

Langsam v Consolidated Edison of N.Y., Inc.

2020 NY Slip Op 35170(U)

October 30, 2020

Supreme Court, Westchester County

Docket Number: Index No. 58990/2019

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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
JONATHAN LANGSAM,

Plaintiff,

- against -

CONSOLIDATED EDISON OF NEW YORK, INC.,
VILLAGE OF PLEASANTVILLE, 42 WHEELER
AVENUE LLC, VERIZON NEW YORK INC.,
LORDAE REALTY CORPORATION, LORDAE I LLC,
LORDAE II LLC, LORDAE III LLC, LORDAE LLC,
PLEASANTVILLE PIZZERIA, METRO NORTH
COMMUTER RAILROAD, and METROPOLITAN
TRANSIT AUTHORITY,

Defendants.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No. 58990/2019
Motion Seq No. 6

The following papers were read on this motion by defendants 42 Wheeler Avenue LLC, Lordae Realty Corporation, Lordae I LLC, Lordae II LLC, Lordae III LLC, and Lordae LLC (hereinafter “moving defendants”) for an order pursuant to CPLR § 3126, CPLR Rule 3124, and CPLR §§ 8101 and 8106 (a) striking and/or dismissing plaintiff’s complaint as against the moving defendants by reason of plaintiff’s failure to provide all of the discovery Plaintiff’s counsel agreed to provide and was ordered by Court to provide in the So-Ordered Preliminary Conference Stipulation, and the plaintiff’s failure to fully comply with the moving defendants’ notice to produce, and awarding costs and disbursements to the moving defendants; (b) in the alternative, precluding plaintiff from offering any evidence during the trial of this action, and awarding costs and disbursements to the moving defendants; (c) in the alternative, compelling plaintiff to supply all outstanding discovery by a date certain, and awarding costs and disbursements to the moving defendants; and (d) granting such other and further relief as the Court deems just and proper under the facts and circumstances of this action:

- Notice of Motion - Affirmation in Support (Dillon, Esq.) - Exhibits A-M
- Memorandum of Law in Support
- Affirmation in Support (Calderon, Esq.)
- Affirmation in Opposition - Exhibits A-F
- Affirmation in Reply - Exhibits A-M
- Affidavit of Service

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

Plaintiff commenced this action on June 12, 2019 by the filing of a summons and complaint. Issue was joined by defendant, Village of Pleasantville, on July 2, 2019. Issue was joined by defendant, Metro North Commuter Railroad and Metropolitan Transit Authority, on July 5, 2019. Issue was joined by defendant Pleasantville Pizzeria on July 11, 2019. Issue was joined by defendant Consolidated Edison Company of New York, Inc. on July 19, 2019. Defendant Verizon New York Inc. thereafter appeared in this action on August 9, 2019. Issue was joined by defendants 42 Wheeler Avenue LLC, Lordae Realty Corporation, and Lordae I LLC on September 9, 2019. The action arises from personal injuries allegedly sustained by plaintiff on November 3, 2018 after tripping and falling on a cable extending from a nearby power pole and inserted into the ground on the side of premises known as 34 Wheeler Avenue, Pleasantville, New York.

Upon the instant motion, moving defendants argue that plaintiff's complaint should be stricken as against the moving defendants, by reason of plaintiff's alleged willful, deliberate, and contumacious refusal to provide certain discovery necessary to their defense of the action. The discovery at issue was demanded in a notice to produce dated September 9, 2019 and incorporated in this Court's Preliminary Conference Stipulation and Order filed March 9, 2020 (NYSCEF Doc. No. 77). In their notice to produce, the moving defendants requested authorizations and documentation relating to the plaintiff's injuries, medical treatment/testing, and litigation stemming from a motor vehicle accident plaintiff was involved in 3 months before the trip and fall at issue in this action.

Moving defendants submit that the discovery sought is relevant to and probative of the occurrence of the trip and fall alleged in this action, as well as to the issue of the injuries, incapacitation, and disability alleged by the plaintiff. Moving defendants allege that plaintiff has refused to obey the Preliminary Conference Stipulation and Order, and has allegedly deliberately, willfully, and contumaciously refused to provide the discovery demanded in their notice to produce. As a result, moving defendants claim an inability to properly defend the action and urge the Court to grant the drastic relief of striking the plaintiff's complaint.

