

Barr v 34th St. Partnership, Inc.
2022 NY Slip Op 31391(U)
April 29, 2022
Supreme Court, New York County
Docket Number: Index No. 152240/2017
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

JODI BARR,

Plaintiff,

- v -

34TH STREET PARTNERSHIP, INC., CITY OF NEW YORK,

Defendant.

-----X

34TH STREET PARTNERSHIP, INC.

Plaintiff,

-against-

DEGEEST LLC D/B/A/ WAFELS AND DINGES

Defendant.

-----X

INDEX NO. 152240/2017

MOTION DATE 04/07/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595624/2017

The following e-filed documents, listed by NYSCEF document number (Motion 002) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 143, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for DISCOVERY.

BACKGROUND

This is a personal injury action that arose on November 21, 2016, when plaintiff was involved in workplace incident at a kiosk operated by third-party defendant Degeest, LLC d/b/a Wafels & Dinges (DeGeest) in Herlad Square. The kiosk was owned by the City of New York (City) and licensed to 34th Street Partnership, Inc, (34TH Street). Thereafter, 34th Street entered into an agreement whereby DeGeest would operate the kiosk. At the time of the incident,

plaintiff, who was employed by DeGeest as a manager, was standing on a ladder, when a portion of the floor in the kiosk collapsed causing plaintiff to fall and sustain multiple bodily injuries.

PENDING MOTIONS

On November 12, 2021, DeGeest moved for an order pursuant to CPLR §3124 compelling plaintiff to supply authorizations in response to: (a) June 9, 2021 Supplemental Discovery Demand Nos. 1, 2 and 3; (b) August 9, 2021 Supplemental Discovery Demands Nos. 1, 2 and 3; which include mental health records of the plaintiff; and

Plaintiff cross-moved for an order (1) pursuant CPLR §3103 issuing a protective order for any mental health treatment records concerning the plaintiff and (2) pursuant to CPLR §3124 compelling 34th Street, the City and DeGeest, to comply with prior orders and provide timely and substantive responses to discovery demands.

On April 7th, 2022, the motions were marked submitted and the court reserved decision. The motions are granted to the extent set forth below.

ALLEGED FACTS

Wafels & Dinges, is a food service business specializing in dessert waffles, which it sells from a small kiosk in Herald Square and in other locations and venues. Initially operating from a food truck, DeGeest introduced the concept of dessert waffles topped with ice cream, whipped cream and a host of other dessert toppings, popular in his native Belgium, to the New York City area. DeGeest hired plaintiff to be the Wafels & Dinges General Manager in the spring of 2015, when this entrepreneurial enterprise was in the startup phase.

In that role, plaintiff's duties encompassed, among others: scheduling, staffing, payroll, ordering, repair and maintenance of the kiosks and off-premises catering. Plaintiff started work on May 7, 2015 at a salary of \$65,000 per year. DeGeest asserts it was not happy with plaintiff's

work from the beginning, and on November 16, 2016 plaintiff was fired. Plaintiff's termination was to have been immediate, but she requested an additional two weeks, and her last day of work was scheduled to be November 30, 2016.

The accident occurred on November 21, 2016.

Plaintiff alleges she had begun to climb the step ladder in the Herald Square kiosk, when the floor collapsed, causing her to fall from the ladder, strike the kiosk door, and land on the floor. Another employee Liberka Reyes was standing next to plaintiff behind the counter in the Herald Square kiosk when the incident occurred.

Plaintiff alleges injuries to her left knee; lower back; left hip; left shoulder; neck and post-concussion syndrome. Plaintiff did not allege and/or plead claims for psychiatric: psychological and/or mental health injuries but alleges a claim for lost earnings.

DISCUSSION

As a general rule, “ ‘material and necessary’ ” is accorded a liberal construction (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406). However, because of their “confidential and private nature” (*Roth v American Colonial Ins. Co.*, 159 AD2d 370), disclosure of tax returns is disfavored, and defendants are required to establish that the information contained in the returns they seek “is indispensable to this litigation and unavailable from other sources” (*Briton v Knott Hotels Corp.*, 111 AD2d 62, 63; *see also, Haenel v November & November*, 172 AD2d 182). Consistent with this authority, the party seeking to compel production of a tax return must identify the particular information the return will contain and its relevance, explain why other possible sources of the information sought are inaccessible or likely to be unproductive and limit examination of the return to relevant material through redaction of extraneous information (6 Weinstein-Korn-Miller, NY Civ Prac ¶ 3101.10a).

Nanbar Realty Corp. v. Pater Realty Co., 242 A.D.2d 208, 209–10 (1997).

