

Cotto v Bautista

2021 NY Slip Op 34286(U)

April 7, 2021

Supreme Court, Bronx County

Docket Number: Index No. 32971/2019E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

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MIRIAM COTTO

Index No. 32971/2019E

-against-

Hon. MARY ANN BRIGANTTI

JUVENTINO BAUTISTA, MTLR CORP. and JOSE
M. SUAREZ ROSA

Justice Supreme Court

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The following NYSCEF docs numbered 12 to 32 were read on this motion (NYSCEF and CASE MANAGEMENT Seq No. 1) to **COMPEL** noticed and submitted on January 11, 2021.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF No(s). 12-28
Answering Affidavits and Exhibits	NYSCEF No(s). 29-31
Replying Affidavit and Exhibits	NYSCEF No(s). 32

Upon the foregoing papers, defendants Juventino Bautista and MTLR Corp. (“moving defendants”) move for an order pursuant to CPLR §3124 and CPLR §3126, compelling plaintiff to provide responses to their discovery demands related to plaintiff’s prior lawsuits and pre-accident injuries by a date certain, compelling co-defendant Jose M. Suarez Rosa (“defendant Rosa”) to respond to moving defendants’ discovery demands by a date certain and a conditional order of preclusion prohibiting plaintiff and/or defendant Rosa from offering any evidence at trial if they fail to respond to discovery demands. The motion is opposed by defendant Rosa.

The cause of action is for personal injuries allegedly sustained by the plaintiff in a motor vehicle accident that occurred on December 19, 2018 in Bronx County.

Moving defendants allege that on May 8, 2020, they filed their Verified Answer, Demand for a Bill of Particulars, and combined demands. A Demand for Black Box Records and a Notice to Preserve were also served on defendant Rosa. After failing to receive a response, counsel for moving defendants sent a letter to all parties dated July 31, 2020, requesting that they comply with outstanding demands. Moving defendants received plaintiff’s Bill of Particulars on July 30, 2020. They contend that in the Bill of Particulars, plaintiff alleges that she sustained injuries to her neck and back, disc bulges and herniations, as

well as injuries to her left knee and left shoulder. Plaintiff also claims an aggravation and exacerbation of the following injuries: concussion, PTSD, headaches, memory loss, nightmares, and dizziness.

The medical records further indicate that she sustained injuries in a motor vehicle accident in 2015 which included concussion, post-concussion syndrome, depression, and anxiety. On August 26, 2020, moving defendants wrote to plaintiff's counsel requesting that plaintiff supplement her Bill of Particulars and provide unrestricted authorizations due to her pre-accident injuries, prior accident, and allegations of aggravation or exacerbation of the injuries. On September 16, 2020, plaintiff served a Supplemental Bill of Particulars and unrestricted authorizations for the medical providers who treated her for the injuries alleged in this action only.

In the Supplemental Bill of Particulars, plaintiff alleges that all of her claimed injuries were aggravated, accelerated or exacerbated by the subject accident. She further alleges that all of the injuries stemmed from the motor vehicle accident in 2015. However, plaintiff failed to provide unrestricted authorizations for prior treatment for the injuries alleged herein. Counsel for moving defendants conducted a search of the New York State Unified Court System which resulted in five cases wherein plaintiff was a party to an action. Moving defendants then requested unrestricted HIPAA compliant authorizations for medical providers, insurers, Social Security Disability claims and any accident reports related to those lawsuits. In response, plaintiff denied knowledge of two of the lawsuits and objected to providing any information related to *Vera v. Cotto*, Index No.: 0024864/2000 and *Cotto v. F.R.I.E.N.D.S.*, Index No.: 0006713/2005, on the grounds that the matters were unrelated and improperly seek information protected by personal privacy rights. No response to the demands for authorizations was ever received.

Moving defendants argue that plaintiff, by claiming permanent disability and aggravation of pre-existing injuries, has placed her entire medical history in controversy and cannot now allege that she has "privacy rights." Therefore, plaintiff should be required to fully disclose all information demanded by the moving defendants with respect to the aforementioned cases and the court should compel same and

plaintiff should face preclusion if she fails to comply.

Defendant Rosa partially opposes the motion and argues that the moving defendants failed to include a proper good faith affirmation. Defendant Rosa further asserts that the requested discovery, including photographs, were already exchanged, and there is no black box to provide. Defendant Rosa further supports the moving defendants' motion against the plaintiff with respect to discovery regarding prior accidents.

In lieu of an affirmation in opposition, plaintiff's counsel electronically filed a letter addressed to moving defendants' counsel wherein plaintiff's counsel alleges that authorizations for the no fault file as well as medical records for plaintiff's 2015 accident were provided to moving defendants. Additionally, plaintiff's counsel claims that authorizations demanded by moving defendants on September 24, 2020 were also provided and they object to providing information regarding the two lawsuits listed above on the ground that neither of them "have anything to do with personal injury and/or medical treatments."

In reply, moving defendants argue that the motion should be granted since defendant Rosa's opposition papers were untimely and plaintiff failed to offer any opposition to the motion. They argue that good faith correspondence was sent to counsel for defendant Rosa and that the discovery provided by defendant Rosa was not responsive and only involved the black box and photographs. Moreover, plaintiff's failure to respond to the motion shows the necessity for an order of preclusion.

CPLR §3126 provides penalties for refusal to comply with discovery. CPLR §3124 permits a court to compel disclosure if a party fails to comply with discovery demands. Unless a moving party can show the failure to provide discovery was willful, contumacious or in bad faith, the drastic sanction of striking a pleading or preclusion, is not warranted. (*see, Corrigan v. New York City Transit Authority*, 144 A.D.3d 495 [1st Dept. 2016]). In this case, there has been no showing of willfulness on the part of defendant Rosa since moving defendants have responded to plaintiff's demand for black box information and have provided the requested photographs. It appears that the only missing items from the July 31,

2020 demand are with respect to any roadside assistance defendant Rosa may have received.

Accordingly, defendant Rosa is directed to fully respond to plaintiff’s demand from July 31, 2020, within thirty (30) days of the date of this order with notice of entry.

With respect to the plaintiff, there was no opposition to the moving defendants’ motion to compel since a letter addressed to moving defendants’ counsel does not amount to opposition papers. To the extent that plaintiff is alleging injuries in the current accident to body parts that were previously injured or subsequently injured, defendants are entitled to “...discovery to determine the extent, if any, to which the plaintiff’s claimed injuries and damages are attributable to accidents other than the one at issue here...” (*Rega v. Avon Products, Inc.*, 49 A.D.3d 329 [1st Dept. 2008]). As such, information regarding prior injuries is necessary and relevant to defendants’ defense.

Accordingly, the motion by the moving defendants as it relates to the plaintiff, is granted to the extent that plaintiff is directed, within thirty (30) days of the date of this order with notice of entry, to comply with all discovery requests by the moving defendants, related to any and all prior injuries alleged by the plaintiff to have been exacerbated and/or aggravated in the current accident as well as any injuries alleged in the current accident that were also alleged in prior lawsuits. Failure of the plaintiff to comply may result in preclusion upon further application to the court.

This constitutes the Decision and Order of this Court.

Dated: APRIL 7, 2021

Hon. Mary Ann Brigantti
M A BRIGANTTI J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE FIDUCIARY APPOINTMENT REFEREE APPOINTMENT