In the alternative, moving defendants seek an order of preclusion, prohibiting the plaintiff from offering testimony or evidence in support of the claims addressed in the notice to produce, or compelling plaintiff to supply all outstanding discovery by a date certain, and awarding costs and disbursements to the moving defendants.

In their memorandum of law in support of the motion, moving defendants argue that the records involving plaintiff's motor vehicle accident are material and relevant to this action because there, plaintiff alleged he was "severely injured, bruised and wounded, suffered, still suffers and will continue to suffer for some time physical pain and bodily injuries and became sick, sore, lame and disabled and so remained for a considerable length of time" and that plaintiff "has been unable to attend to his usual occupation in the manner required" (NYSCEF Doc. No. 215).

In his bills of particulars in the motor vehicle accident, plaintiff claims to have sustained permanent and debilitating injuries that include cervical spinal cord deformity, herniated cervical and lumbar discs, and numbness in his back and legs, for which plaintiff maintains he needs surgery to his cervical and lumbar spines, and as a result of which, he suffers from severe pain, swelling and tenderness in his cervical and lumbar spines; loss of strength, function, and motion of his cervical and lumbar spines; restriction of motion of his cervical and lumbar spines, continuing radiating pain, and “resulting pain, deformity and disability” (NYSCEF Doc. No. 216). Plaintiff also claims that:

- he sustained injuries that impaired his general health;
- he “may permanently suffer” from those injuries, which “may limit his activities in his employment and his life”;
- he “may be restricted in his normal life and activities and may permanently require medical and neurological care and attention”;
- he “remains confined to his home intermittently to date and on a day to day basis” as a result of his motor vehicle accident;
- he sustained permanent loss of use of a body organ, member, function or system;
- he sustained permanent consequential limitation of use of a body organ or member;
- he sustained significant limitation of use of a body function or system; and
- he sustained a medically determined injury or impairment that prevented him from performing substantially all of his usual and customary daily activities for not less than 90 of the first 180 days immediately following his motor vehicle accident.

Moving defendants argue that the subject accident occurred during the first 90 days after plaintiff’s motor vehicle accident, at which time plaintiff allegedly already was debilitated and incapacitated and unable to perform substantially all of his usual and customary daily activities. As such, moving defendants submit that the similarity of the injuries claimed by plaintiff in this action and in his motor vehicle action is striking. In both actions plaintiff alleges to have sustained permanently debilitating injuries, impairment and restriction of his “general health”, “normal life and activities” and his employment, and ongoing intermittent confinement to bed and/or home (*see* NYSCEF Doc. Nos. 214, 215, 216).

Moving defendants submit that given the occurrence of the motor vehicle accident shortly before the subject accident, moving defendants need to determine what plaintiff’s “general health” and “normal life and activities” were following the motor vehicle accident and before the subject accident. In addition, moving defendants allege a need to determine whether plaintiff tripped and fell in whole or in part due to the injuries he sustained in the motor vehicle accident and their sequelae (which include numbness in plaintiff’s legs). Accordingly, they submit that the items requested in the notice to produce are material and necessary to the defense of this action to the extent that they include authorizations and documentation relating to the injuries, medical treatment/testing, and litigation resulting from plaintiff’s motor vehicle accident (NYSCEF Doc. No. 217).

As reflected in the Preliminary Conference Stipulation and Order, during the preliminary conference, plaintiff's counsel stipulated that plaintiff would provide (a) responses to the moving defendants' discovery demands by April 2, 2020, (b) non-privileged portions of the litigation file maintained by plaintiff's counsel for the action stemming from the motor vehicle accident [the attorneys who represent Plaintiff in this action are the same attorneys who represent Plaintiff in the motor vehicle action], and (c) the requested authorizations for the medical treatment and testing plaintiff underwent due to his motor vehicle accident (NYSCEF Doc. No. 219). Moving defendants allege that despite plaintiff's counsel's stipulation as noted above, plaintiff has failed to produce the requested documentation and improperly now objects to providing the documents on relevance grounds.

