

Velez v Walsky

2021 NY Slip Op 31140(U)

April 8, 2021

Supreme Court, New York County

Docket Number: 151948/2019

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART IAS MOTION 22

Justice

-----X

SIMON VELEZ

Plaintiff,

- v -

MAXINE WALSKY,

Defendant.

-----X

INDEX NO. 151948/2019
MOTION DATE 11/17/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISCOVERY

This personal injury action stems from a motor vehicle accident that occurred on June 15, 2018, while plaintiff, Simon Velez, was riding a bicycle and was injured when struck by defendant, Maxine Walsky. Defendant filed the instant motion seeking an Order pursuant to CPLR §3126(3), to strike Plaintiff's Complaint in its entirety, and to dismiss this action due to the Plaintiff's willful failure and wanton refusal to provide defendant with their response to written discovery demands. In the alternative, defendant is seeking an Order pursuant to CPLR §3126(2), to preclude Plaintiff from offering, producing or introducing any testimony or evidence in support or opposition of any designated claims or defenses in this action, including evidence as to the physical condition sought to be determined or negligence claimed herein; or alternatively, an Order pursuant to CPLR §3124, compelling compliance with the defendant's written discovery demands. Plaintiff has filed opposition to the motion.

On March 2, 2020, defendant served a Supplemental Demand upon plaintiff. (See, Mot. 001, Exhibit A). On March 13, 2020, defendant's counsel made a good faith attempt to obtain responses in an email addressed to plaintiff. (id., Exhibit C). On March 20, 2020, defendant's counsel served plaintiff with Supplemental Post Deposition Demands, and on April 1, 2020, demanded Lost Wage Claim discovery. (id., at Exhibit B).

On March 26, 2019, this Court issued a Case Scheduling Order (CSO) which required all demands to be served by April 4, 2019. This Court's CSO permitted HIPPA compliant

authorizations for medical records from this accident, as well as relevant medical records for prior and subsequent injuries or conditions (if applicable). In addition, this Court's CSO permitted authorizations for employment records for two years prior to the accident, which must have been served by April 11, 2019. (See, *NYSCEF document #5 at ¶¶ 3 and 4*). Further, the CSO indicated that all other disclosures shall be completed by September 6, 2019.

Pursuant to *CPLR §3124*, "if a person fails to respond or comply with any request, notice, interrogatory, demand, or question...the party seeking disclosure may move to compel compliance or a response." *CPLR §3124*. A party may move to compel further discovery under this provision when the movant demonstrates that it has made a "good faith effort to bring about a non-judicial resolution to any remaining discovery disputes." *Barber v. Ford Motor Co.*, 250 A.D.2d 552, 553 (1st Dep't 1998). "While the disclosure provisions of the CPLR are ordinarily to be construed liberally, the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as that phrase is used in *CPLR 3101(a)*." *Auerbach v. Klein*, 30 A.D.3d 451, 452 (2d Dep't 2006).

Here, the Court takes into consideration that "[i]t is well settled that a court should not resort to striking an answer for failure to comply with discovery directives unless noncompliance is clearly established to be both deliberate and contumacious. Moreover, even where the proffered excuse is less than compelling, there is a strong preference in our law that matters be decided on their merits." *Catarine v. Beth Israel Med. Ctr.*, 290 A.D.2d 213, 215 (1st Dep't 2002)(*internal citations omitted*). Contrary to defendant's assertion that plaintiff failed to respond to outstanding demands, plaintiff, in opposition to the motion, attached responses to defendant's Supplemental Demand. (See, plaintiff's Docs 31-32;-34).

Further in opposition, plaintiff asserts that he promptly responded to defendant's Supplemental Demand, Supplemental Post Deposition Discovery Demand and Supplemental Demand for Lost Wages Information. (See, *Aff in Opp, Exhibits A, B and D*). Plaintiff argues that defendant is attempting to secure discovery for injuries not related to the subject accident, specifically to where plaintiff suffered a fractured left clavicle bone with surgical repair. Plaintiff further asserts that he has provided all relevant records of his injury for defendant's review, and all authorizations demanded pursuant to the CSO. Here, plaintiff contends that defendant repeatedly requests the same discovery. Upon review of plaintiff's opposition and supporting papers, this Court does not find that plaintiff was willful or negligent in its delay and ultimate response to the

defendant's demands. In fact, the Plaintiff has provided *some* of the discovery sought by defendant.

Therefore, the Court, is within its discretion, and hereby compels plaintiff to provide defendant with the following: a) authorizations for employment records to obtain tax returns of the plaintiff for two years preceding the accident, up to and including the present calendar year, if not already provided; b) authorizations to obtain plaintiff's records from the Motor Vehicle Accident Indemnification Corporation as it pertains to the June 15, 2018 accident, if not already provided; and c) information and/or authorizations pursuant to the Supplemental Post Deposition Discovery Demand as it pertains to relevant injuries sustained in the **June 15, 2018 accident only**, if not already provided.

Consequently, the defendant's motion is denied in part as the court will not strike the complaint nor preclude testimony; and granted in part as the court hereby compels plaintiff to provide the above-mentioned discovery.

Accordingly, it is

ORDERED that the relief sought in defendant's motion to strike and preclude is denied; and it is further

ORDERED that the relief sought in defendant's motion to compel plaintiff to provide outstanding discovery is granted; and plaintiff shall provide the discovery as stated herein; and it is further

ORDERED that defendant shall inform plaintiff of any specific discoverable matter defendant is seeking within 30 days of the date of this order; and it is further

ORDERED that plaintiff provide the above-mentioned outstanding discovery as listed above within 60 days of the date of this order; and it is further

ORDERED that the parties shall proceed with all further discovery expeditiously and in good faith; and it is further

ORDERED that the parties shall contact the court's law clerk for a status conference after due diligence with the demands have been made; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendant with notice of entry; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered.

This Constitutes the Decision/Order of the Court.

4/8/2021

DATE

Lisa S. Headley
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LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE