

Caceres v Motor Veh. Accident Indem. Corp.

2020 NY Slip Op 34034(U)

December 7, 2020

Supreme Court, Kings County

Docket Number: 506150/19

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

JOSE CACERES,

Plaintiff,

- against -

Index No.: 506150/19

MOTOR VEHICLE ACCIDENT
INDEMNIFICATION CORPORATION,

Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

30-36

Opposing Affidavits (Affirmations) _____

38-39

Upon the foregoing papers in this personal injury action, defendant Motor Vehicle Accident Indemnification Corporation (defendant) moves (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 2221 (e), granting it leave to renew this court's July 30, 2020 order, which denied its motion to strike plaintiff's note of issue.

Background

On August 4, 2017, plaintiff allegedly sustained personal injuries in an automobile accident while he was riding a bicycle, and subsequently, in 2019, commenced suit. On May 15, 2020, plaintiff filed a note of issue (NOI). Defendant moved on May 18, 2019, for an order striking plaintiff's NOI on the ground that plaintiff failed to respond to defendant's October 30, 2019 Supplemental Notice for Discovery & Inspection. On July 30, 2020, this court denied defendant's motion to strike plaintiff's NOI. Defendant now seeks leave to renew or reargue that order, pursuant to CPLR 2221 (e).

Defendant's Arguments

Defendant argues that its motion to renew should be granted because defense counsel mistakenly included the incorrect discovery request as exhibit "A" to its moving papers in support of its underlying motion to strike plaintiff's NOI. Defense counsel asserts that she inadvertently placed a previous Supplemental Notice for Discovery & Inspection dated June 17, 2019 as exhibit "A", but the body of her motion referenced the correct discovery request, the October 30, 2019 Supplemental Notice for Discovery. The October 30, 2019 Supplemental Notice for Discovery & Inspection seeks authorizations to obtain workers' compensation records and plaintiff's social security application. Plaintiff testified that a week after the subject automobile accident he injured his left calve cutting tile at work. Plaintiff is also alleged to have applied for social security a month and half prior to his deposition concerning his shoulders, back and knees.

Defendant received authorizations to obtain medical records from Drs. Offenbacher and Quareshi. Defendant seeks the workers' compensation and social

security application as outstanding discovery. Defendant claims that it would be highly prejudiced if it is not provided plaintiff's workers' compensation and social security applications, and that it needs those records to "comprehensively evaluate the claim." In support of the motion, defendant submits, among other exhibits, its motion to strike plaintiff's NOI, plaintiff's opposition, the October 30, 2019 Supplemental Notice for Discovery and Inspection and a transcript of plaintiff's examination before trial.

Plaintiff's Opposition

Plaintiff, in opposition, argues that defendant is seeking to obtain additional discovery to which it is not entitled under any court order. Plaintiff also argues that the instant motion violates 22 N.Y.C.R.R. § 202.21 (d)¹ of the Uniform Rules of Trial Courts since the NOI was filed with the Kings County Clerk's office on May 15, 2020. Plaintiff asserts that motions filed pursuant to that rule should be granted conservatively and require both (1) unusual or unanticipated circumstances, and (2) substantial prejudice to the moving party. Plaintiff relies on the proposition that "[t]he common thread in cases allowing further discovery [is] some occurrence after the filing of the note of issue that is not in the control of the party seeking further discovery, and which cause[s] actual, rather than potential prejudice[.]" citing *Audiovox Corp. v Benyamini* (265 AD2d 135, 139 [2000]). Further, plaintiff asserts that there is no "unusual or unexpected" circumstance

¹ Section 202.21 (d) provides that "where unusual or unanticipated circumstances develop subsequent to the filing of the note of issue, which require additional pretrial proceedings to prevent substantial prejudice, the court, upon a motion supported by an affidavit, may grant permission to conduct such necessary [discovery] proceedings."

that prevented defendant from seeking these records timely.

Additionally, plaintiff argues that defendant's instant motion fails to meet the requirements for a motion to renew because it does not contain a reasonable justification for defendant's failure to present such facts on the prior motion. Plaintiff characterizes the instant motion as a fishing expedition and asserts that "a motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" citing *Renna v Gullo* (19 AD3d 472, 473 [2005] [quoting *Rubinstein v Goldman*, 225 AD2d 328, 329 (1996)]). Plaintiff notes that a motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination (CPLR 2221 [e] [2]), and "shall contain reasonable justification for the failure to present such facts on the prior motion" citing *Pacheco v. Halsted Communications, Ltd.* (144 A.D.3d 768, 769 [internal citations and quotations omitted]).

Plaintiff argues that defendant has failed to demonstrate that the workers' compensation records and social security application are relevant or are reasonably calculated to lead to relevant information. Plaintiff recounts that the instant action is grounded in an automobile accident and that plaintiff's injuries are limited to internal derangement and tears in the right shoulder, left shoulder, cervical and lumbar spine, left knee, left elbow and left wrist. Plaintiff asserts that the workers' compensation and social security records relate to a superficial laceration, or a "cut" to plaintiff's left calf, which has no connection with the subject accident. Plaintiff also argues that defendant

did not provide a time frame for the authorizations sought for the workers compensation records or the social security application.

Discussion

A motion pursuant to CPLR 2221 to renew “must be (1) based upon new facts not offered on the prior motion that would change the prior determination, and (2) set forth a reasonable justification for the failure to present such facts on the prior motion” (*Matter of Nelson v Allstate Ins. Co.*, 73 AD3d 929, 929 [2010]).

The October 30, 2019 Supplemental Notice for Discovery is referenced in the body of defendant’s original motion, although it was not attached as an exhibit. In support of defendant’s instant motion to renew, it submits a copy of October 30, 2019 Supplemental Notice for Discovery that was inadvertently omitted from defendant’s original motion. Defendant’s explanation for the prior omission is reasonable and the information contained in the October 30, 2019 Supplemental Notice for Discovery was not previously provided to the court.

The contents of defendant’s October 30, 2019 Supplemental Notice for Discovery warrants renewal of this court’s prior determination because it reflects that defendant sought authorizations for plaintiff’s workers’ compensation records and social security application, and a time frame for each request is provided. The time frame for the workers’ compensation records are from the date of the workplace accident in 2017 to 2020, and plaintiff testified to only one workplace accident where he sought worker’s compensation. The time frame for the social security application is from the time it was

filed around 2019 to 2020. Additionally, the record demonstrates that defendant timely demanded the workers' compensation records and social security application approximately six days after plaintiff's October 24, 2019 examination before trial.

Here, defendant offers a time frame for the workers' compensation and social security application authorizations and explains the relevancy of the documents sought. Defendant explains that the records sought may concern an area of the body that plaintiff claims to have injured in the subject accident. Thus, defendant has demonstrated that disclosure of the workers' compensation information and social security application are relevant to the subject accident, will lead to relevant information or that defendant will be prejudiced without disclosure of such information because it bears on the claims at issue. Defendant asserts that it would be prejudiced if it is not provided plaintiff's workers' compensation records and social security applications because it requires such records to "comprehensively evaluate the claim." Accordingly, it is

ORDERED that defendant's motion (in mot. seq. two) to renew defendant's motion to strike plaintiff's Note of Issue is granted and, upon renewal, defendant's motion to strike plaintiff's NOI is only granted to the extent that plaintiff is directed to respond to defendant's September 30, 2019 Supplemental Notice for Discovery within 30 days after service of this order with notice of entry thereof.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

6

Justice Lawrence Knipel