

Jordan-Covert v Petroleum Kings
2020 NY Slip Op 34664(U)
October 27, 2020
Supreme Court, Westchester County
Docket Number: Index No. 51886/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
JANINE JORDAN-COVERT,

Plaintiff,

DECISION & ORDER

-against-

Index No. 51886/2017
Motion Seq. 7

PETROLEUM KINGS and KENNETH MARIN,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendant Petroleum Kings¹ for an order (a) vacating or striking plaintiff's note of issue and certificate of readiness pursuant to 22 NYCRR § 202.21(d); and (b) pursuant to CPLR § 3043(b), striking plaintiff's supplemental bill of particulars and expert response for plaintiff's treating physicians, Drs. Das and Cash" dated April 29, 2020 ("supplemental bill of particulars and expert response") and precluding plaintiff from offering any evidence at trial as to future or lifetime lost wages contained therein; or (c) alternatively, pursuant to CPLR § 3126(c), striking the supplemental bill of particulars and expert response as non-compliant with CPLR § 3042(d) and CPLR § 3101(d); and (d) pursuant to CPLR § 3124, compelling plaintiff to serve a separate supplemental bill of particulars and expert disclosure pursuant to CPLR § 3101(d); and (e) pursuant to CPLR § 3124, compelling plaintiff to provide the outstanding power of attorney for an authorization for plaintiff's employer and an authorization for the release of the non-privileged portions of plaintiff's legal file from counsel for her prior accident; and (f) pursuant to CPLR § 3124, compelling plaintiff to clarify whether she is claiming lifetime lost wages; and (g) pursuant to CPLR § 3124, compelling plaintiff to appear for a further deposition and vocational independent medical examination as to the newly alleged or supplemented claim of future lost wages; and (h) for such other and further relief as this Court deems just and proper:

Notice of Motion, Affirmation in Support, Exhibits A-K; Further Affirmation in Support, Exhibits A-B
Affirmation in Opposition; Exhibits 1-4
Affirmation in Reply

¹ By Decision and Order entered April 24, 2018 this action was dismissed as to defendant Kenneth Marin.

Correspondence to the Court (NYSCEF Doc. # 204)
NYSCEF File

Upon the foregoing papers, this motion is determined as follows:

Plaintiff commenced this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on February 20, 2014 in Briarcliff Manor, New York. Issue was joined by defendant on or about May 25, 2018, at which time defendant served discovery demands.

On or about July 5, 2018, plaintiff served a verified bill of particulars wherein plaintiff claimed she sustained serious and permanent injuries to her neck and back as well as, migraines.

In pertinent part, the bill of particulars states as follows:

“8. At the time of the subject crash plaintiff was employed as a teacher’s assistant. Plaintiff’s earnings annually were \$38,000.00

9. At the time of the subject crash plaintiff was employed by White Plains School District located at 5 Homeside Lane, White Plains, New York 10605. Plaintiff was incapacitated from her employment for a period of approximately four months and intermittently thereafter.

10. Plaintiff is not totally disabled at this time. Plaintiff is partially and permanently disabled to the present.

...

12. For a list of special damages, see plaintiff’s no-fault file and collateral source records.”

Plaintiff was deposed on October 24, 2018. The note of issue was filed on September 11, 2019. On or about April 29, 2020, plaintiff served the supplemental bill of particulars and expert response. This disclosure provided in part that:

“[t]he expert will testify as to the approximate costs, over the plaintiff’s life expectancy...the effect that her injuries have had upon her inability to work, and the Functional Capacity Limitations that her injuries have placed upon her ability to work, the effect that her injuries have had upon her work life history and her capacity to work and earn money.”

The disclosure also stated that plaintiff “was a candidate for disability as she was unable to do her job due to chronic pain,” that a Functional Capacity Evaluation had been performed, and that “it was opined that she needed to remain as totally disabled occupationally.”

By letter dated May 14, 2020, defendant objected to that disclosure document on the grounds

that it failed to conform to the requirements of CPLR 3101, it improperly combined the supplemental bill with the expert reports rendering it impossible to distinguish, what was alleged as a supplemental claim and what was being offered as expert opinion. Defendant also stated that the disclosure failed to identify which opinion was attributable to which physician.

In a separate letter dated May 14, 2020 defense counsel served demands seeking a power of attorney for the authorization for plaintiff's employer, a further deposition, a vocational assessment, and authorizations for plaintiff's social security disability filing, plaintiff's state disability filing, and an authorization for Dr. Cash's records. Defendant also served a notice to produce, dated May 14, 2020, requesting an authorization for the release of plaintiff's legal file from the Law Office of Steven Elias in connection with plaintiff's June 28, 2013 accident.

After defendant filed its affirmation in support of the present motion, but prior to the service of plaintiff's opposition papers, plaintiff served a response to defendant's demand for expert information dated July 2, 2020, identifying Stuart W. Sachnin, MS.Ed., M.B.A., CRC, ("Sachnin") as a vocational economic specialist who would be called to testify "as to the nature and extent of plaintiff's lost earnings and loss of earning capacity occasioned by the accident which is the subject matter of this dispute, the present and future value of plaintiff's economic damages, her post-injury earning capacity and her post-injury work-life expectancy."

In his Vocational Economic Assessment ("VEA") report dated June 9, 2020, Sachnin opined that plaintiff's loss of earning capacity in present value is approximately \$1,095,869 and approximately \$1,250,058 in terms of future value. Sachnin states that he conducted plaintiff's VEA on May 31, 2020. Sachnin explains in his report that the VEA "is a five-step method employed to determine the economic impact of an injury on an individual's capacity to perform work and to earn money over their lifetime." As a result of his assessment of plaintiff, Sachnin further opined that plaintiff meets the definition of being occupationally disabled and that she is physically incapable of performing the physical demands required to perform as a teaching assistant. The report explains that the U.S. Department of Commerce defines occupational disability as existing when a person is limited in terms of the amount or kind of work an individual can do on a job because of a physical or mental impairment." Sachnin also opined that plaintiff, in addition to satisfying the criteria for occupational disability, also satisfied the criteria for physical disability. By letter dated July 7, 2020, defendant rejected plaintiff's July 2, 2020 response on the grounds, inter alia, that it failed to comply with CPLR 3101(d), was speculative, conclusory, contains ultimate opinions, and was improperly served as both a bill of particulars as well as a purported expert disclosure.

Contentions of the Parties

Defendant states that the original bill of particulars (served prior to the filing of the note of issue) did not include a claim for future lost earnings or a claim for lifetime disability. Defendant further states that although plaintiff previously claimed partial/temporary disability the original bill states that "[P]laintiff is not totally disabled at this time." Defendant states that claims for lost future earnings and total occupational disability were raised for the first time in the supplemental bill and expert disclosure. Defendant argues that plaintiff's claim for a lifetime of future wages constitutes

unusual or unanticipated circumstances requiring further discovery and necessitating the vacatur of the note of issue.

Defendant refers to plaintiff's deposition testimony wherein she stated that she returned to work for a month as a teacher's assistant in June 2014, returned to work in September 2014 as scheduled, and was only out of work intermittently after September 2014. Defendant argues that plaintiff's current claims drastically changes her prior claim of lost earnings and that the following discovery is now necessary: an authorization for the release of plaintiff's legal file from the Law Office of Steven Elias concerning a prior accident occurring on June 28, 2013, an authorization for plaintiff's social security disability filing, an authorization for plaintiff's state disability filing, and an authorization for Dr. Cash, as well as a further deposition, and a vocational independent medical examination of plaintiff. Defendant states that since plaintiff had not previously indicated that she would be seeking these damages, defendant was not on notice of plaintiff's claim for future or lifetime lost wages and was unable to explore that claim during discovery. Defendant argues that it should either be provided the opportunity to seek additional discovery regarding these new claims or the Court should strike the supplemental bill of particulars and expert response.

Defendant further argues that rather than a supplemental bill of particulars this document is an amended bill of particulars that was served without leave of court as required by the CPLR. Accordingly, defendant argues that the supplemental bill and expert response should be stricken, and plaintiff should be precluded from offering evidence as to her future or lifetime lost wages claims.

Additionally, defendant contends that the supplemental bill and expert response is neither a proper bill of particulars nor an expert disclosure. Defendant contends that the supplemental bill and expert response does not specifically state claims for future lost earnings or plaintiff's inability to work for a lifetime duration but insinuates them. Defendant states that to the extent the document purports to be an expert disclosure, there is absolutely no delineation between the opinions of Dr. Das and Dr. Cash. Defendant argues that it is unclear from the "expert response" which opinions belong to Dr. Das and which opinions belong to Dr. Cash. Additionally, defendant argues that the "opinions" within the document are legal conclusions, rather than actual opinions. Defendant also states that the document includes information from a narrative report that was not disclosed to defendant. For these reasons, defendant contends plaintiff should be compelled to serve a separate supplemental bill of particulars and expert disclosure which conforms to the requirements of the CPLR.

With respect to Sachnin's report, defendant contends that this new disclosure is further evidence that plaintiff is now claiming lifetime lost wages which supports its application to vacate the note of issue and to obtain further discovery concerning these claims.

In opposition, plaintiff argues that given the reduced scheduling of jury trials due to the COVID-19 pandemic, and the limited nature of the discovery defendant seeks, discovery could be completed before the matter will be called for trial, making it unnecessary to strike the note of issue. Plaintiff states that she has provided an authorization and power of attorney for plaintiff's employer's records, and an authorization for plaintiff's social security disability file.

Plaintiff argues that insofar as Drs. Das and Cash are plaintiff's treating physicians whose records and reports have been fully disclosed any failure to serve a CPLR 3101(d) notice regarding those physicians does not warrant preclusion of their expert testimony.

Plaintiff also argues that the injuries alleged in the supplemental bill of particulars and expert disclosure are a continuation "of the same constellation" of the injuries alleged in the original bill of particulars and that defendant's characterization of the supplemental bill as an amended bill is incorrect. Plaintiff contends that her deposition testimony along with her previously provided medical records demonstrate that she was permanently partially disabled from working. Plaintiff contends that her injuries have worsened from the time of her deposition to the extent that she is now unable to work and is totally disabled.

Plaintiff argues that an additional deposition is unnecessary because plaintiff has already testified at length regarding the nature, extent, and impact of her injuries on her daily life. Plaintiff contends there is nothing more that defendant could discover through a further deposition that defendant has not already asked or that has been provided by plaintiff's medical records and the "expert response."

Plaintiff concedes that defendant is entitled to have plaintiff examined by its own vocational economic expert and posits that any questions which defendant would want to ask in a further deposition of plaintiff could be asked at that time.

Plaintiff asserts that according to the Law Office of Steven D. Elias, P.A., plaintiff was not represented by that firm and therefore defendant's demand for an authorization to obtain the nonprivileged portions of her legal file from that office concerning her prior accident is moot.

Plaintiff also argues that defendant's request for additional discovery concerning her claim for lifetime lost wages is addressed by Sachnin's report.

In reply, defendant first contends that since plaintiff's opposition papers were filed one day late, they should be disregarded by the Court. Defendant further contends that the first indication that plaintiff might be asserting a lifetime lost wage claim was when defendant was served with Dr. Das and Dr. Cash's "expert response" on April 29, 2020. Defendant states that although plaintiff's supplemental bill and expert response insinuated a claim for lifetime lost wages, it does not explicitly state that plaintiff is seeking these damages. Defendant contends that it was not until the service of Sachnin's expert response that plaintiff confirmed she was claiming future lost earnings. Defendant argues that this is a further reason why plaintiff must serve a further supplemental bill. Additionally, defendant states that Sachnin relied on, inter alia, plaintiff's tax returns from 2012 to 2019 in preparing his report.

While defendant concedes plaintiff's point that an expert disclosure is not required for a treating physician, defendant argues that once plaintiff decided to serve a disclosure entitled "expert response" that response was required to comport with the CPLR requirements for serving expert disclosures. Defendant argues that a combined supplemental bill with an expert report is improper causing defendant to guess what claims plaintiff will assert at trial.

Concerning a further deposition, defendant states that plaintiff's deposition occurred in October 2018 at which time she indicated that while she took intermittent time off from work, she was working fulltime from September 2014 forward and her work records indicated she worked fulltime from September 2014 as a teacher's assistant until her resignation in December 2019. Defendant contends that although the supplemental bill of particulars and expert response hinted at a claim for future earnings, it was not clear that plaintiff intended to claim future lost earnings until service of Sachnin's expert disclosure in July 2020. Defendant states that as a result, it has not had an opportunity to question plaintiff concerning her occupational disability or lost future earnings claim.

Defendant disputes plaintiff's counsel's claim that she was never represented by The Law Office of Steven B. Elias and contends that defense counsel's investigation has revealed that plaintiff was involved in a prior accident on June 28, 2013, and that she was represented by that law firm in relation to that claim.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

"The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

Initially, given the short delay in filing and the reasonable excuse proffered therefore by plaintiff's counsel (NYSCEF Doc. # 204) the Court in its discretion has considered plaintiff's opposition in the determination of this motion.

The Court does not find grounds warranting preclusion or granting other relief pursuant to CPLR 3126 at this time. Insofar as plaintiff's supplemental bill of particulars and expert response and Sachnin's report assert post-note of issue claims of lost earning potential and damages related thereto which were not previously asserted in the complaint or bill of particulars, such newly asserted claims constitute unusual or unanticipated circumstances requiring the vacatur of the note of issue and certificate of readiness. Defendant is entitled to, but not limited to, the following discovery concerning those newly asserted claims: a supplemental bill particularizing plaintiff's claims concerning these newly asserted claims, an assessment by defendant's vocational economics expert, fresh authorizations for Dr. Das and Dr. Cash, the power of attorney and authorizations for plaintiff's employer records, and authorizations for plaintiff's social security disability and state disability files. Additionally, defendant is entitled to a further deposition of plaintiff limited to her newly asserted claims of lost earning potential and damages related thereto.

With respect to Drs. Das and Cash's expert disclosure, CPLR 3101(d)(1)(i) requires a party to identify the expert witnesses who are expected to be called at trial and to disclose the subject matter on which the expert is expected to testify. However, this rule applies only to experts retained to give testimony at trial, and not to treating physicians (*Mantuano v Mehale*, 258 AD2d 566, 567 [2d Dept 1999][internal citations omitted]; see, *Duman v Scharf*, 186 AD3d 672 [2d Dept 2020]). Nor does the Court agree with defendant's contentions that Sachnin's expert report failed to comply with this statute. However, plaintiff improperly combined the supplemental bill with the expert reports. Accordingly, plaintiff shall serve an amended bill of particulars in compliance with CPLR 3043.

Concerning defendant's demand for plaintiff's legal file from her 2013 accident, whether she was represented by The Law Office of Steven B. Elias or by some other law firm is immaterial. Insofar as defendant was aware of the 2013 accident prior to plaintiff's deposition (see NYSCEF Doc. # 78), and in the absence of an explanation why defendant failed to seek the legal file for that accident prior to the filing of the note of issue and service of its May 14, 2020 demands, defendant is not entitled to now seek that discovery.

All other arguments raised, and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence or reference thereto.

Accordingly, it is

ORDERED that defendant's motion is granted to the extent that the note of issue and certificate of readiness are vacated; and it is further

ORDERED that plaintiff is directed to provide to defendant, to the extent not previously provided, on or before November ____, 2020: a further supplemental bill in compliance with CPLR 3043 particularizing plaintiff's claims of lost earnings and lost earning capacity, fresh authorizations for Dr. Das and Dr. Cash, the power of attorney and authorizations for plaintiff's employer records, and authorizations for plaintiff's social security disability and state disability files; and it is further

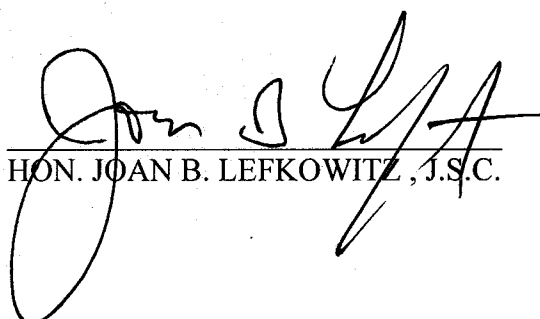
ORDERED that the parties shall appear for a virtual Compliance Conference via Microsoft

Teams, or as the Court shall direct, in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District before Chief Court Attorney Diane Clerkin on 11-18-20 @ 3:00 PM at which time a schedule for outstanding discovery will be issued limited to plaintiff's newly asserted claims of lost earning potential and damages related thereto; and it is further

ORDERED that all other requests for relief are denied at this time, without prejudice to renew in the event that plaintiff fails to comply with this Order; and it is further

ORDERED that defendant shall serve a copy of this Order with notice of entry upon plaintiff within three (3) days of entry, with proof of such service filed to NYSCEF within three (3) days thereof, or as the Court shall further direct due to the COVID-19 health emergency.

Dated: White Plains, New York
October 27, 2020



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Counsel by NYSCEF

cc: Compliance Part Motion Clerk