SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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HARVEY KAPLAN,

Plaintiff,

- v -

55TH STREET APARTMENTS INC.,J&C LAMB MANAGEMENT CORP., JEFFREY LAMB,

Defendant.

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INDEX NO. 655243/2019

MOTION DATE 05/26/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

55TH STREET APARTMENTS INC., J&C LAMB MANAGEMENT CORP., JEFFREY LAMB

Plaintiff,

-against-

GREATER NEW YORK MUTUAL INSURANCE COMPANY

Defendant.

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Third-Party
Index No. 595263/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86, 87

were read on this motion to/for DISCOVERY.

The motion by defendants to compel plaintiff to produce documents demanded in defendants' October 19, 2020 demand, the demand for a verified bill of particulars served on October 20, 2020 and to demands in the December 13, 2021 deficiency letter and supplemental demands, to compel plaintiff to appear for a second deposition, to sanction plaintiff for spoliation of evidence and to direct plaintiff to pay costs and expenses related to the instant motion is granted in part and denied in part.

Background

Plaintiff contends that he owns shares in a cooperative in Manhattan and operates his business (a dentist's office) from a unit in the building. He alleges that he has owned the space since 1984. Plaintiff maintains that in 2016, he sought to renovate his office and used another office on a temporary basis at a nearby building. He complains that what was supposed to be an eight-to-ten-week renovation turned into a two-year ordeal.

Plaintiff states that asbestos was discovered during the renovation and alleges that defendants did not hire anyone to inspect or clean the asbestos. He insists he contacted engineers to inspect and test the particles and this confirmed his suspicions that the asbestos needed to be remediated.

Plaintiff alleges that, eventually, defendants agreed to let an asbestos removal company come in and do the remediation. But he argues that defendants refused to pay certain amounts for the work done by the cleanup company and observes that subsequent follow ups (including one by a plumbing contractor) discovered that there was still asbestos present. He brings causes of action for negligence and breach of the proprietary lease against defendants.

In this motion, defendants take issue with the status of discovery. They want plaintiff to produce documents requested on multiple prior occasions and to require plaintiff to appear for a second deposition. Defendants also seek spoliations sanctions with respect to a ShopVac allegedly used to vacuum the asbestos and argue that plaintiff intentionally did not preserve the vacuum filter. Defendants detail the good faith efforts they employed to try and resolve these discovery issues but contend plaintiff simply ignored their requests. Defendants seek photographs from plaintiff in a legible format and, where possible, in color.

In opposition, plaintiff contends that the branch of the motion related to the demands, the supplemental demands and the deficiency letter is moot as he has now properly responded. Plaintiff points out that he had already agreed to appear for a second deposition and so this branch of the motion is also moot. With respect to the vacuum and its filter (the spoliations issue), plaintiff contends that he has ensured that the vacuum is in a storage unit and remains wrapped up in the same state as when it was left by the cleanup contractor.

Plaintiff explains that he has produced over 600 documents and that there are no further documents in plaintiff's possession with respect to the demands for documents numbered 7, 24-25, 31 and 35. He also maintains that he has turned over all documents related to the plumbing contractor and maintains he does not have the original drawings discussed during plaintiff's deposition.

Plaintiff argues that he does not recall going to see certain doctors (Dr. Sporter, Dr. Block and Dr. Markowitz) and concludes there "would therefore be no authorizations with respect to these physicians" (NYSCEF Doc. No. 77, ¶ 11). Plaintiff insists that he need not provide patient lists because it would violate HIPAA. He also observes that he intended to show up for his medical exam but contracted COVID-19.

In reply, defendants point out that plaintiff provided a partial disclosure of documents on May 16, 2022 (one and a half hours before plaintiff filed his opposition). Defendants insist the motion is not moot because there are items outstanding. They maintain that the branches of the motion for sanctions and legal fees are still ripe for review.

Defendants contend that relevant items are still outstanding. They seek *inter alia* a lease for the temporary office space used during the renovations, communications related to a rent agreement for the temporary office space and records of rent payments other than plaintiff's

handwritten notes. They also point out that they want documents supporting plaintiff's loss of patients and that he can provide such information while still complying with HIPAA by simply removing individually identifiable health information. Defendants further seek documents related to the progress of the renovation.

Discussion

"Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. We have emphasized that the words, 'material and necessary', are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is "material and necessary"—i.e., relevant—regardless of whether discovery is sought from another party or a non party" (*Forman v Henkin*, 30 NY3d 656, 661, 70 NYS3d 157 [2018] [internal quotations and citations omitted]).

As an initial matter, the Court denies the branch of the motion that seeks sanctions arising out of alleged spoliation of evidence relating to the ShopVac. According to plaintiff, the vacuum and the filter are available for inspection. And plaintiff agrees to appear for another deposition so this branch of the motion needs no analysis; plaintiff must comply with these requests.

While the Court recognizes that plaintiff offered a response to the requested discovery, that does not end the Court's inquiry. Defendants' reply makes clear what records remain outstanding and why the information sought is relevant. Paragraph 6 of the reply (NYSCEF Doc. No. 84) lays out in great detail the items defendants complain about. The Court is satisfied

that each one is a legitimate area of inquiry. For instance, defendants point out that they want an authorization for Oxford Insurance—the company that purportedly provides medical insurance to plaintiff (according to plaintiff at his deposition).

Defendants also seek information about lost patients (a basis for certain damages sought by plaintiff). That is clearly relevant and plaintiff can produce records that comply with HIPAA. He cannot claim he lost patients but then assert he need not produce evidence about the number of patients he lost during the relevant time period. Similarly, defendants' request for records from the environmental consultant purportedly hired by plaintiff are relevant and must be produced. Plaintiff seeks reimbursement for the costs associated with hiring this consultant but, according to defendants, plaintiff has only produced a self-created spreadsheet instead of invoices and agreements. In sum, each of these deficient responses (subparagraphs a-m) require sufficient responses.

The Court finds that plaintiff must produce documents relevant to these requests on or before June 30, 2022. If plaintiff insists he has no other documents, then he must prepare a Jackson affidavit for that specific document demand. These affidavits must be produced on or before June 30, 2022. The Court also finds that plaintiff may not use or rely upon any documents not produced by June 30, 2022 at trial or in future motion practice.

The Court recognizes that plaintiff details a range of excuses for his delay in timely responding to defendants' document demands (NYSCEF Doc. No. 78 [plaintiff's aff in opposition]). The Court is willing, on this occasion, to grant plaintiff some leeway based on this affidavit. After all, the Court prefers to decide cases on the merits and views the imposition of sanctions (which defendants seek here) to be a drastic remedy. But the time for delay is over. Plaintiff, as is his right, decided to bring a case that involves a great deal of legitimate areas of

inquiry. Plaintiff seeks damages arising out of allegedly losing patients, having to hire outside consultants and expending resources for which he claims defendants should provide reimbursement. The very nature of those claims involves producing documents supporting those assertions. In other words, plaintiff cannot seek a wide variety of damages and then fail to produce a paper trail to support these claims.

Moreover, the Court observes that it is wholly inappropriate for a party to submit responses that have been pending for many, many months only in response to a discovery motion (which is what plaintiff did here). That type of litigation tactic will not be condoned as this case progresses and the Court will not hesitate to entertain future requests for appropriate relief should plaintiff continue to delay the case. Plaintiff has an opportunity now to address defendants' concerns and move this case forward. If plaintiff continues to play a game of "keep away" then he will only lengthen the time it takes to resolve this matter and likely result in future motion practice; eventually, he will not be able to prove damages.

As stated above, the Court declines to issue sanctions at this time. There is no basis to find that plaintiff destroyed evidence (the ShopVac) and while plaintiff should have already appeared for an IME, the Court finds that he must appear for an IME on or before June 30, 2022. The failure to do so (absent good cause shown, i.e., evidence of a serious medical issue) may result in the imposition of proper penalties.

Accordingly, it is hereby

ORDERED that the motion by defendants is granted only to the extent that plaintiff must respond to the requests listed in paragraph 6 of defendants' reply on or before June 30, 2022 and that he must draft a Jackson affidavit for any requests for which he claims he does not possess any other documents, and it is further

ORDERED that plaintiff must appear for an IME on or before June 30, 2022, and it is further

ORDERED that, as agreed, plaintiff must make the Shop Vac, including the filter, available for inspection by defendants' expert(s), by July 29, 2022; and must appear for another deposition by August 31, 2022; and it is further

ORDERED that any documents ordered herein but not produced by plaintiff on or before June 30, 2022 cannot be used by plaintiff in this case, either at trial or in connection with a future motion.

Next Conference: Already Scheduled for July 12, 2022 at 11:30 a.m. (NYSCEF Doc. No. 83 [directing the parties to provide a discovery update by July 5, 2022]).

6/1/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE