Bellet v Town of Cortlandt
2021 NY Slip Op 32302(U)
October 7, 2019
Supreme Court, Westchester County
Docket Number: Index No. 68140/2017
Judge: Joan B. Lefkowitz
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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

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PETER R. BELLET and MAURA K. BELLET,

Plaintiffs,

-against-

TOWN OF CORTLANDT, JAMES PATRICK HICKEY and MARY FINN HICKEY fka MARY FINN,

Defendants.

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DECISION and ORDER
Index No. 68140/2017
Motion Date: Oct. 7, 2019
Seq. Nos. 1 & 2

LEFKOWITZ, J.

The following papers were read on this motion (Seq. No. 1) by defendant Town of Cortlandt ("Town") for an order 1) compelling plaintiffs to produce authorizations allowing defendant Town to obtain plaintiff Peter R. Bellet's optometry and/or opthalmology records for three years prior to the subject accident; 2) compelling plaintiff Peter R. Bellet to attend an opthalmology medical examination; 3) compelling plaintiff Peter R. Bellet to produce for inspection a certain pair of glasses purchased in Puerto Rico; 4) compelling plaintiff Peter R. Bellet to attend an endocrinology independent medical examination; 5) compelling plaintiffs to produce an authorization allowing the Town to obtain plaintiff Peter R. Bellet's pharmacy records regarding medications taken for diabetes; and 6) for such other, further and different relief as this court may deem just, proper and equitable:

Order to Show Cause; Affirmation in Support; Exhibits A-J; Affidavit of Service
Affidavit in Opposition (Bellet); Affirmation in Opposition (Altman) ; Exhibits 1-2
NYSCEF File

The following papers were read on this motion (Seq. No. 2) by plaintiffs for an Order compelling defendant Town to produce an additional witness for deposition, ie. Steven Clausen, a certified arborist in the employ of the Town's dedicated tree crew; and for such other relief as the court may deem just and proper:

Order to Show Cause; Affirmation in Support; Exhibits 1-4
Affirmation in Opposition; Affidavit of Service
NYSCEF File

Upon the foregoing papers and the proceedings held on October 7, 2019, these motions are determined as follows:

Relevant Facts and Procedural History

Plaintiffs allege that on October 27, 2016, plaintiff Peter R. Bellet tripped on a tree stump located on a strip of land owned/maintained by defendants. Plaintiffs filed their summons and verified complaint on October 27, 2017. Defendant Town filed its verified answer with cross-claim on December 19, 2017. Defendants James Patrick Hickey and Mary Finn Hickey filed their verified answer on June 13, 2018.

Contentions of the Parties

Motion Sequence No. 1

Defendant Town moves to compel. On May 30, 2019, both plaintiffs appeared for their examinations before trial. Defendant Town argues that plaintiff Peter R. Bellet ("Peter") testified that his accident took place outside of the Paradise Restaurant in Verplanck at approximately 10:45 p.m. At the time, it was drizzling and dark outside. Defendant Town argues that Peter testified that his accident took place when he walked from the sidewalk onto the grass to enter the passenger side of his car. Defendant cites to Peter's deposition testimony where he states that his wife was going to drive them home because he does not drive at night[1]. Defendant also cites to plaintiff Peter's testimony that he was looking at the car door and not on the ground when his left foot hit something and he fell. Defendant also cites to the testimony of Peter's wife, plaintiff Maura K. Bellet ("Maura"), that she intended to drive home that evening as her husband does not like to drive at night. Defendant also submits portions of Maura's testimony where she states that Peter was wearing his older glasses the night in question because the ones he purchased in Puerto Rico were not correct.

On June 8, 2019, defendant Town served plaintiffs with a Notice of Discovery & Inspection dated June 7, 2019 wherein it sought, *inter alia*, authorizations for plaintiff Peter's optometry and opthalmology records for three years prior to the subject accident, including from the Walmart in Puerto Rico and the production of the glasses he purchased at the Walmart in Puerto Rico. On June 28, 2019, plaintiffs served their First Supplemental Combined Responses to Discovery Demands wherein they objected to the Town's demands set forth in paragraphs 5, 6 and 7, as not being material or necessary and as being overly broad and palpably improper. Defendant Town argues that it is entitled to determine whether plaintiff Peter was wearing eyeglasses with an incorrect prescription at the time he tripped. Defendant argues that while plaintiffs' claim is that Peter could not see the tree stump before he walked into and tripped on it as it was dark outside, plaintiff may not have been wearing the correct glasses at the time. Therefore, defendant submits that this could be a reason Peter did not see the tree stump before he fell. Furthermore, defendant Town argues that plaintiff Peter should be required to submit to an Independent Opthalmology Examination and should also be required to produce the pair of glasses that his wife testified as having an incorrect prescription. Additionally, defendant Town avers that plaintiff Peter has placed his physical

[1] See deposition testimony of plaintiffs (defendant Town's exhibits F & G) filed to NYSCEF as Doc. Nos. 36 and 37.

condition, specifically his vision, at the time of the accident in controversy through the inconsistent testimony of his wife.

Moreover, in support of its motion, defendant Town submits that plaintiff Peter went to the Emergency Room at Phelps Memorial Hospital on June 14, 2017 for an ulcerated right toe. A note in the medical record states partially that plaintiff "...is (a) poorly compliant diabetic". Defendant Town argues that someone with diabetes is more likely to develop infections after surgery and any lack of compliance with taking his medications or failing to adhere to the proper diet would have impacted plaintiff Peter's recovery after the accident. As such, defendant Town contends that plaintiff Peter should be required to submit to an Independent Medical Examination conducted by an endocrinologist. Additionally, defendant Town seeks to compel an authorization to obtain plaintiff Peter's pharmacy records regarding medications he took for his diabetes. Defendant argues that the authorization should be unlimited as to time in order for defendant Town to make a determination as to what medications plaintiff Peter took or did not take for his diabetes at various periods of time preceding the subject accident.

Plaintiffs oppose the motion. Plaintiffs submit the affidavit of Peter M. Bellet who states at the time of the accident he was wearing his regular, customary glasses. In the affidavit he also states he had purchased a different pair of eyeglasses in a Walmart located in Puerto Rico but he was dissatisfied with them. He further states that due to the fact that he was dissatisfied with the glasses and because he felt his vision was worse when wearing those glasses, he decided not to use the Walmart glasses and continued using the glasses he already had. He further states that while he is capable of driving at night, he prefers not to do so. In the affidavit, plaintiff also states he does not drive at night due solely to personal choice and not due to any inability to drive or disease. Plaintiffs also submit counsel's affirmation in opposition wherein plaintiffs argue that plaintiff Peter was wearing bifocals during the incident. Plaintiffs further cite to Peter's testimony that the lighting was bad, that it was dark out and he was looking at the car door when he tripped. Plaintiffs also argue that Peter was never asked any questions at his deposition about any problems or issues with his glasses or whether he had any difficulty seeing in the dark. Plaintiffs further argue that defendant Town, in support of its motion, submitted incomplete quotes of Maura in discussing the glasses Peter was prescribed in Puerto Rico and the glasses he was wearing at the time of the accident. Plaintiffs further contend that when Maura was asked about which glasses her husband was wearing at the time of the accident, she responded "Not them. He wasn't wearing them, because he never seemed to think they were right." Plaintiffs submit that Maura unequivocally testified that her husband was not wearing the glasses that he purchased in the Puerto Rico Walmart on the night he tripped, as he did not think they were right. As such, plaintiffs argue that defendant's contention that a serious issue exists about whether Peter was wearing the correct prescription glasses at the time of his accident is incorrect and misleading. Plaintiffs further contend that neither plaintiff Peter nor anyone on plaintiffs' behalf has asserted that any impairment of Peter's vision was the cause of why he did not perceive the existence and location of the stump. As such, plaintiffs argue that defendant Town has not demonstrated that plaintiff Peter affirmatively placed his eyesight into controversy. Plaintiffs also argue that Peter should not be forced to undergo an eye exam based upon defendant's contention that an eye exam is necessary to determine the proper prescription of eyeglasses Peter

should have been wearing.

Turning to that branch of defendant's application to compel plaintiff Peter to undergo an Independent Medical Examination with an endocrinologist, plaintiffs argue that this portion of the motion is premature and not supported by the record. Plaintiffs submit that Peter was seen on June 14, 2017 in the Phelps Emergency Room for a work-up in preparation for possible surgery to remove his right toe the following day. The medical record states in part that plaintiff Peter is a poorly compliant diabetic. Plaintiffs argue that this entry in the medical record is not attributable to anyone specifically. Plaintiffs argue that the issue is not yet ripe for decision as plaintiffs have provided defendant Town with an authorization for all of plaintiff Peter's records for his diabetes from the time of his diagnosis with this disease through the present. Plaintiffs submit that plaintiff Peter was initially not compliant with his medication and diet when he first became diagnosed but he subsequently became compliant with his diabetes regimen starting in 2014 and has remained compliant ever since. Plaintiffs also argue that a pharmacy authorization for plaintiff Peter's diabetic medication from the date of the accident forward has already been provided to defendants. Plaintiffs object to any earlier period as they argue it is not material or necessary to the defense of this case. Plaintiffs further argue that if Peter was not compliant with taking his medications and thereby failed to mitigate his damages after the accident, then plaintiffs have already provided defendants with that evidence.

Motion Sequence No. 2

Plaintiffs seeks an additional deposition from defendant Town. Plaintiffs allege that defendant Town cut down the subject tree and left a stump protruding from the ground thereby creating a tripping hazard. Plaintiffs submit that two witnesses were already produced by defendant Town. The first witness produced was Stephen J. Ferreira, a licensed Civil Engineer. His title is Director of Environmental Services and he has been employed by the Town for approximately 21 years. Part of his responsibility is to supervise the Highway and Park Divisions which provide landscaping throughout the Town. Plaintiffs cite to his testimony where he learned of a Work Order wherein a "tree takedown" was done on July 31, 2014 which resulted in the tree stump that plaintiff Peter tripped on[2]. Furthermore, plaintiffs submit that this witness further testified that the tree crew consists of trained arborists who are assisted by a laborer or two and that typical procedures for taking down a tree involve cutting as close to the surface as possible, but that there would be a stump remaining. Additionally, plaintiffs cite to testimony where this witness stated that he was unaware of any standards or procedures employed by other municipalities with respect to stumps remaining after a tree takedown.

Thereafter, defendant Town produced someone by the name of Robert Dyckman who has been employed by the Town for approximately 26 years. He is a foreman with the Highway Division of the Department of Environmental Services. Plaintiffs cite to testimony wherein he stated he was familiar with and recalled the taking down of the subject tree. He identified the Work Order for the takedown of the tree and remembered taking the complaint. Additionally, when reviewing the Work Order, this witness recognized the handwriting of the individual who reported

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[2] See deposition testimony of defendant Town employees (plaintiffs' exhibits 2 & 4) filed to NYSCEF as Doc. Nos. 45 and 47.

that the job was completed as that of Steven Clausen, an arborist employed by the Town. Plaintiffs argue that Steven Clausen should be produced as the two witnesses previously produced by the Town had no information about the Town's policy of leaving tree stumps in the ground. Furthermore, plaintiffs argue that the witnesses testified that the Town arborists have information that would be material and necessary to the prosecution of this matter, specifically as to, *inter alia*, why a stump was left, why the particular stump was not removed, what are accepted practices for removing trees and how other municipalities handle the removal of trees and leaving tree stumps in the ground. Thus, plaintiffs submit that the two witnesses previously produced did not have knowledge about tree care, policies and procedures and the two witnesses deferred knowledge of those issues to the arborists employed by the Town.

Defendant Town opposes plaintiffs' motion contending that it has already produced two witnesses and that both of these witnesses had significant knowledge regarding the specific tree stump in issue herein, the cutting down of this tree and the policies concerning the removal of trees in the Town. Therefore, defendant Town argues that there is no need to produce any additional witnesses, including Steven Clausen. Additionally, defendant argues that plaintiffs' arguments that Steven Clausen would have information as to other municipalities and what their procedures are in regard to leaving tree stumps is not at all relevant to this case.

Analysis

Pursuant to CPLR 3101(a)(1), there must be full disclosure of all matters "material and necessary" in the prosecution or defense of an action. The phrase "material and necessary" is interpreted liberally to require disclosure, on request, of any facts bearing on the controversy that will assist preparation for trial by sharpening the issues and reducing delay and prolixity (*see Matter of Kapon*, 23 NY3d 32 [2014], *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). "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" (*Forman v Henkin*, 134 AD3d 529, 529 [1st Dept 2015], *quoting Vyas v Campbell*, 4 AD3d 417, 418 [2d Dept 2004]; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]). However, unlimited disclosure is not mandated and may be denied, limited, conditioned or regulated by the court (*see Diaz v City of New York*, 117 AD3d 777 [2d Dept 2014]).

The 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 (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]), as well as impose penalties upon a party which "refuses to obey an order for disclosure" or "wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126).

Here, contrary to plaintiffs' assertion that it is premature and not ripe for determination, the Court finds that defendants are entitled to obtain an independent physical examination of plaintiff by an endocrinologist, as it goes directly to damages. Defendants are also entitled to an authorization to obtain plaintiff's pharmacy records regarding medications he has taken for diabetes from the date

of diagnosis to the present, for the same reason. Plaintiffs' own papers allege that plaintiff Peter developed post-surgical complications which lead to, *inter alia*, the application of an external ring fixator and a bone stimulator for purposes of promoting healing and numerous surgical debridements[3]. The deposition testimony of plaintiff Peter Bellet is that he was diagnosed with diabetes for the first time when he went to the hospital to be treated for this accident[4]. However, his wife Maura testified that Peter was diagnosed in 2013 after an employment physical[5]. To the extent that plaintiffs have not previously provided an authorization for plaintiff Peter's pharmacy records from the date of diagnosis to the present, plaintiffs will be directed to provide such an authorization.

However, the Court finds that, contrary to defendant Town's arguments, the testimony of plaintiffs is not ambiguous with respect to which glasses plaintiff Peter was wearing on the night in question and therefore declines to grant defendant's motion with respect to compelling plaintiff's optometry and/or opthalmology records, requiring him to attend an opthalmology medical examination or compelling him to produce for inspection the eyeglasses he purchased in Puerto Rico. While plaintiff Peter placed his physical condition in controversy when the lawsuit was commenced *(see Koump v Smith*, 25 NY2d 285 [1969]), the Court does not agree with defendant's assertions that the testimony of plaintiff's wife placed his vision in controversy. Her testimony was unequivocal with respect to the glasses he was wearing at the time and the reasons why plaintiff chose not to wear the glasses he bought in Puerto Rico. Additionally, plaintiffs' testimony and Peter's affidavit in opposition is unequivocal as to his personal preference not to drive at night and that this preference is not based upon any disability or disease with respect to his vision[6]. Additionally, plaintiffs' claims and testimony are that he was not looking at the ground as he was walking but was focused on the passenger side car door when he tripped and fell.

Turning to plaintiffs' motion to compel a further deposition, a municipality, in the first instance has the right to determine which of its employees with knowledge of the facts may appear for a deposition (*see Douglas v New York City Auth.*, 48 AD3d 615 [2d Dept 2008]; *Del Rosa v City of New York*, 304 AD2d 786 [2d Dept 2003]). A plaintiff may demand the production of additional witnesses upon a showing that (1) the representative already deposed had insufficient knowledge or was otherwise inadequate, and (2) there is a substantial likelihood that the person sought for depositions possesses information which is material and necessary to the prosecution of the case (*see Walker v City of New York*, 140 AD3d 739 [2d Dept 2016]; *Spohn-Konen v Town of Brookhaven,*

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[3]See paragraphs 5, 6, and 7 of plaintiffs' affirmation in support of their motion filed to NYSCEF as Doc. No. 43.

[4] See lines 8-25 of p. 81 of plaintiff Peter Bellet's deposition transcript filed to NYSCEF as Doc. No. 36.

[5] See pp. 11-16 of plaintiff Maura Bellet's deposition transcript filed to NYSCEF as Doc. No. 37.

[6] See lines 14-25 on p. 48 and lines 14-25 on p. 56 of plaintiff Peter Bellet's deposition transcript filed to NYSCEF as Doc. No. 36.

74 AD3d 1049 [2d Dept 2010]). The burden is on the examining party to make a showing as to both factors (*see Espinoza v City of New York*, 113 AD3d 590 [2d Dept 2014]; *Bentze v Island Trees Union Free School Dist.*, 92 AD3d 709 [2d Dept 2012]).

In this instance, the Court finds that plaintiffs have proffered a sufficient basis for deposing an additional employee of defendant Town, namely Steven Clausen by establishing that there is a substantial likelihood that this person is employed by defendant Town and who possesses information material and necessary to the prosecution of this action.

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

In light of the foregoing it is hereby:

ORDERED that defendant Town of Cortlandt's motion to compel (Sequence #1) is granted to the limited extent that on or before October 21, 2019, plaintiffs shall provide a pharmacy authorization from the date of Peter R. Bellet's diagnosis with diabetes to the present; and it is further

ORDERED that on or before November 25, 2019, plaintiff Peter R. Bellet shall submit to an Independent Medical Examination by an endocrinologist designated by defendant Town; and it is further

ORDERED that all remaining branches of defendant Town of Cortlandt's motion to compel are denied for the reasons more fully set forth herein; and it is further

ORDERED that plaintiffs' motion to compel (Sequence #2) is granted to the extent that on or before November 25, 2019, defendant Town of Cortlandt shall produce Steven Clausen, an arborist employed by the Town for a deposition; and it is further

ORDERED that the parties shall appear for a conference in the Compliance Part, Courtroom 800, on November 26, 2019 at 9:30 a.m.; and it is further

ORDERED that plaintiffs shall serve a copy of this Decision & Order, with notice of entry, upon defendants within five (5) days of entry.

The foregoing constitutes the Decision & Order of this court.

Dated: White Plains, New York
October 7, 2019

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

To:
Service Upon All Counsel Via NYSCEF
cc: Compliance Part Clerk