access to Plaintiff's personal email account;
- unrestricted authorizations for records maintained by the New York State Education Department Office of Adult Career and Continuing Education Services;
- authorizations to obtain Plaintiff's Social Security Disability Insurance records;
- authorizations to obtain Plaintiff's Medicare records;
- authorizations to obtain Plaintiff's pharmacy records; and
- *Arons* authorizations to speak with Plaintiff's treatment providers.

In opposition to this motion Plaintiff argues that he has already fully complied with some of these demands and that Defendants are simply not entitled to the remainder. In this regard, Plaintiff asserts that Defendants previously stipulated to accept documentation for the three years prior to his accident and that they may not alter this stipulation at this late stage of the case.

The pension document raises questions about the possibility of Plaintiff having a pre-existing condition. Defendants should be able to investigate why Plaintiff's union work records fluctuated so much over a several year period. At the same time, the court must balance Defendants' right to discovery pursuant to CPLR 3101 against the fact that many of these discovery requests are simply too broad in scope. With that in the mind, the court addresses each discovery request below.

1. Workers' Compensation Board authorization – The court's July 31, 2017 Preliminary Conference order directed Plaintiff to provide, among other things, original Workers'

Compensation Board authorizations.² Instead, on February 25, 2020, Plaintiff provided Defendant with a record of his independent job search efforts through the Workers' Compensation Board.³ Plaintiff also attests that the only claim he has ever made for Workers' Compensation is related to this accident. Notwithstanding, Defendants are entitled to perform their own investigation. Accordingly, Plaintiff is directed to provide a Workers' Compensation Board authorization for five years prior to the date of the accident.

2. Social Security Earnings information – Defendants seek an executed form SSA-7050-F4, OMB No. 0960-0525 in order to receive a certified statement showing Plaintiff's Social Security earnings information back to 2009. Plaintiff's December 9, 2019 Response to Demand for Discovery and Inspection provides: "Plaintiff does not and has not received Social Security benefits and therefore no authorization is provided for same."⁴ Furthermore, Plaintiff asserts in his January 24, 2020 affidavit that he has never submitted an application for Social Security benefits.⁵ Based on these representations, this court declines to order further discovery in this regard and Defendants' request for an Executed Form SSA-7050-F4 (OMB No. 0960-0525) to obtain Plaintiff's Social Security Earning Information is denied. Notwithstanding, the information that Defendants seek will be provided in other documents for which authorizations will be provided as per this decision and order.
3. Tax Records – Defendants seek executed Forms 4506 and 4506-T to retain Plaintiff's tax information from 2007 to the present. Plaintiff opposes, arguing that Defendants are bound by the terms of the January 2019 stipulation. Per the January 28, 2019 stipulation, Plaintiff

² NYSCEF Doc. No. 129.

³ NYSCEF Doc. No. 124.

⁴ NYSCEF Doc. No. 144.

⁵ NYSCEF Doc. No. 105.

was to provide IRS W-2 authorizations with 4506 (tax return) and 4506-T (tax transcript) forms for 2014 to the present.⁶ Regardless, in a December 9, 2019 Response to Demand for Discovery and Inspection, Plaintiff provided the authorizations from 2013 to the present.⁷ Given the outstanding issue regarding Plaintiff's pension records, the court will expand the scope of the January 2019 stipulation and require Plaintiff to provide authorizations for all tax records dating back to tax year 2011, thereby encompassing a five-year period prior to the accident.

4. Employment History – Defendants seek authorizations to obtain records related to Plaintiff's employers from 2007 through the present, namely Monster Floorcovering Inc., National Interiors Inc., Town & Country Wood Floor, Freeman Decorating Services, Exserv Inc., Resource New Jersey Inc., and Erector Specialist Inc. Plaintiff partially objected to this request and has provided authorizations for all employers from 2013 to the present, except for Freeman Decorating Services, Exserv and Erector Specialist, whom Plaintiff asserts never employed him.⁸ To the extent not already provided, Plaintiff is directed to provide authorizations for all of his employers for the five years prior to the date of the accident. Plaintiff shall provide an affidavit stating that he has not worked for any other employers besides those for which he has provided authorizations.
5. Job Applications – On February 25, 2020, Plaintiff provided a record of his independent job search efforts through the Workers' Compensation Bureau.⁹ The job search record indicates that the applications were submitted on a website called Indeed.com. To the extent not

⁶ NYSCEF Doc. Nos. 24 and 144.

⁷ NYSCEF Doc. No. 144.

⁸ NYSCEF Doc. Nos. 144 and 145.

⁹ NYSCEF Doc. No. 124.

already provided, Plaintiff shall provide Defendant with copies of all applications submitted through Indeed.com from the date of the accident. Plaintiff shall also provide an affidavit indicating what other jobs (if any) he applied for besides those listed in the February 25, 2020 Workers' Compensation Board document previously provided.

6. Email and Password – Defendants' request for the password to Plaintiff's personal email account is denied. However, Plaintiff shall confirm that he is preserving all emails related to any job searches sent or received since the date of the accident.
7. Office of Adult Career and Continuing Education Services – Defendants seek an authorization for records maintained by the New York State Education Department - Office of Adult Career and Continuing Education Services. In this regard, Defendants argue that Plaintiff met with a vocational rehabilitation counselor in 2018 who assessed his ability to return to work.¹⁰ As these records are relevant to Plaintiff's claim of future lost wages, Plaintiff is directed to provide an unrestricted authorization for records in the possession of this agency.
8. Social Security Disability Insurance and Medicare Records – Defendants seek authorizations for Plaintiff's Social Security Disability Insurance records and Medicare records. Plaintiff contends that during his deposition he mistakenly stated that he had applied for Social Security benefits and later corrected his mistake when he affirmed, "I have not submitted any application for Social Security Disability or any other benefits from Social Security."¹¹ Additionally, Plaintiff has indicated that he is not a recipient of Medicare benefits.¹² Defendants contend that Plaintiff's deposition acknowledgment entitles Defendants to these

¹⁰ NYSCEF Doc. No. 123.

¹¹ NYSCEF Doc. Nos. 62 and 105.

¹² NYSCEF Doc. No. 113.

records on the ground that Social Security Disability Insurance benefits are a collateral source that can be used to offset damages. The court directs Plaintiff to provide the Social Security Disability Insurance and Medicare authorizations and expects that no such records will need to be produced given Plaintiff's assertion that he neither applied for nor receives Social Security Disability Insurance or Medicare.

9. Pharmacy Records – On March 26, 2018 and on January 28, 2019, this court ordered Plaintiff to respond to demands for pharmacy authorizations.¹³ On April 26, 2018 and on February 4, 2019, Plaintiff provided duly executed authorizations permitting Defendants to obtain records from Raess Pharmacy.¹⁴ Defendants contend that the Raess Pharmacy authorizations do not include information pertaining to all of Plaintiff's prescriptions. Specifically, Defendants assert that a Dr. Charles Kaplan prescribed Plaintiff several medications that were filled by another pharmacy. Based upon these representations, Plaintiff is directed to provide authorizations for the pharmacy where he filled the prescriptions issued by Dr. Kaplan. If Plaintiff did not fill such prescriptions, Plaintiff shall so aver in an affidavit.
10. Arons Authorizations – Finally, Defendants request that Plaintiff provide authorizations pursuant to *Arons v Jutkowitz*, 9 NY3d 393 (2007) to speak privately with all of Plaintiff's treatment providers. Defendants' right to request and to receive such authorizations is well settled. *See Rucinski v More Restoration Co. Inc.*, 147 AD3d 485, 486 (1st Dept 2017). As such, to the extent not already provided, Plaintiff is to provide *Arons* authorizations for all of Plaintiff's post-accident treatment providers who have treated injuries that are at issue in this case.

¹³ NYSCEF Doc. Nos. 12 and 24.

¹⁴ NYSCEF Doc. Nos. 132 and 140.

Once all such discovery is complete, the court shall decide whether Defendants are entitled to a supplemental deposition of the Plaintiff, and if so, the scope of any such inquiry.

CONCLUSION

In light of all of the foregoing, it is hereby


ORDERED that Defendants' motion is granted in part and denied in part as set forth herein; and it is further

ORDERED that, within 30 days from the date of entry of this order, Plaintiff shall provide Defendants with all outstanding discovery as set forth herein.

Counsel are directed to appear for a virtual conference on October 6, 2020 at 9:30AM.

This constitutes the decision and order of the court.

DATED: 9.15.20



SHERRY KLEIN HEITLER, J.S.C.