

Salomon v United States Tennis Assn.

2022 NY Slip Op 30610(U)

February 25, 2022

Supreme Court, New York County

Docket Number: Index No. 153060/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

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KRISTEN SALOMON,

Index No. 153060/2015

Plaintiff

- against -

DECISION AND ORDER

UNITED STATES TENNIS ASSOCIATION,
UNITED STATES TENNIS ASSOCIATION
NATIONAL TENNIS CENTER, INC., LEVY
RESTAURANTS, and A&A MAINTNENANCE &
CONTRACTING, INC.,

Defendants
-----x

LUCY BILLINGS, J.S.C.:

Plaintiff seeks damages for personal injuries sustained when she slipped on a wet floor surface and fell at the United States Tennis Association (USTA) National Tennis Center. Defendants USTA and USTA National Tennis Center, Inc., move to vacate the note of issue, to compel plaintiff's disclosure by a specified deadline, and to preclude her evidence of damages at trial if she fails to comply with that deadline. C.P.L.R. §§ 3124, 3126(2); 22 N.Y.C.R.R. § 202.21(e). For the reasons explained below, the court denies the USTA defendants' motion to the extent the motion seeks to vacate the note of issue, 22 N.Y.C.R.R. § 202.21(e), and to compel disclosure that has been waived or provided or is irrelevant, but grants the motion to the extent the motion seeks other disclosure as specified below. C.P.L.R. § 3124. Absent plaintiff's noncompliance with the order compelling disclosure, the court denies the motion to the extent the motion seeks to

preclude evidence, without prejudice to a future motion before the trial justice.

I. RELEVANT PROCEDURAL HISTORY

In a stipulated Status Conference Order dated February 20, 2018, defendants stipulated that all disclosure was complete. Plaintiff then proceeded to file a note of issue April 27, 2018. None of defendants moved to vacate the note of issue within the 20 days permitted. 22 N.Y.C.R.R. § 202.21(e). As the USTA defendants acknowledge, on June 24, 2021, the court (Gesmer, J.) notified the parties that the trial would commence March 1, 2022. Now, the USTA defendants seek three categories of disclosure.

II. AUTHORIZATIONS PURSUANT TO ARONS V. JUTKOWITZ

First, the USTA defendants seek plaintiff's authorizations for her medical treatment providers to discuss her health information with the USTA defendants' attorneys pursuant to Arons v. Jutkowitz, 9 N.Y.3d 393, 415-16 (2007). See Caminiti v. Extell W. 57th St. LLC, 139 A.D.3d 482, 483-84 (1st Dep't 2016). As the Court of Appeals made clear in that decision, however, a demand for such authorizations is subject to the same pre-note of issue constraints as any other disclosure. Arons v. Jutkowitz, 9 N.Y.3d at 411. The USTA defendants do not show that they ever demanded these authorizations before the note of issue, nor that the need for them is a circumstance that was unanticipated and has developed since the note of issue, nor that they could not have been sought, compelled via a motion, or provided for in a preliminary, compliance, or status conference order before the

note of issue. 22 N.Y.C.R.R. § 202.21(d); Arons v. Jutkowitz, 9 N.Y.3d at 411; Palmiero v. 417 E. 9th St. Assoc., LLC, 167 A.D.3d 472, 472 (1st Dep't 2018); Prevost v. One City Block LLC, 155 A.D.3d 531, 537 (1st Dep't 2017); Allen v. Hiraldo, 144 A.D.3d 434, 435 (1st Dep't 2016).

The USTA defendants thus have waived this disclosure. Aikanat v. Spruce Assoc., L.P., 182 A.D.3d 437, 437 (1st Dep't 2020); Alvarez v. Feola, 140 A.D.3d 596, 597 (1st Dep't 2016); Perez De Sanchez v. Trevz Trucking, 124 A.D.3d 527, 528 (1st Dep't 2015); Stolowski v. 234 E. 178th St. LLC, 104 A.D.3d 569, 570 (1st Dep't 2013). The fact that plaintiff may have conducted disclosure after the note of issue is not a reason to allow the USTA defendants belatedly to conduct such disclosure, since they were free to object to and move for a protective against any efforts by plaintiff to obtain post-note of issue disclosure. C.P.L.R. §§ 3103(a), 3122(a)(1). Therefore the court denies the USTA defendants' motion to the extent it seeks authorizations pursuant to Arons v. Jutkowitz, 9 N.Y.3d 393. C.P.L.R. § 3124.

II. AUTHORIZATIONS TO SUBPOENA EVIDENCE FOR THE TRIAL

Second, the USTA defendants seek plaintiff's updated authorizations for release of her health information by all the medical treatment providers for whom she previously has provided authorizations. While the USTA defendants already have had access to these providers' records, the updated authorizations are to enable the USTA defendants to subpoena the providers and their medical records for the trial and to ensure that the USTA

defendants have up-to-date records. Although the USTA defendants' motion does not specify for which providers plaintiff has not produced updated authorizations, plaintiff in response shows that she has produced those authorizations, with three exceptions discussed below, and the USTA defendants in reply do not show otherwise. Since these authorizations are for providers for whom plaintiff previously provided authorizations, the USTA defendants know who the providers are and therefore surely were capable of identifying any for whom updated authorizations are lacking.

