

<b>Bain v 50 W. Dev., LLC</b>
2022 NY Slip Op 30756(U)
March 31, 2022
Supreme Court, New York County
Docket Number: Index No. 160488/2016
Judge: Frank Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANK NERVO PART 04**

*Justice*

-----X

KENDELL BAIN,

Plaintiff,

- v -

50 WEST DEVELOPMENT, LLC, HUNTER ROBERTS  
CONSTRUCTION GROUP, LLC,

Defendant.

-----X

INDEX NO. 160488/2016

MOTION DATE 07/29/2021

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182

were read on this motion to/for DISCOVERY.

This matter was transferred to Part IV. As an initial matter, the Court has not considered those portions of the motions directed to vitriol between counsel, as same are entirely unhelpful in addressing the discovery disputes underlying the parties' motions.

Defendants seek an order, inter alia, compelling plaintiff to appear for further deposition and medical exam. Plaintiff cross-moves for sanctions, contending that the discovery sought by defendants in this motion was previously denied prior to the transfer of this matter to Part IV.

CPLR § 3101(a) directs that there “shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of the burden of proof” (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is “one of usefulness and reason” (*id.*). CPLR § 3124 empowers a party to seek court intervention to compel disclosure.

Having previously moved to compel discovery, the Court finds that the discovery sought herein related to plaintiff’s disclosures prior to May 27, 2020, the date defendants filed their prior discovery motion, has been waived. Where the material/document underlying a movant’s second discovery motion was known to the movant in their first discovery motion, the failure to seek such relief in the initial motion constitutes waiver. “A party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence’” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]). Put simply, judicial economy is not served by successive piecemeal discovery motions upon information readily available to the movant. Thus, the Court addresses only that discovery predicated upon disclosures after filing the prior discovery motion on May 27, 2020.

As relevant here, plaintiff's fourth supplemental verified bill of particulars, served April 19, 2021, added claims related to recommendations for lumbar interbody fusion with spinal instrumentation, spinal cord stimulator, epidural steroid injections and nerve blocks, and potential radio frequency ablation. The fourth supplemental verified bill of particulars further added claims related to plaintiff's lost earning, alleging he earned approximately \$1,745 weekly and, at that point, claimed approximately \$559,000 in lost wages, with such losses continuing.

Turning to plaintiff's work history and activities for the period of 2009 through 2013, defendants assert that they are entitled to further depose plaintiff regarding same. However, defendants concede that plaintiff timely served authorizations for his employer and union, defendants timely proceeded authorizations and issued appropriate subpoenas, and that defendants received documents from plaintiff's pension fund in November of 2019 - which provided a list of hours worked by plaintiff (NSYCEF Doc. No. 156 at ¶ 35). Furthermore, to the extent that defendants contend the relatively fewer hours worked by plaintiff during this time, including zero hours in 2012, provides a basis for further discovery, such argument was raised and addressed by Justice Heitler in the Court's September 15, 2020 decision and order. To the extent that

defendants contend the pension records reflect negatively on plaintiff's credibility, it is beyond cavil that same is a consideration for trial and does not provide a basis for further deposition of plaintiff. Consequently, further deposition on this issue is denied.

Relatedly, defendants contend that they are entitled to question plaintiff regarding "all medical treatment received" from the date of his last deposition, as same will reflect upon plaintiff's medical damages (NYSCEF Doc. No. 156 at ¶ 9). It is beyond cavil that a plaintiff claiming personal injury necessarily places his/her medical condition at issue and waives physician-patient confidentiality (*Dillenbeck v. Hess*, 73 NY2d 278 [1989]). However, despite defendant's contention, the waiver is not absolute; only treatment related to the condition or exacerbation of a prior condition is "material and necessary" to the defense of the action, and therefore discoverable (*Brito v. Gomez*, 33 NY3d 1126 [2019]; *Spencer v. Willard J. Price Assoc., LLC*, 155AD3d 592 [1st Dept 2017] *Gumbs v. Flushing Town Center III, L.P.*, 114AD3d 573 [1st Dept 2014]). Consequently, defendants may further depose plaintiff related solely to those injuries newly added by plaintiff's fourth supplemental verified bill of particulars and defendants, should they choose to further depose plaintiff, shall notice plaintiff's deposition as ordered herein. Inasmuch as defendants seek to compel

further discovery with respect to injuries alleged in prior supplemental bills of particular, the Court notes that same were served prior to defendants' previous motion to compel discovery and discovery related to these new injuries was either omitted from defendants' motion or was included in the Court's September 15, 2020 decision and order. Consequently, to the extent such relief was omitted the Court deems same waived, and to the extent such relief was addressed by the Court's prior order, seeking similar relief here is not appropriate.

Finally, turning to plaintiff's cross-motion for sanctions, such relief is denied without prejudice to renewal before the trial court.

Accordingly, it is

ORDERED the note of issue (NYSCEF Doc. No. 183) is vacated as significant discovery is outstanding and the parties have not moved, pursuant to the Part Rules, to extend the note of issue deadline; and it is further

ORDERED that defendants shall serve notice of plaintiff's further deposition no later than April 22, 2022, and such notice shall otherwise conform with the

Uniform Rules. Failure to timely serve notice of plaintiff's further deposition shall constitute waiver of same; and it is further

ORDERED that should defendants timely notice plaintiff's further deposition, plaintiff's deposition shall be completed, either in-person or via electronic means, no later than June 3, 2022. Such deposition shall be limited to new injuries alleged in plaintiff's fourth supplemental verified bill of particulars and shall otherwise comport with the Uniform Rules regarding depositions; and it is further

ORDERED that post-deposition demands, limited to the newly alleged injuries as above, shall be served within 20 days of completion of plaintiffs' deposition or shall be deemed waived; responses thereto shall be served within 20 days of receipt of demand. Failure to timely respond to a timely post-deposition demand shall result in sanctions, upon further application and in the Court's discretion; and it is further

ORDERED that plaintiff's cross-motion for sanctions is denied without prejudice to renew before the trial court; and it is further

ORDERED that the note of issue deadline is extended to September 2, 2022 and this extension is **FINAL** absent compelling circumstances as found by the Court. Failure to timely file a note of issue or move to extend the deadline to file same, in accordance with the Part Rules, may result in sanctions, in the Court's discretion.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

3/31/2022  
DATE

  
FRANK MERVO, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE