

Degerolamo v New York City Tr. Auth.

2021 NY Slip Op 31912(U)

March 19, 2021

Supreme Court, Richmond County

Docket Number: 100436/2015

Judge: Thomas P. Aliotta

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART TR-2

-----X
ANNAMARIE DEGEROLAMO,

Plaintiff,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
MTA BUS COMPANY, CHRISTOPHER MILIANTE
and MARK G. BIRMINGHAM, JR.,

Defendants.
-----X

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 100436/2015

Motion Seq. 009 and 010

Recitation, in accordance with CPLR 2219(a), of the following papers numbered "1" through "6" were marked fully submitted on February 26, 2021

Notice of Motion to Strike and Affirmation with Exhibits
by Plaintiff ANNAMARIE DEGEROLAMO
(dated December 18, 2020).....1, 2

Affirmation in Support of Plaintiff's
Motion by Defendant BIRMINGHAM
(dated December 28, 2020).....3

Notice of Cross-Motion to Strike and Affirmation
in Support and in Opposition to Plaintiff's Motion
with Exhibits by Defendants NYCTA, MTA,
MTA BUS COMPANY and MILANTE
(dated January 7, 2021).....4, 5

Reply Affirmation in Support of Cross-Motion
and in Opposition to Plaintiff's Motion with
Supporting Papers, by Defendants NYCTA,
MTA, MTA BUS COMPANY and MILANTE
(dated February 25, 2021).....6

Upon the foregoing papers, the motion (No. 009) by plaintiff ANNAMARIE DEGEROLAMO (hereinafter "plaintiff") and the cross-motion (No. 010) by defendants THE

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY and CHRISTOPHER MILANTE (hereinafter collectively referred to as "TRANSIT") to strike, preclude or compel discovery are granted only to the extent hereinafter provided.

FACTS

Plaintiff commenced this action to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on February 28, 2014, at the intersection of Richmond Avenue and Hylan Boulevard in Staten Island. Plaintiff was a passenger on a New York City bus owned by defendant NEW YORK CITY TRANSIT AUTHORITY and operated by defendant/bus driver CHRISTOPHER MILANTE. Plaintiff alleges that she was seated in the front of the bus in a handicapped seat across from the bus driver MILANTE when suddenly the bus collided with a vehicle driven by defendant MARK G. BIRMINGHAM (hereinafter "BIRMINGHAM") at the intersection of Hylan Boulevard and Richmond Avenue.

Plaintiff alleges that she was propelled to the floor of the bus and sustained injuries to her back, neck, and knees. As a result of said injuries, plaintiff was required to undergo spinal fusion procedures to her neck and lower back. She was also required to wear a neck and back brace and required wrist injections. Plaintiff alleges that she has difficulty performing many of her daily activities and experiences excruciating back pain that prevents her from sitting or standing in one position for any significant period of time. Although plaintiff was diagnosed with multiple sclerosis approximately 18 years ago, she had been managing her disability without incident until the subject accident.

In the current applications, both plaintiff and Transit seek an order striking, precluding or compelling the other to produce outstanding discovery based on prior demands regarding, *inter*

alia, the production of witnesses for depositions and for duly executed authorizations regarding plaintiff's prior treatment, accident-related treatment, employment records and collateral source records.

In particular regard to plaintiff's motion, it is plaintiff's position that Transit has willfully refused to produce two surface line dispatchers in their employ for deposition. According to plaintiff, Transit's discovery responses indicated that its employees Richard Devito and John Paul were both present at the scene of the subject accident to investigate and report their findings. In spite of several "good faith" attempts by plaintiff to secure these witnesses for deposition, Transit has failed to produce these witnesses. Plaintiff argues more specifically that three notices for deposition were validly served upon Transit and a good faith letter dated July 20, 2020 was sent, requesting that Transit produce these witnesses for deposition. Nevertheless, Transit has failed to respond to these notices, thereby prompting this application for an order either striking Transit's answer, precluding any testimony at trial regarding any information obtained through Mr. Devito or Mr. Paul's investigation, or compelling the deposition of these witnesses. Defendant Birmingham also joins in plaintiff's application regarding Transit's failure to produce its two witnesses for deposition. Transit opposes the motion and cross-moves for authorizations regarding plaintiff's prior medical treatment; accident-related treatment; employment records and collateral source records.

First, in regard to its opposition to plaintiff's and Birmingham's application, Transit argues that it did not willfully or contumaciously refuse to produce Devito and Paul for deposition but, instead, it had already produced defendant/bus driver Milante for deposition, who had first-hand knowledge of the facts surrounding the happening of the accident. In addition, while seeking additional depositions of surface line dispatchers Devito and Paul, plaintiff has

failed to establish that Milante's deposition was insufficient or otherwise inadequate. According to Transit, Devito and Paul arrived at the scene well after the accident took place. In addition, any information gathered by these employees was already provided to plaintiff in the reports they prepared relative to the subject incident, including a "brief sheet" and a Supervisor's Accident Investigation Report.

Insofar as plaintiff argues that Transit's refusal to produce these witnesses was willful and contumacious, Transit argues that in or about November of 2019, plaintiff unilaterally scheduled the depositions of Devito and Paul (which were not court-ordered), and then proceeded to cancel the deposition without a future date. Eventually, on April 6, 2020, plaintiff sent a notice to take deposition and set a deposition date of May 18, 2020. Due to the COVID shutdown, Transit did not receive the notice. Afterwards, plaintiff began unnecessary motion practice to compel these depositions. On July 15, 2020, this Court denied plaintiff's application and directed the parties to resolve the issue between themselves.

According to Transit, following an October 5, 2020 conference, plaintiff indicated that she was no longer seeking these depositions. However, plaintiff, thereafter, unilaterally attempted to schedule the deposition of these two witnesses again on December 18, 2020. Another conference was held whereby Transit was permitted to object to these depositions. Transit argued that it only agreed to produce these witnesses if these depositions were held after plaintiff's deposition. Transit points out, however, that it was never directed by the Court to produce these witnesses.

Finally, Transit argues that striking its answer or precluding testimony are harsh sanctions which would severely prejudice its ability to defend itself, especially since there is no

indication establishing that its refusal to produce these witnesses for deposition was willful or contumacious.

Insofar as Transit cross-moves for outstanding authorizations, Transit argues that demands for authorizations were first made in 2015, and since then, plaintiff has been directed to provide additional authorizations. Although plaintiff has provided some authorizations, many were not properly executed, *i.e.*, missing relevant information. Despite numerous stipulations, court orders and good faith letters, plaintiff has still not provided proper authorizations necessary to obtain relevant information regarding her current and prior treatment as well as insurance and employment records and documentation of special damages. Transit argues that these are routine discovery items yet crucial to properly assess plaintiff's allegations. As a result of the failure to provide necessary authorizations, plaintiff has thwarted Transit's ability to properly defend the matter.

DISCUSSION

It is well-settled that the drastic sanction of striking a pleading should not be invoked unless the default is shown to be deliberate and contumacious (*see e.g.*, Mayers v. Consolidated Charcoal Co., 154 AD2d 577 [2nd 1989]). Thus, in order to prevail on such a motion, it is the movant's burden to make a clear-cut showing of willfulness (*see* Rosner v. Blue Channel Corp., 131 AD2d 654 [2nd 1987]). Here, in the opinion of this Court, neither party has sufficiently established that the conduct by the other relating to the scheduling of depositions or the exchange of discovery rises to the level of willful or contumacious. Instead, the situation presented here appears to be more of a dispute regarding the necessity to produce and/or relevancy of certain discovery material, in addition to some interference caused by the COVID shutdown. Thus, the

motion and cross-motion seeking to strike or preclude information at trial regarding the exchange of discovery in this regard are denied.

Insofar as the respective motions seek specific discovery, it is well-settled that CPLR 3101(d)(1) entitles each party to the “full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof”. What is “material and necessary” generally has been left to the sound discretion of the court and may include “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 Pub. Co., 21 NY2d 403, 406 [1968]).

Here, in the opinion of this Court, the discovery sought by the parties is material and necessary to both the advancement of claims made by plaintiff, and to the defendants to properly defend this action. Therefore, the motion and cross-motion insofar as each seeks to compel discovery from their adversary is granted as hereinafter provided.

With regard to plaintiff’s motion, in the opinion of this Court, the testimony of two of Transit’s surface line dispatchers, Mr. Devito and Mr. Paul, is certainly material and necessary to the advancement of claims made herein by plaintiff. These Transit employees were witnesses who arrived at the scene shortly after the subject accident and were charged with investigating the accident. While said investigation resulted in a report which plaintiff has in her possession, it is the opinion of this Court that testimony regarding their findings can certainly serve to clarify issues regarding their assessment of the scene and the facts surrounding the accident, some of which may not be evident from their report. Therefore, plaintiff’s motion seeking to compel the deposition of these witnesses is granted as hereinafter provided (*see* CPLR 3124).

In regard to Transit's cross-motion, plaintiff has included a plethora of injuries in her bill of particulars, supplemental and amended bill of particulars, all allegedly attributable to the subject accident. Some of these claims relate to prior conditions which are claimed to be exacerbated from the said accident, and some refer to subsequent treatment, including the need for additional surgery, also related to the subject accident. In addition, plaintiff has claimed that she continues to be intermittently confined to her bed and home; that she has suffered emotionally; and that her injuries are permanent. Accordingly, it is the opinion of this Court that all of the medical records presently sought by Transit may well be material and relevant to the claims made by plaintiff in this lawsuit.

Proof submitted to the Court indicates that plaintiff has provided Transit with some of the authorizations requested. While some authorizations are incomplete, and some remain outstanding, there is no proof in this regard that said conduct rises to a level of being either willful or contumacious. Notwithstanding a careful review of the various demands made and responses thereto, the Court, however, is unable to determine exactly which of Transit's authorizations remain outstanding. Therefore, Transit is directed to serve a supplemental demand on plaintiff listing only those authorizations which remain outstanding or are incomplete. Thereafter, plaintiff shall provide properly executed authorizations within the time limit hereinafter provided.

In addition, based on the fact that plaintiff has undergone additional procedures which may be related to the injuries sustained by the subject accident, Transit is entitled to both a further deposition of plaintiff and physical examination relating to subsequent procedures and treatment received by plaintiff.

The parties should be advised that in the event the Court must revisit the issues addressed in the above motion and cross-motion by a further application, the offending party will face being sanctioned by the striking of a pleading or an order of preclusion.

Accordingly, it is hereby,

ORDERED that plaintiff's motion (No. 009) to strike, preclude or compel is granted only to the extent that defendants, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, and CHRISTOPHER MILIANTE, are directed to produce for deposition the two named Surface Line Dispatchers within 45 days from the service upon them of this Order with Notice of Entry; and it is further

ORDERED that the balance of plaintiff's motion seeking to strike or preclude is denied; and it is further


ORDERED that the cross-motion by defendants, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, CHRISTOPHER MILIANTE, (No. 010) to strike, preclude or compel is granted to the extent that said defendants are directed to serve a supplemental demand for authorizations listing only those items not already provided or those authorizations improperly executed within 20 days of the service upon them of this Order with Notice of Entry and that plaintiff is directed to provide duly executed authorizations contained within such demand within 20 days of receipt of said demand; and it is further

ORDERED that plaintiff shall submit to further deposition relative to subsequent surgery and treatment and further physical examination following the exchange of the above-referenced discovery; and it is further

ORDERED that the balance of the cross-motion by defendants, THE NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY, CHRISTOPHER MILIANTE, (No. 010) seeking to strike or preclude is denied.

This constitutes the decision and order of the court.

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.

Dated: March 19, 2021