Plaintiff's failure to produce all the updated authorizations until February 7, 2022, is the result of the USTA defendants' failure to request all of them until January 20, 2022. In any event, their receipt February 7, 2022, gives the USTA defendants time to subpoena the providers and their records for the trial and to check for any recent entries in the records. C.P.L.R. §§ 2302(b), 2307.

III. OTHER AUTHORIZATIONS

Finally, the USTA defendants seek plaintiff's authorizations for release of her health information by six medical treatment providers and two insurers for whom she previously has not provided authorizations that the USTA defendants claim they previously demanded, before the note of issue. Since these authorizations will be up-to-date, they will serve the same purpose as the updated authorizations sought above. Plaintiff in response shows that she produced authorizations for the two

insurers and three of the medical treatment providers between 2015 and 2019 and for each of them again February 7, 2022, which the USTA defendants do not contest in reply.

Plaintiff maintains that the USTA defendants never requested authorizations for release of her health information by physical therapists Stahr and Davis until January 20, 2022, yet have known about them since 2016, long before the USTA defendants stipulated that disclosure was complete and plaintiff filed the note issue. The Preliminary Conference Order and C.P.L.R. § 3101(h) nonetheless obligated plaintiff to identify and produce authorizations for her relevant medical treatment providers as they became known to her. Therefore she shall produce to defendants authorizations for release of her health information by physical therapists Stahr and Davis by March 1, 2022. C.P.L.R. § 3124.

The USTA defendants, on the other hand, do not show that they suddenly became aware that these physical therapists were relevant medical treatment providers in January 2022. The USTA defendants do not dispute that they were aware of these therapists' relevance long before the note of issue, when they could have requested authorizations specifically for these therapists, compelled the authorizations via a motion, or provided for them in a compliance or status conference order. Therefore the USTA defendants are at least equally to blame for the late production of these authorizations, which in any event still gives the USTA defendants time to subpoena the therapists

and their records for use at the trial. C.P.L.R. §§ 2302(b), 2307. The USTA defendants do not suggest that these therapists' treatment was so extensive that their records will be too voluminous to review in time to use this evidence at the trial.

Plaintiff further maintains that she is unfamiliar with any "Dr. Kapoor," for whom the USTA defendants also request an authorization. Therefore, only upon the USTA defendants' showing, as yet not made, that "Dr. Kapoor" examined or treated plaintiff relevant to her claimed injuries, shall plaintiff, within three calendar days after that notice, produce to defendants an authorization for release of information regarding any such examination or treatment. C.P.L.R. § 3124.

IV. AUTHORIZATIONS UNRESTRICTED AS TO TIME

The USTA defendants also insist that the authorizations be unrestricted as to the time span of the providers' treatment of plaintiff, because she claims exacerbation of prior symptoms that has limited her ability to work, other activities, and enjoyment of life and caused her to incur medical expenses. Records of any injuries, physical limitations, or medical conditions she suffered before 2014 also are relevant to show impairments that limited her activities and diminished her enjoyment of life immediately before her injury in 2014 and since then. If plaintiff suffered from any injuries, physical limitations, or medical conditions immediately preceding her injury in 2014 claimed in this action, however, they would be revealed in her medical records during the immediately preceding period. See

Diako v. Yunga, 148 A.D.3d 438, 438 (1st Dep't 2017). If she suffered an injury, physical limitation, or medical condition in the past, but it no longer affected her in 2014, it is irrelevant unless plaintiff claims it was an earlier latent condition exacerbated by the injury claimed in this action. Curran v. New York City Tr. Auth., 161 A.D.3d 649, 649 (1st Dep't 2018); Diako v. Yunga, 148 A.D.3d at 438; Matter of Souza, 80 A.D.3d 446, 446 (1st Dep't 2011); Tomaino v. 209 E. 84 St. Corp., 68 A.D.3d 527, 530 (1st Dep't 2009).

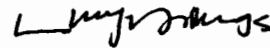
The USTA defendants do not identify any such latent condition claimed by plaintiff, nor any provider who treated such a latent condition. Nor do they claim that physical therapists Stahr or Davis or Dr. Kapoor treated plaintiff before her injury in 2014. Therefore the court denies the USTA defendants' motion to the extent it seeks authorizations unrestricted as to the time span. C.P.L.R. § 3124.

V. CONCLUSION

To recapitulate, the court grants the USTA defendants' motion to compel disclosure to the following extent. By March 1, 2022, plaintiff shall produce to defendants authorizations for release of her health information by physical therapists Stahr and Davis. C.P.L.R. § 3124. Within three calendar days after the USTA defendants' showing to plaintiff that "Dr. Kapoor" examined or treated plaintiff relevant to her claimed injuries, plaintiff shall produce to defendants an authorization for release of information regarding any such examination or

treatment. The court denies the USTA defendants' motion to compel any other disclosure, to vacate the note of issue, or to postpone the trial. C.P.L.R. § 3124; 22 N.Y.C.R.R. § 202.21(e). The court also denies the motion to the extent the motion seeks to preclude evidence, without prejudice to a future motion before the trial justice in the event plaintiff fails to comply with the above order compelling disclosure. C.P.L.R. § 3126(2).

DATED: February 25, 2022



LUCY BILLINGS, J.S.C.

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