Olmann v RCB1 Nominee, LLC
2021 NY Slip Op 31410(U)
April 27, 2021
Supreme Court, New York County
Docket Number: 152429/2018
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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DANIEL OLMANN,

Plaintiff,

-against-

RCB1 NOMINEE, LLC, TISHMAN CONSTRUCTION CORPORATION, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK AND FRED GELLER ELECTRICAL

Defendants.

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and a third-party action

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DECISION AND ORDER

Index Number 152429/2018

Mot. seq. 004

NERVO, J.:

Defendants/third-party plaintiffs RCB1 Nominee, Tishman Construction, and Tishman Construction of New York (hereinafter "movants") seek, inter alia, an order dismissing plaintiff's complaint for alleged failure to provide responses to movants' demands related to plaintiff's prior injuries and failure to provide answers at his deposition. Alternatively, movants seek to preclude plaintiff from offering evidence at trial related to his right leg or right knee. As a second alternative, movants seek a conditional preclusion order.

Movants also seek an order striking the answer of defendant Fred Geller for its alleged failure to comply with discovery demands.

Finally, movants seek to extend the deadline to complete plaintiff's Independent Medical Exam (IME) and extend the deadline to file the Note of Issue (NOI).

I. DISCOVERY SANCTIONS

CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof" (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is "one of usefulness and reason" (*id.*).

CPLR § 3126 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has "clearly shown that its opponent's nondisclosure was willful, contumacious or due to bad faith" (*Commerce & Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct (s*ee Merchants T & F, Inc. v. Kase & Druker*, 19 AD3d 134 [1st Dept 2005]); s*ee also Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]). "A party that permits discovery to 'trickl[e] in [with a] cavalier attitude should not escape adverse consequence'" (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

As the Court of Appeals has repeatedly underscored, "our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of

having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution" (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]). Disregard of discovery deadlines will not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C*, 5 NY3d 514, 521 [2005]; *see also Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]).

A. PLAINTIFF'S AUTHORIZATIONS FOR PRIOR INJURY

By Order of November 18, 2020, plaintiff was directed to provide medical authorizations within 14 days for "treatment of all prior injuries impacting his claims in this matter, including his November 11, 2014 work-related accident and injuries for the five years preceding the alleged accident" (NYSCEF Doc. No. 80, citation omitted). The Order further provided that failure to timely provide authorizations may result in preclusion of medical evidence or the striking of the complaint (*id.*).

CPLR § 3101(a) provides for full disclosure of all matter material and necessary to the prosecution and defense of an action (*supra*). While medical records are subject to physician-patient privilege, a plaintiff who seeks to recover for physical injuries unavoidably places their physical condition in controversy and waives the physician-patient privilege as to medical records relating "to those conditions affirmatively placed in controversy" (*Felix v. Lawrence Hosp. Ctr.*, 100 AD3d 470 [1st Dept 2012]; *see also*

Brito v. Gomez, 168 AD3d 1 [1st Dept 2018]; CPLR § 3121[a]). Consequently, a plaintiff claiming personal injury must provide authorizations for records of prior injuries which have a bearing on the injuries in the instant suit. To be material, the prior injury need not effect an identical body part or function, but rather need only impact the calculation of damages (*Vanalst v. City of New York*, 276 AD2d 789 [1st Dept 2000] prior back injury material in calculation of damages for claimed loss of enjoyment of life due to knee injury; *Caplow v. Otis Elevator Co.*, 176 AD2d 199 [1st Dept 1991] prior treatment to lower extremities material in matter claiming back injury; *see generally Allen v. Cromwell-Collier Pub Co.*, 21 NY2d 403 [1968]).

This matter has a history of noncompliance with the Court's discovery and conference orders, as evinced by serial Court conferences ordering completion of the same discovery and depositions. This noncompliance has delayed the resolution of this matter. "[U]pon learning that a party has repeatedly failed to comply with discovery order, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance" (*Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

The Court's November 11, 2020 Order was fashioned to ensure future compliance, providing for sanctions should the parties' noncompliance continue. This order was unequivocal, and required plaintiff provide authorizations within 14 days. Notwithstanding, plaintiff has not provided the authorizations, as required. It is beyond cavil that plaintiff's prior injuries to his right knee are material to this action for

workplace personal injury to the same body part.[1] The Court finds plaintiff's contention that he does not know the identity of his primary care physician or the physical therapy facility which treated him for his prior knee injury, unavailing. Moreover, plaintiff has failed to provide authorizations for other medical or insurance providers from the time period of his prior accident, which may identify the primary-care physician and physical therapist who treated plaintiff's prior injury. Additionally, the Court notes that plaintiff did not seek relief from the Court's November 18, 2020 Order. Plaintiff's contention that partial compliance with the Court's prior orders suffices is without merit and summarily rejected.

Consequently, plaintiff is precluded from presenting any medical evidence related to his right knee at the time of trial, and such preclusion shall apply to both liability and damages, should the trial be bifurcated.

B. LITIGATION LOANS & PENDING LAWSUIT

Movants also seek to compel the disclosure of testimony and documents related to alleged litigation loans and a domestic violence lawsuit involving plaintiff.

CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof" (*Forman v. Henkin*, *supra*). The test utilized is "one of usefulness and reason"

[1] There is no dispute that plaintiff has suffered prior injury to his right knee (*see e.g.* plaintiff's continued deposition, NYSCEF Doc. No. 106 at p.89).

(*id.*). Where a party fails to respond or comply with a demand, the party seeking disclosure may move to compel such response (CPLR § 3124).

Plaintiff is not claiming damages related to litigation loans, nor are litigation loans are not a collateral source, as contemplated by CPLR § 4545. Movants have failed to establish that the subject loans are material or necessary to their defense or prosecution of this action.

The domestic violence lawsuit against plaintiff is currently pending. As such, it is beyond cavil that plaintiff has a Fifth Amendment right against self-incrimination and will not be compelled to answer questions in this proceeding which would violate that right. Additionally, as that lawsuit remains pending, the domestic violence allegations against plaintiff have not been proven, at this time, if at all. Accordingly, the Court declines to compel plaintiff disclose information related to his litigation loans or his pending domestic violence lawsuit, nor will it compel his further deposition related to same.

C. FRED GELLER – INSURANCE POLICIES

Movants contend that third-party defendant, Fred Geller Electrical, has failed to comply with the Court's order related to certified copies of insurance policies and "other discovery" (NYSCEF Doc. No. 87 at ¶ 60, 62). Notably, movants do not specify which aspects of their "initial discovery demands" have gone unanswered by Geller (*id.* at ¶ 60-63). In opposition, Geller contends that movants have not made a good-faith effort to resolve the dispute related to the production of certified policies, that Geller has

requested certified copies of the policies, and it will provide certified copies of the policies upon receipt.

The Court's November 18, 2020 Order directed Geller to provide certified copies of the instant insurance policies within 30 days. It is uncontroverted that Geller did not provide certified copies of these policies, nor did it seek relief from the November 18, 2020 Order. Notwithstanding, the prior order did not direct that sanctions would be imposed against Geller for noncompliance with that portion of the order, and the Court declines movants' invitation to sanction Geller, at this time. Instead, the Court directs Geller to provide certified copies of the instant insurance policies within 60 days of notice of entry of this decision and order.

II. CONSOLIDATION

Consolidation rests within the discretion of the Court and is appropriate where two actions involve "a common question of law or fact" (CPLR § 602[a]); the burden is on a party resisting consolidation to show that consolidation would be prejudicial. (*Vigo S. S. Corp. v. Marship Cop.*, 26 NY2d 157 [1970]). Courts are inclined to award consolidation where it promotes efficiency and judicial economy. (*Amcan Holdings, Inc. v. Torys LLP*, 32 AD3d 337 [1st Dept 2006]).

The Court declines the parties' request to consolidate this matter with *James v. RCBI Nominee et al* under index numbers 155519/2018 and 700491/2021. Discovery in this matter has neared completion and judicial economy is not served by consolidating this matter with *James*. Furthermore, although common questions of law and fact are

present in these matters, individual issues predominate (*Bender v. Underwood*, 93 AD2d 747 [1st Dept 1983]). Any potential benefit of consolidation is outweighed by the possibility of jury confusion (*id.*; *see also Doll v. Castiglione*, 86 AD2d 711 [3d Dept 1982]).

III. EXTEND TIME – IME & NOI

Finally, movants seek to extend the time to conduct a medical exam of plaintiff (IME,) as well as to extend the note of issue (NOI) deadline.

Defendants contend that because medical records related to plaintiff's prior knee injury are outstanding plaintiff's IME could not be held. However, as the Court has precluded plaintiff from presenting medical evidence related to his right knee, plaintiff's IME is no longer predicated upon the receipt of medical records related to the prior injury. As movants have sought to extend the IME prior to the deadlines set forth in the November 18, 2021 Order, and timely noticed the IME, the Court extends the time to complete the IME as below. Accordingly, the NOI is likewise extended. The Court has considered movants' claims that COVID has delayed their ability to complete the IME and finds the below extension of the IME and NOI deadlines appropriate.

IV. CONCLUSION

Accordingly, it is

ORDERED that plaintiff is precluded from presenting medical evidence related to his right knee at the time of trial, and such preclusion shall apply to both liability and damages phases of this trial, should it be bifurcated; and it is further

ORDERED that defendants' motion seeking to compel disclosure related to litigation loans and a pending domestic violence lawsuit is denied; and it is further

ORDERED that defendants shall serve notice of plaintiff's IME within 10 days of notice of entry of this decision and order; and it is further

ORDERED that plaintiff shall appear for an IME within 30 days of receipt of movants' notice of same; and it is further

ORDERED that defendants shall serve a copy of the IME report within 30 days of exam; and it is further

ORDERED that the IME shall not be adjourned absent Court permission; and it is further

ORDERED that failure to timely notice and hold the IME, as above, shall constitute waiver of same; and it is further

ORDERED that plaintiff's failure to appear for the scheduled IME shall result in the striking of the complaint, in the Court's discretion upon further application; and it is further

ORDERED that third-party defendant Fred Geller Electrical shall provide certified copies of the subject insurance policies within 60 days of notice of entry of this decision and order; and it is further

ORDERED that the NOI deadline is extended to July 30, 2021; and it is further

ORDERED that movants shall file notice of entry of this decision and order within 7 days.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 27, 2021

ENTER:

Hon. Frank P. Nervo, J.S.C.