Co-defendant Consolidated Edison Company of New York, Inc. s/h/a Consolidated Edison of New York, Inc. (hereinafter "Con Edison") submitted an affirmation in support of the motion. Counsel for Con Edison agrees that the information sought regarding the accident and the injuries to plaintiff are relevant in light of plaintiff's claim of loss of enjoyment of life as a result of injuries from this accident. Specifically, plaintiff's bill of particulars alleges several items of damages, including allegations that (a) plaintiff suffered an inability to ambulate; (b) the injuries directly affected the bones, tendons, tissues, muscles, ligaments, nerves, blood vessels and soft tissue in and about the involved areas and sympathetic and radiating pains all of which plaintiff has suffered, still suffers, and may permanently suffer; (c) as a result of the accident and injuries herein sustained, the plaintiff suffered a severe shock to his nervous system; (d) the foregoing injuries impaired the general health of the plaintiff; and that (e) the plaintiff may permanently suffer from the aforesaid injuries and from its effects upon his nervous system and may limit his activities in his employment and his life; (f) plaintiff may be restricted in his normal life and activities and may permanently require medical and neurological care and attention.

Con Edison's counsel argues that in plaintiff's motor vehicle accident's bill of particulars, plaintiff claims "numbness to back and legs" and "marked restriction of range of motion", both of which would affect plaintiff's ability to ambulate as claimed in the present lawsuit. Counsel states that plaintiff also repeats the same language in both bills of particulars regarding the topics of "shock to the nervous system", "impaired general health", and "limit his activities in his employment and his life...may be restricted in his normal life and activities".

Based on the above, Con Edison's counsel alleges it is clear that the plaintiff is claiming that the injuries from the subject accident are affecting his general health, nervous system, and ability to ambulate and perform daily activities and work activities. He makes similar claims in both lawsuits. Therefore, Con Edison asserts that the plaintiff has in fact placed his general health into question and that the defendants are entitled to review records from plaintiff's motor vehicle accident to ascertain to what extent his health and ability to perform daily and work-related tasks were already compromised as a result thereof.

In opposition to the motion, plaintiff's counsel states generally that plaintiff sustained serious personal injuries when he was caused to trip and fall on a defective and dangerous guy-wire extending from a power pole and inserted into park property located on the side of the premises known as Pleasantville Pizzeria, which is located at 34 Wheeler Avenue, in the County of Westchester, Village of Pleasantville and State of New York. As a result of the fall, Plaintiff sustained a fractured hip, for which he was required to undergo surgery on November 4, 2018. By this motion, defendants seek documents and medical records relating to plaintiff's motor vehicle accident case captioned *Jonathan Langsam v Gustavo Gaspar*, Supreme Court, Westchester County, Index # 60545/2019. In that case, plaintiff solely claims injuries to his spine.

Plaintiff's counsel argues that defendants' requests for plaintiff's spine injury records is a fishing expedition designed solely to harass the plaintiff and that case law provides that a plaintiff in a personal injury action is only required to produce records relating to the injuries at issue and that unrelated injuries are not relevant and, therefore, not discoverable. Here, plaintiff only claims an injury to the right hip and as such, his spine injury records are not discoverable. Counsel alleges that the defendants' arguments are based on speculation and conjecture and, therefore, fail to satisfy defendants' burden to demonstrate that the requested records are relevant to this action.

Despite plaintiff's counsel's claim that plaintiff's loss of enjoyment of life allegations in this case do not allow defendants to obtain his spine injury records, counsel agrees to waive his loss of enjoyment of life claim in this case. As a result, counsel submits there can be no dispute that the motor vehicle accident records are not discoverable in this action.

In referencing the requirements of the Preliminary Conference Stipulation and Order, plaintiff's counsel makes the argument that the language of the stipulation and order does not require plaintiff to produce anything other than the non-privileged portion of the file. Specifically, the language is as follows:

Plaintiff to provide AZ for non-privileged portions of litigation file maintained by Counsel for Plaintiff under index 60545/2-2019; physician, hosp, diagnostic testing, WC carrier & board related to index No. 60545/2019 Westchester Cty.

Counsel argues that authorizations are NOT required for the medical providers listed, because the drafter of the statement failed to include the word "authorization" a second time prior to the word "physician". Accordingly, counsel submits the requirement is ambiguous and unenforceable. As a result, counsel for plaintiff states that "... in order to be fully compliant with the preliminary conference order, we are providing all counsel with authorizations for the non-privileged portion of the legal file, and medical providers, for the Motor Vehicle Accident

case (even though the preliminary conference order does not require this), limited to records pertaining to plaintiff's hip. Pursuant to the June 24, 2020 compliance conference order, this discovery response is not due to be served until July 17, 2020" and is therefore timely (NYSCEF Doc. No. 226, ¶ 21).

Plaintiff's counsel argues that striking pleadings and entering preclusion orders are drastic remedies only appropriate where a party has acted willfully or contumaciously in failing to comply with multiple court orders regarding discovery and that here, plaintiff is fully compliant with his discovery obligations, not in violation of any court order, and has provided defendants with all discovery they are entitled to. As a result, counsel submits that there is no basis to strike plaintiff's complaint or preclude plaintiff. Further, it is submitted that there exists no basis for an award of costs and disbursements.

In reply, moving defendants submit that plaintiff's opposition is largely irrelevant due to the existence of the Preliminary Conference Stipulation and Order which directs the exchange of the records at issue. As such, they submit it is irrelevant if plaintiff argues that there is insufficient overlap of injuries, or withdraws his claim for loss of enjoyment of life. Regardless of this fact, and given the occurrence of the motor vehicle accident shortly before the subject accident, moving defendants need to determine what plaintiff's "general health" and "normal life and activities" were following the motor vehicle accident and before the subject accident. In addition, moving defendants allege a need to determine whether plaintiff tripped and fell in whole or in part due to the injuries he sustained in the motor vehicle accident and their sequelae (which include numbness in plaintiff's legs).

Legal Analysis/Discussion

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." 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" (*see Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [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" (*see Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure 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" (*see Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial 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 (*see Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

"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*, 38

AD3d 820, 821 [2d Dept 2007] [internal quotation marks omitted]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is willful and contumacious (*see Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders, ... coupled with either no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

A plaintiff who commences a personal injury action waives the physician-patient privilege with respect to those physical or mental conditions which he or she affirmatively places in issue in the lawsuit, thereby entitling the defendant to disclosure regarding the relevant physical or mental conditions at issue (*Arons v Jutkowitz*, 37 AD3d 94 [2d Dept. 2006]; *Primeau v Town of Amherst*, 303 AD2d 1035 [4th Dept. 2003]; *Mayer v Cusyck*, 284 AD2d 937 [4th Dept. 2001]; *Sadicario v Stylebuilt Accessories*, 250 AD2d 830 [2d Dept. 1998]; *Zappi v Pedigree Ski Shop*, 244 AD2d 331 [2d Dept. 1997]; *Wachtman v Trocaire College*, 143 AD2d 527 [4th Dept. 1988]; *Iseman v Delmar Medical-Dental Building*, 113 AD2d 276 [3d Dept. 1985]; *Josephs v Oliver*, 48 AD2d 688 [2d Dept. 1975]; *Gorman v. Goldman*, 36 AD2d 767 [2d Dept. 1971]). A party does not waive the medical privilege with respect to records of unrelated illnesses or treatments (*Barnes v Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014]; *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]; *Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008]; *McLane v Damiano*, 307 AD2d 338 [2d Dept 2003]; *Carboni v New York Medical College*, 290 AD2d 473 [2d Dept. 2002]).

The physician-patient waiver extends, with respect to records of pre-accident treatment, only to treatment of the same anatomical parts to which plaintiff claims injury (*Geraci v National Fuel Gas Distrib. Corp.*, 255 AD2d 945 [4th Dept. 1998]; *Dantzler v 2727 Realty LLC*, 62 AD3d 412 [1st Dept. 2009]). Such waiver does not permit wholesale discovery of information regarding the plaintiff's physical and mental condition (*Carter v Fantauzzo*, 256 AD2d 1189, 1190 [4th Dept 1998]). Records of previous treatment to other body parts or other organs are considered unrelated (*see e.g. Noble v Ackerman*, 216 AD2d 140 [1st Dept 1995]). Although a plaintiff puts his or her physical condition in controversy by bringing an action for personal injuries, thereby waiving the physician-patient privilege, the scope of the waiver is limited and "does not permit discovery of information involving unrelated illnesses and treatment" (*Primeau v Town of Amherst*, 303 AD2d 1035 [4th Dept. 2003]). The party seeking to compel production of medical records has the initial burden of making an evidentiary showing that the other party's medical condition has been placed in controversy in the action (*Hayes v Costco Wholesale Corp.*, 2018 NY Slip Op 31785(U), ¶ 5, 2017 N.Y. Misc. LEXIS 5469 [Westchester Sup. 2017]).

The court has considered the submissions and arguments of the parties. Upon the record before it, the court finds the records of plaintiff's motor vehicle accident are discoverable in this action. Not only is there a stipulation and order requiring the exchange of the documentation sought by the moving defendants, but the bills of particulars in the two actions contain similar all-encompassing language regarding the alleged injuries (e.g., that the injuries from each occurrence are affecting plaintiff's general health, nervous system, ability to ambulate, and perform daily activities and work activities). In addition, moving defendants are entitled to determine what plaintiff's "general health" and "normal life and activities" were following the

motor vehicle accident and before the subject accident given the short period of time between the two, and further require discovery to determine whether the plaintiff tripped and fell in whole or in part due to the injuries he sustained in the motor vehicle accident and their sequelae.

To the extent that plaintiff's counsel argues that the Preliminary Conference Stipulation and Order does not require the exchange of authorizations for the stated medical providers, this argument is rejected as without merit. The provision is construed by the Court to constitute a list of entities and/or providers from whom the parties agreed plaintiff would provide authorizations. To view the language in any other way renders it meaningless. Accordingly, plaintiff's assertion that he has complied with all outstanding discovery demands is false.

In light of the foregoing, moving defendants' motion is granted to the extent that plaintiff is directed to produce all outstanding discovery as listed in the Preliminary Conference Stipulation and Order as construed by the Court herein, as well as all discovery demanded in the moving defendants' notice to produce dated September 9, 2019 within 30 days of service of this Decision and Order with notice of entry. To the extent the plaintiff fails to comply, the plaintiff shall be precluded from offering evidence and testimony at trial on the issues contained therein. The balance of the relief in moving defendants' motion is denied.

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

Accordingly, it is

ORDERED that the moving defendants' motion is granted to the extent that plaintiff is directed to produce all outstanding discovery as listed in the Preliminary Conference Stipulation and Order as construed by the Court herein, as well as all discovery demanded in the moving defendants' notice to produce dated September 9, 2019 within 30 days of service of this Decision and Order with notice of entry; and it is further

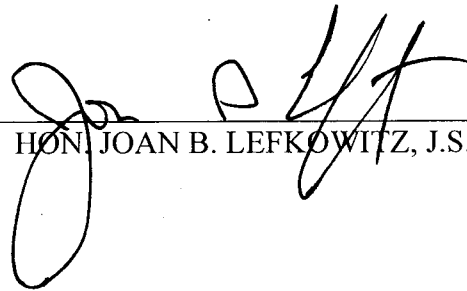
ORDERED that if plaintiff fails to comply, the plaintiff shall be precluded from offering evidence and testimony at trial on the issues contained therein. Upon plaintiff's non-compliance, moving defendants are directed to submit an affirmation of non-compliance and a proposed order of preclusion on notice to all parties; and it is further

ORDERED that the balance of the relief requested in moving defendants' motion is denied; and it is further

ORDERED that counsel are directed to appear for a conference via Microsoft Teams with Court Attorney Referee Angela Di Biasi on December 14, 2020 at 3:00 P.M.; and it is further

ORDERED that the moving defendants shall serve a copy of this decision and order upon all parties with notice of entry within 10 days of entry.

Dated: White Plains, New York
October 30, 2020



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

TO:
All Counsel by NYSCEF
cc: Compliance Part