DeGeest seeks to compel the production of authorizations related to: (a) Employment, salary and income history records of a sufficient scope to enable the defense to challenge Plaintiff's lost wage claims; and (b) Counselling records that go to Plaintiff's lost wage and other damages claims.

Tax Records

Plaintiff asserts the motion should be denied as untimely because the past order required that the motion be made by October 6, 2021, and the motion was filed on October 10, 2021. The court finds the four-day delay de minimis and will consider the motion on the merits.

As of October 15, 2020, plaintiff asserted \$276,631.00 for damages in past loss wages and \$2,012,019.00 in damages for future lost wages.

To date only limited information about plaintiff's earnings and income history have been produced establishing that

(a) Plaintiff was employed as the manager of a single "Pret a Manger" sandwich shop location for 3 years and 7 months, from 2/28/2014 to 9/27/2014;

(b) Subsequent to the termination of her employment with Pret-a-Manger it is believed and therefore averred that plaintiff was employed by "Hale & Hearty," a chain of restaurants that features a variety of soups; and

(c) Plaintiff began working at DeGeest at an annual salary of \$65,000, from May 7, 2015 until she was fired in November of 2016.

Disclosure of tax returns is generally disfavored due to their confidential and private nature. The party seeking an order to compel their production must make a strong showing of necessity and desirability. (*Niagara Falls Urban Renewal Agency v. Friedman*, 55 AD2d 830 [4th Dept 1976]; *Smith v. Providence Washington Ins. Co.*, 51 AD2d 1074 [3d Dept 1976]; *Glenmark, Inc. v. Carity*, 22 AD2d 680 [1st Dept 1964]; 3A Weinstein-Korn-Miller, NY Civ Prac ¶ 3101.10.)

The unavailability of earnings and income data for the period that preceded the DeGeest employment is due to the failure plaintiff's prior employer to retain these records. Plaintiff has asserted a claim for over two million dollars in lost wages based on a showing of only the job she was fired from and held for just over a year. Defendant attempted to get information directly from past employers but was unable to do so.

Additionally, as set forth below, the court is denying the request for plaintiff's mental health records, which defendant argues are also applicable to the lost wages claim. Based on the

particular circumstances of this case, the court therefore finds defendant has made a showing of the necessity and desirability of obtaining tax records for plaintiff. While defendant seeks records going back five years, the court shall limit it to four. While plaintiff argues the court is precluded from making such an award based on past discovery orders issued in this case, the court also retains discretion to supervise discovery. (*Berkowitz v. 29 Woodmere Blvd. Owners', Inc.*, 135 A.D.3d 798, 799, quoting *Mattocks v. White Motor Corp.*, 258 A.D.2d 628, 629, 685 N.Y.S.2d 764; see *Gilman & Ciocia, Inc. v. Walsh*, 45 A.D.3d at 531, 845 N.Y.S.2d 124).

Based on the foregoing, plaintiff's motion to compel the production of the following is granted:

IRS authorizations for the production of all personal tax records to the undersigned counsel of all said records starting four years prior to the alleged incident to the present, including tax years 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020 (and subsequent years prior to trial); and

Executed authorizations directed to every state and municipality to which plaintiff paid income taxes for the production of all personal tax records to undersigned counsel starting four years prior to the alleged incident to the present, including tax years: 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020 (and subsequent years prior to trial).

Mental Health Records

Plaintiff states unconditionally she is not making any claim for psychiatric and or psychological injury. In her original verified bill of particulars, plaintiff included a general allegation of "severe emotional pain & suffering". However, on June 16, 2021, plaintiff served an amended bill of particulars wherein plaintiff withdrew the allegation of "severe emotional pain and suffering". Plaintiff has agreed through counsel and in writing that she would not seek jury charge as per PJI 2:284 (Damages - Emotional Distress and Physical Consequences Thereof) or introduce expert testimony relevant to emotional distress.

It is well settled law that records of mental health treatment are protected by statute (CPLR § 4507 and Mental Hygiene law § 33.13 (c) (1)) and will only be discoverable if the party seeking same can establish a "compelling need" and demonstrate the plaintiff's mental health condition is in controversy. Mental Hygiene Law § 33.13 (c) (1); CPLR § 4507; *James v. 1620 Westchester Avenue, LLC*, 147 A.D.3d (1st 2017); *Alford v. City of New York*, 116 A.D.3d 483 (1st Dept. 2014); *Budano v. Gurdon*, 97 A.D.3d 497 (1st Dept. 2012); *Salazar v. 521-533 West 57th Street Condominium*, 84 A.D.3d 927 (2d Dept. 2011); *Napoli v. Crovello*, 49 A.D.3d 699 (2d Dept. 2008).

Mental Hygiene Law § 33.13 (c) (1) establishes that mental health treatment records are not subject to disclosure. More specifically, the law reads:

(c) Such information (mental health treatment records) about patients or clients reported to the offices, including the identification of patients or clients, clinical records or clinical information tending to identify patients or clients, and records and information concerning persons under consideration for proceedings pursuant to article ten of this chapter, at office facilities shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices except as follows:

1. pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality.

CPLR § 4507 provides:

The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.

In *James v. 1620 Westchester Avenue LLC*, supra, defendants moved to compel plaintiff to authorize the release "mental health" treatment and other unrelated records. Plaintiff cross-moved for a protective order with regards to those records. The Supreme Court denied

defendants motion and granted the motion for a protective order. Defendants appealed. The Appellate Division, First Department, affirmed, holding

Defendants did not meet their burden of showing a "compelling need" for medical records concerning HIV; they failed to submit evidence that would establish a connection between plaintiff s claimed HIV status and her future enjoyment of life (Public Health Law § 2785 [2] [a] ; *Budano v Gurdon*, 97 AD3d 497 (1st Dept 2012); see also *Abdur-Rahman v Pollari*, 107 AD3d 452 (1st Dept 2013). Similarly. defendants failed to meet their burden of showing that "the interests of justice significantly outweigh the need for confidentiality" such to permit discovery of mental health, alcohol abuse, or substance abuse records (Mental Hygiene Law §§ 33.13 [c] [1]; 22.05 [b]; see also *Keith v Forest Labs., Inc.*, 72 AD3d 519 (1st Dept 2010); *Catherine D. v Judy*, 38 AD3d 258 (1st Dept 2007).

On this motion, DeGeest has failed to demonstrate a "compelling need" for the records or demonstrate that the interests of justice are "significantly outweigh" the statutory privilege given to records for mental health treatment. As such, the motion to compel discovery of those records is denied and the cross-motion for a protective order as to said records is granted.

Finally, the City has agreed to and is hereby directed to provide a response to plaintiff s November 2, 2020 discovery demand within 30 days of this order.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that defendant's motion to compel is granted in part; and it is further

ORDERED that plaintiff shall produce to defendants on or before June 15, 2022 the following:

IRS authorizations for the production of all personal tax records to the undersigned counsel of all said records starting four years prior to the alleged incident to the present, including tax years 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020; and

Executed authorizations directed to every state and municipality to which plaintiff paid income taxes for the production of all personal tax records to undersigned counsel starting four years prior to the alleged incident to the present, including tax years: 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019 and 2020; and it is further

ORDERED that the motion for a protective order of plaintiff is granted to the extent of holding plaintiff is not required to provide her mental health records; and it is further

ORDERED that the City is hereby directed to provide to plaintiff on or before June 15, 2022:

Copies of all Parks Department Daily Inspection Reports/Memoranda with all attachments and photographs (in color) for all inspections, re-inspections and/or follow-up inspections for Herald Square and the subject kiosk for 2 years prior to and including the date of the accident; and

Copies of all Parks Department Photo Inspection reports with all attachments and photographs (in color) for all inspections, re-inspections and/or follow-up inspections for Herald Square and the subject kiosk for 2 years prior to and including the date of the accident; and

Copies of all violations, letters, memorandum or other similar document sent by the Parks Department to any party herein concerning the results of any inspection of the aforementioned premises and the subject kiosk for 2 years prior to and including the date of the accident; and

Individual color copies of all photographs taken in connection with any and all inspections of the subject premises and the subject kiosk for 2 years prior to and including the date of the accident including but not limited to the photographs contained in the report dated January 8, 2016 and August 31, 2016; and

Copies of all rules, regulations, procedures, checklists and/or other similar information concerning the duties and responsibilities of Park Department inspectors when conducting inspections of the subject premises and kiosk; and

A copy of the Parks Department Inspectors Handbook, in effect for 2 years prior to and including the date of the accident; and

Copies of all correspondence between the City of New York (Parks Department) and 34th Street Partnership Inc, concerning the maintenance, repair and/or operation of the subject concession and the subject kiosk for 2 years prior to and including the date of the accident; and

The full names and last known addresses of all Parks Department Inspectors who inspected the subject concession and the subject kiosk for 2 years prior to and including the date of the accident. Copies of the Parks Rules & Regulations as referenced in Section 4 - sub paragraph (a) of the Agreement dated June 9, 1997; and

A copy of the Request for Proposal submitted by defendant 34th Street Partnership Inc., with regards to the subject concession; and it is further

ORDERED that counsel are directed to appear for a virtual status conference on June 23, 2022, at 12 PM; and it is further

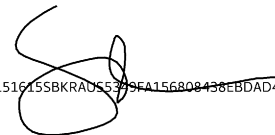
ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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4/29/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE