

Montes v 660 Park Ave. Corp.
2021 NY Slip Op 32140(U)
October 27, 2021
Supreme Court, New York County
Docket Number: Index No. 156522/2017
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHILLIP HOM PART 2

Justice

-----X

RAMON MONTES,

Plaintiff,

- v -

660 PARK AVENUE CORPORATION, NOVA
CONSTRUCTION SERVICES LLC,

Defendant.

-----X

660 PARK AVENUE CORPORATION

Plaintiff,

-against-

NOVA CONSTRUCTION SERVICES LLC, NOVA
RESTORATION LLC

Defendant.

-----X

NOVA CONSTRUCTION SERVICES LLC

Plaintiff,

-against-

AKIN INC.

Defendant.

-----X

INDEX NO. 156522/2017
MOTION DATE 04/07/2021
MOTION SEQ. NO. 001 002

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595298/2018

Second Third-Party
Index No. 595321/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 87, 88, 89, 90

were read on this motion to/for ORDER OF PROTECTION.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for SANCTIONS.

Upon the foregoing documents, it is ORDERED that the motion for a protective order is denied as moot; it is further ORDERED that the motion to vacate the pre-surgery IME is denied as moot; it is further ORDERED that the cross-motion to compel Plaintiff to appear for a pre surgery IME is denied as moot; and it is further ORDERED that the motion to dismiss for spoliation and sanctions is granted to the extent that an adverse inference jury instruction shall be given against Plaintiff.

Background

In this personal injury action, Plaintiff Ramon Montes (“Montes”) is seeking to recover money damages for personal injuries allegedly suffered at a construction site located at 660 Park Avenue, New York, NY, on September 12, 2016. Montes was allegedly struck by a wooden plank on his right hand while working upon a pipe scaffold 20 feet above the floor and applying tar to the wall of the sub roof. Montes claims he suffered injuries to his right thumb, right hand/wrist, right shoulder, neck and back.

At the time of the accident, Defendant/Third-Party Plaintiff 660 Park Avenue Corporation (“660 Park Ave”) owned the premises and had retained Defendant/Third-Party Defendant/Second Third-Party Plaintiff Nova Construction Services LLC (“Nova”) as the construction manager for the work. Nova contracted with Montes’ employer, Second Third-Party Defendant Akin Inc. (“Akin Inc”).

Montes moves, under Motion Seq. 1, for a protective order under CPLR §3103(a), and to vacate Nova’s demand for a pre-surgery physical. Nova cross-moves under CPLR §3121(a) and 22 NYCRR 202.17(a) to compel Montes to appear for a pre-surgical physical examination under its demand dated October 13, 2020 (the “Demand”). Akin Inc submitted papers in support,

joining and adopting Nova's arguments. Montes filed this motion on November 23, 2020 and the return date was January 27, 2021. During the pendency of this motion, Montes underwent surgery on his neck on January 1, 2021.

Nova made a CPLR §3126 motion to dismiss the Verified Complaint (Motion Seq. No. 2) for spoliation of evidence and sanctions because of the January 1, 2021 surgery. 660 Park Ave and Akin submitted papers in support, joining and adopting Nova's arguments. Montes submitted late opposition to the motion. However, the Court exercises its discretion under CPLR §2001 to consider the late opposition papers finding no prejudice to Defendants, who were able to file a reply.

Motion Sequence 1

CPLR §3121(a) provides that after commencement of an action in which the mental or physical condition of a party is in issue, any party may serve notice on another party to submit to a physical or mental examination by a designated physician without a court order. If the notice is challenged (*see*, CPLR §3122), the party seeking such an examination, as a preliminary burden, must demonstrate that the mental or physical condition of the party from whom discovery is sought is in controversy (*Andon v 302-304 Mott St. Assoc.*, 257 AD2d 37, 39-40 [1st Dept 1999] *citing Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). CPLR §3103(a) provides that the court may on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome (*Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept. 1998]). When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper (*Jones v. Maples*, 257 A.D.2d 53, 57 [1st Dept 1999]).

Montes moves for a protective order and to vacate Nova's demand to conduct a pre-surgery independent medical examination ("IME"). He alleges that Nova did not request a pre-surgical physical examination in its demands dated June 25, 2018 (NYSCEF Doc. No. 23). Montes also alleges that the Preliminary Conference Order, Compliance Conference Order, and multiple Status Conference Orders order a physical examination of Montes, but do not specify a pre-surgical physical examination.

Montes submitted an attorney's affirmation in support [NYSCEF Doc. No. 41] stating he has had numerous surgeries to his back and neck and that Nova's demand for pre-surgical physical examination was served after his surgeries. The affirmation alleges Nova had notice of the surgeries because in a July 24, 2020 deposition, Montes testified that he had surgery to his neck in the past and had recent neck surgeries due to the subject accident. A review of the July 24, 2020 transcript show no discussion of prior surgeries.

Montes further claims that Nova was aware that he had planned, scheduled and completed surgeries, and that his physical condition was altered by these surgeries prior to the IME notice. Montes states it is impossible for him to comply with such a pre-surgery IME demand now and he may need further surgeries.

In opposition, Nova argues that it was unaware that Montes had undergone any surgeries. Nova states Montes' depositions were conducted on July 7, 2020 and October 8, 2020 and were limited to the issue of liability with no testimony about medical treatment or surgery. Nova further argues that the Bill of Particulars and Supplemental Bill of Particulars did not list the surgeries. The July 24, 2020 deposition appeared to have been conducted by Defendant 660 Park Avenue Corporation, and although Nova's attorney was present, surgery was not addressed.

Nova further argues it needed to examine Montes' pre-surgical condition because his medical records show that he has underlying medical conditions such as diabetes and HIV which affect his injury claim. Nova claims it is entitled to have Montes' pre-surgical condition evaluated to determine if his pre-accident medical conditions predisposed him to the alleged injuries. Nova cross moves to compel Montes to submit to a pre-surgery examination. Akin joins and incorporates Nova's arguments in its papers opposing a protective order. Akin further states that Montes' deposition as to damages has yet to be scheduled by the parties.

In reply, and in opposition to the cross-motion, Montes argues that Nova did not attach the October 13, 2020 demand (NYSCEF Doc. No. 90) (Nova refers to an October 23, 2020 demand, which appears to be a typo). Montes further argues that the Demand is improper because it fails to set out a date time and place of compliance, fails to identify the examining physician, and fails to identify the subject matter of the examination in accordance with CPLR §3121. Under CPLR § 2001, the Court will consider the October 13, 2020 demand mistakenly omitted from NOVA's Affirmation because there is no prejudice to Montes, who is aware of the Demand.

All of the relief sought has been rendered moot because Montes underwent surgery on January 1, 2021 during the pendency of this motion and cross motion. Accordingly, Montes

motion for a protective order and to vacate the demand for a pre-surgery IME is denied as moot. Nova's cross motion to compel Montes to appear for a pre-surgery examination, denying protective order and denying Montes' motion to vacate the pre-surgery demand is also denied as moot.

Motion Seq. 2 -Spoliation

Nova seeks to dismiss the Verified Complaint because Montes allegedly spoliated important evidence by failing to submit to an IME prior to his surgery. Nova argues that Montes had a duty to preserve relevant evidence, his physical condition, that he intentionally or negligently altered that evidence by having the neck surgery on January 1, 2021; and that by altering that evidence, Montes deprived Nova of the opportunity to conduct meaningful IMEs, significantly prejudicing its defense of the action.

Montes opposes Nova's motion arguing that he did not spoliage relevant evidence because all his medical records are available to all the parties, and the records provide any of Defendants' IMEs with the information necessary to render opinions as to his medical condition. Montes further argues that Nova's Demand dated October 13, 2020, demanding a pre-surgery IME did not constitute a proper demand for an IME under CPLR §3121 because it did not designate a physician or specify a date for an examination. Montes stresses that no Court Order required him to appear for a pre-surgical IME. In reply, Nova argues that the Demand placed Montes on clear notice to preserve the physical evidence – the parts of his body that were allegedly injured during the September 12, 2016 accident.

On a motion for spoliation sanctions, the moving party must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2)

the records were destroyed with a culpable state of mind, which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense (*VOOM HD Holdings LLC v EchoStar Satellite, L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]; *Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481 [1st Dept 2010]).

In deciding whether to impose sanctions, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness (*Standard Fire Ins. Co. v Federal Pac. Elec. Co.*, 14 AD3d 213, 218 [1st Dept 2004]). The burden is on the party requesting sanctions to make the requisite showing (*Mohammed v Command Sec. Corp.*, 83 AD3d 605, [1st Dept 2011]; *Duluc v AC & L Food Corp.*, 119 AD3d 450, 451-452 [1st Dept 2014]).

As stated, Nova served Montes with the Demand for a pre-surgical IME dated October 13, 2020. The Demand requested, among other things, Montes provide Nova with information of any scheduled dates of surgical procedures, the name and address of the physician performing the surgery, and the place of surgery (NYSCEF Doc. No. 90 and 67). Montes' deposition, *not IME (emphasis added)*, was scheduled for January 8, 2021, however, it had to be cancelled because he had undergone neck surgery the week before (NYSCEF Doc. No. 71). Dr. Weinstein performed the neck surgery. Nova did not have access to Dr. Weinstein's medical records or information.

The Court finds Montes had an obligation to preserve his physical condition. The condition of Montes' neck and spine is evidence that is capable of being spoliated. (*Martinez v. Nelson*, 101 NYS3d 580 [Sup. Ct. Bronx Cty. 2019], citing *Mangione v Jacobs*, 37 Misc 3d 711[Sup Ct, Queens County 2012], *affd* 121 AD3d 953 [2d Dept 2014]). Even if the October 13, 2019 Demand did not comply with all the requirements of CPLR §3121, it did notify Montes that

Nova wanted to make a pre-surgery examination of him and that he should preserve that evidence (See *Martinez*, at 584 [finding an obligation to preserve the condition of plaintiff's cervical spine arose from a preservation letter sent one month before the surgery]).

Because of the Demand, Montes was on notice that his pre-surgery condition was relevant in this action (*In re New York City Asbestos Litigation*, 157 AD3d 564 [1st Dept 2018]; *Malouf v Equinox Holdings, Inc.*, 113 AD3d 422 [1st Dept 2014]). Also, in its June 25, 2018 Combined Demands for Discovery, Nova demanded that Montes retain, preserve, protect and allow defendants to inspect physical evidence in connection with his claim. (NYSCEF Doc. No. 23).

The second part of the spoliation analysis is whether the evidence was destroyed with a culpable state of mind. In *Mangione v Jacobs*, 37 Misc 3d 711 [Sup Ct, Queens County 2012], *aff'd* 121 AD3d 953 [2d Dept 2014], the trial court granted defendants' motion to dismiss plaintiff's complaint because it found she intentionally destroyed evidence by undergoing surgery before submitting to IMEs scheduled by the defendants. The Appellate Division, Second Department affirmed the trial court, but on other grounds, finding that the drastic remedy of striking a pleading should not be imposed unless the failure to comply with discovery demands or orders is clearly willful and contumacious. The court found plaintiff's actions willful and contumacious because she failed to comply with court-ordered discovery without an adequate explanation (*Id.*).

While Montes' actions do not rise to the willful and contumacious conduct of the plaintiff in *Mangione*, who ignored three court orders to have her pre-surgery condition examined by an IME, he is not totally without blame. There is no evidence the January 1, 2020 surgery was an emergency, but it did alter the condition of his neck. Montes was aware that Nova considered

his physical condition pre-surgery relevant to its defense, yet chose to undergo surgery during the pendency of his motion for a protective order. Montes argues Defendants were aware he already had surgeries, so his pre-surgery condition was already altered. However, there is no evidence that Defendants were aware he had prior surgeries before Nova sent its Demand. Nothing in the deposition transcripts or Bill of Particulars indicate there was any prior surgery or intention to undergo future surgery. Nova has also stated it was never provided any medical records of surgeries despite its demand for Bill of Particulars and Combined Demands requesting the name and addresses of any medical providers rendering treatment to Montes and authorizations for the reports of such providers. The Court finds that Montes was at least negligent by submitting to surgery despite Nova's Demand. Montes, who is represented by Counsel knew or should have known that the condition of his neck/spine would be pertinent to this litigation after receiving the October 13, 2019 Demand.

The Court also finds the condition of Montes' neck/cervical spine is relevant to Nova and the other Defendants' defense. Montes claims injuries to his right thumb, right hand/wrist, right shoulder, neck and back caused by the accident, placing his physical condition in issue. (*see, Andon v 302-304 Mott St. Assoc., supra* at 39-40). The condition and extent of Montes' neck/cervical spine injuries is material to this litigation.

Courts have held that spoliation sanctions may be imposed on a tort plaintiff who has surgery on a body part that is in issue in litigation before the defendant, who has demanded an IME of plaintiff, has an opportunity to conduct it (*see Mangione v Jacobs, supra*). A court is vested with broad discretion in determining sanctions for spoliation and, if appropriate, is not constrained to impose the least onerous sanctions. (*Id.* [cites omitted]). Among some of the factors in determining the appropriate sanction are the type of spoliation involved, the degree of

prejudice, the level of culpability of the litigant and his or her counsel, protecting the integrity of court orders and other processes and deterring other would be spoliators (*Id.*).

In the present case, as Montes notes, there were no court orders requiring him to undergo a pre-surgery IME and Nova's October 13, 2019 Demand did not meet all CPLR §3121 requirements, but it did put Montes on notice that he should preserve his physical condition. Montes' attorneys also understood the seriousness of the Demand, filing a motion for a protective order and to vacate the Demand. Despite this notice, Montes chose to undergo surgery during the pendency of the motion. Although Montes' culpability does not rise to the level of Mangione, where several court discovery orders were ignored and the remedy of dismissal was proper, Montes destroyed relevant evidence vital to Defendant's defense. Defendants can obtain operative report records to be used by their IMEs, but those records do not substitute for Defendants' IMEs having the opportunity to examine Montes first-hand before surgery. After considering these factors, the Court finds that the appropriate sanction for spoliation in this case is the giving of an adverse inference jury instruction.

Conclusion

Accordingly, it is hereby

ORDERED that Montes' motion for an order of protection and to vacate the Demand is denied as moot because Montes had the surgery; and it is further

ORDERED that Nova's cross motion is denied as moot; and it is further

ORDERED that Nova's motion to dismiss for spoliation of evidence and for sanctions is granted to the extent that an adverse inference jury instruction shall be given against Montes for spoliation.

