

Petralia v 150 E. 58th St. LLC
2020 NY Slip Op 33841(U)
November 19, 2020
Supreme Court, New York County
Docket Number: 156840/2016
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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PATRICIA PETRALIA,

Plaintiff,

- v -

150 EAST 58TH STREET LLC, THE O'MARA
ORGANIZATION, INC.

Defendant.

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INDEX NO. 156840/2016

MOTION DATE March 27, 2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISCOVERY.

In this personal injury action, plaintiff alleges that as a result of a trip and fall on October 18, 2013, she suffered aggravation and exacerbation of a pre-existing back injury, due to the claimed negligence by defendants and violation of Labor Law §200, 240(1) and 241(6). Defendants seek a further deposition of plaintiff pursuant to CPLR 3124, claiming that additional medical records were received after plaintiff's initial deposition that demonstrate that plaintiff was not truthful and that her attorney improperly instructed her not to answer questions related to the injuries she is claiming as a result of the accident and as to her prior medical treatment. Plaintiff opposes the motion claiming that plaintiff was already produced for two depositions and that defendants should have adjourned the first deposition if they did not have all plaintiff's medical records and claiming that plaintiff answered all questions posed to her.

DISCUSSION

“Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense

of an action, regardless of the burden of proof. . . . The test is one of usefulness and reason.” (*Forman v Henkin*, 30 NY3d 656, 661, 70 N.Y.S.3d 157, 93 N.E.3d 882 [2018] [internal quotation marks and citations omitted]). “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court” (*Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843, 958 NYS2d 459 [2d Dept 2013] [internal quotation marks and citations omitted]).

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412(U), *5 [Sup Ct, NY County 2015]). “[T]he request need only be appropriately tailored and reasonably calculated to yield relevant information. . . . [T]he purpose of discovery is to determine if material relevant to a claim or defense exists.” (*Forman v Henkin*, 30 NY3d at 664). Plaintiff, as the opposing party, has the burden of establishing that the “disclosure sought is improper.” (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258, 608 NYS2d 647 [1st Dept 1994]).

Here, defendants contend that they are entitled to an additional deposition of plaintiff to explore the questions that her attorney refused to allow her to answer concerning her prior back treatment. Defendants further aver that the discovery sought is both material and necessary to the claims asserted by plaintiff concerning her claims that additional surgery is required due to the accident that forms the basis of this lawsuit and because she is claiming aggravation of a pre-existing back injury. Plaintiff argues that defendants are not entitled to another deposition as plaintiff answered all questions posed to her and that any additional deposition should be limited

in scope to the events that occurred after the prior depositions. A review of the deposition testimony submitted in support of the motion demonstrates that plaintiff did not in fact answer all questions posed to her, and that her counsel specifically instructed her not to answer questions related to her pre-existing treatment and back injuries as documented in the additional medical records received after her first deposition, contending that the second deposition should be limited in scope only to her further surgery. (NYSCEF Doc # 31, ¶¶ 10-11). The court disagrees.

In resolving this discovery dispute, the court must balance the competing interests presented and “the need for discovery must be weighed against any special burden to be borne by the opposing party” (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954, 705 NE2d 1197, 683 NYS2d 156 [1998] [citations and internal quotation marks omitted]). “[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition.” (*Matter of Farrow v Allen*, 194 AD2d 40, 45-46, 608 N.Y.S.2d 1 [1st Dept 1993]). For those conditions that plaintiff affirmatively placed at issue, plaintiff “may not insulate from disclosure material necessary to the defense concerning that condition.” (*Hoening v Westphal*, 52 NY2d 605, 610, 422 N.E.2d 491, 439 N.Y.S.2d 831 [1981]).


Defendants have demonstrated that they are entitled to a further deposition of plaintiff because the information is necessary to present “a full and fair picture [of plaintiff’s] condition.” *Matter of Farrow*, 194 AD2d at 45. Accordingly, it is hereby,

ORDERED that defendant’s motion to compel is granted; and it is further

ORDERED that plaintiff shall be produced for a further deposition on or before December 27, 2020, at a time place and manner agreed upon by the parties; and it is further

ORDERED that counsel for the parties are directed to confer with one another by telephonic or electronic means, within 30 days of plaintiff's supplemental deposition, and promptly thereafter send a joint e-mail message to the clerk of Part 23 advising whether a status conference is necessary to schedule additional discovery.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

<u>11/19/2020</u> DATE		 W. FRANC PERRY, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE