

Ormsten v Kiop Merrick L.P.

2022 NY Slip Op 30511(U)

February 16, 2022

Supreme Court, New York County

Docket Number: Index No. 154119/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE BLUTH PART 14

Justice

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INDEX NO. 154119/2018

MARION ORMSTEN, FRANK ORMSTEN,

MOTION DATE 02/14/2022

Plaintiffs,

MOTION SEQ. NO. 010

- v -

KIOP MERRICK L.P., KIR MERRICK 028, LLC, KIMCO INCOME OPERATING PARTNERSHIP, L.P., KIMCO INCOME REIT, KIMCO REALTY CORPORATION, BEST YET MARKET, INC., BEST MARKET OF MERRICK, INC., BEST MARKET OF TRIBECA, INC., BEST YET MARKET OF HARLEM, INC.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 337, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 355, 356, 357

were read on this motion to/for STRIKE NOTICE TO PRODUCE

The motion by defendants KIOP MERRICK L.P., KIR MERRICK 028, LLC, KIMCO INCOME OPERATING PARTNERSHIP, L.P., KIMCO INCOME REIT, KIMCO REALTY CORPORATION (collectively, "Kimco") for a protective order striking plaintiffs' notice to produce dated November 9, 2021 and to compel plaintiff to provide authorizations to obtain medical records related to prior injuries and surgeries is granted in part and denied in part.

Background

In this trip and fall case at a supermarket, the Court issued a discovery order dated October 4, 2021 that stated that the only issue remaining in discovery was authorizations sought by defendants about a prior slip and fall by plaintiff Marion Ormsten (NYSCEF Doc. No. 301). This order, issued after a conference, noted that it was unclear whether the authorizations were

relevant because the date of the prior accident was unknown and more information needed to be gleaned about the body parts injured. The Court insisted that plaintiffs provide additional information about the prior slip and fall and subsequent pelvic surgery by October 29, 2021 (*id.*).

Kimco claims that counsel for plaintiff sent a letter to Kimco on October 29, 2021 and attaches a copy of the letter. In it, counsel for plaintiff casts aspersions about counsel for Kimco's conduct and stated that plaintiff Marion Ormsten "never testified at her deposition about a prior pelvic surgery. To the contrary, Plaintiffs testified that they were unaware of any prior pelvic surgery" (NYSCEF Doc. No. 302). He added that the prior incident involved a slip and fall on ice that took place approximately in December 2008 and Ms. Ormsten injured her right knee (*id.*). Counsel for plaintiff represented that his client did not suffer any long-term effects on her ability to perform tasks (*id.*).

Kimco contends that because the bill of particulars contains representations that the accident occurred due to plaintiff's inability to lift her leg above a curb, prior leg and pelvis injuries are relevant. It also complains that despite the Court's directive that these authorizations were the only discovery issue outstanding, plaintiffs served a notice to produce and admit on November 10, 2021. Kimco argues that this latest discovery requested by plaintiffs is duplicative and these issues have already been decided by the Court.

In opposition, plaintiffs claim they served the November 9, 2021 discovery demands "for the sake of clarity to memorialize previous demands for material" (NYSCEF Doc. No. 342, ¶ 2). They assert that defendants have not established that Marion's Ormsten's prior right knee injury suffered in October 2008 is relevant to her present claims and that neither plaintiff recalls Ms. Ormsten undergoing a pelvic surgery.

In reply, Kimco emphasizes that prior injuries to Ms. Ormsten's right knee are relevant and plaintiff should execute authorizations.

Discussion

As an initial matter, the Court grants the branch of the motion that seeks to strike the November 10, 2021 notices to produce and admit served by plaintiff. The Court's order narrowed the remaining issue to be the authorizations about Ms. Ormsten's prior injuries. The Court has no idea what counsel for plaintiff meant by saying this discovery demand was served "for the sake of clarity." The Court's order dated October 4, 2021 stated that "all other discovery not raised is deemed to be waived" (NYSCEF Doc. No. 301). These demands, filed *after* that Court order, are too late.

With respect to the authorizations the Court finds as follows: plaintiffs must provide authorizations for any prior injuries to her right knee, which includes the 2008 slip and fall on ice. Contrary to plaintiffs' arguments, *Jerez v 2141, LLC* (191 AD3d 407, 137 NYS3d 688 [1st Dept 2021]) does not compel a different outcome. *Jerez* held that plaintiff need not provide discovery about a prior back injury where the plaintiff alleged shoulder and knee injuries (*id.* at 407). Here, it is clearly relevant that Ms. Ormsten suffered a prior injury to the same body part. Plaintiffs' claim that this injury was resolved is besides the point. A fact finder (assuming the fact finder gets to the damages portion of the trial) should be able to consider the degree to which Ms. Ormsten actually suffered and recovered. That necessarily involves evaluating her condition prior to the alleged accident in this case. It may be that a fact finder does not believe it significant that Ms. Ormsten fell in 2008, but that does not render this incident irrelevant. Authorizations for Ms. Ormsten's prior injuries to her right knee must be served on or before February 23, 2022.

However, the Court denies the branch of the motion that seeks authorizations relating to a prior pelvic injury or surgery. The bill of particulars does not seek relief for a pelvis injury and simply alleging a loss of enjoyment of life does not affirmatively place an injured plaintiff's entire medical history at issue (see *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 981 NYS2d 394 [1st Dept 2014]). Defendants' assertion that a prior pelvis injury could have had some impact on her ability to step over a curb is too vague and speculative to require plaintiffs to execute authorizations for such an injury.

Accordingly, it is hereby

ORDERED that the motion by defendants KIOP MERRICK L.P., KIR MERRICK 028, LLC, KIMCO INCOME OPERATING PARTNERSHIP, L.P., KIMCO INCOME REIT, KIMCO REALTY CORPORATION is granted to the extent that they are granted a protective order striking plaintiffs' November 10, 2021 demands and that plaintiffs shall serve authorizations for Ms. Ormsten's prior right knee injuries, including the 2008 incident, on or before February 23, 2022 and denied the extent the motion sought additional relief.

Remote Conference: April 4, 2022 (NYSCEF Doc. No. 290).

2/16/2022
DATE


ARLENE BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE