

Ceballos v Howard Spring, Inc.
2022 NY Slip Op 32477(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 156963/2016
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

VIRCIA CEBALLOS,

INDEX NO. 156963/2016MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 005

- v -

HOWARD SPRING, INC., PRIMAVERA PROPERTIES, L.P.,
RITE AID OF NEW YORK, INC., RITE AID STORE #07808-
4188,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114

were read on this motion to/for

DISMISS

BACKGROUND

In this personal injury action, Plaintiff alleges that on January 5, 2014, she tripped and fell on the sidewalk adjacent to 4188 Broadway, New York, New York, and sustained injuries to her back and left foot.

The summons and complaint were filed on August 18, 2016.

Defendants appeared by counsel and filed an answer on November 21, 2016.

PENDING MOTION

On July 20, 2022, Defendants moved to dismiss pursuant to CPLR §3126(3) for Plaintiff's failure to provide discovery; to preclude Plaintiff from introducing any evidence or testimony on the issues of liability and damages at trial pursuant to CPLR §3126(2), or in the alternative to compel Plaintiff to respond to Defendant's demand for a Supplemental Verified

Bill of Particulars and Supplemental Notice for Discovery & Inspection dated May 2, 2022 and June 7, 2022.

On July 19, 2022, Plaintiff submitted opposition and on July 20, 2022 the Court reserved decision.

DISCUSSION

Defendants assert that on or about September 30, 2021 Plaintiff filed a subsequent lawsuit under Index No. 158964/2021 against Fort Tyron Center for Rehabilitation and Nursing, Inc., et al. The complaint alleges that defendants therein caused various and unspecified personal injuries to the plaintiff at various times throughout 2020.

Thereafter Defendants herein served plaintiff with a Demand for Supplemental Verified Bill of Particulars and Supplemental Notice for Discovery & Inspection on May 2, 2022 seeking information as to Plaintiff's alleged injuries stemming from this recent lawsuit. Specifically, Defendants are requesting the nature of the alleged injuries and the involved body parts; the identity (name, address, telephone number) of each and every medical doctor or facility that provided treatment for the plaintiff's injuries from that lawsuit, along with duly executed HIPAA compliant authorizations to obtain the plaintiff's medical records from each and every such provider; the complete non-privileged portion of her attorney's litigation file for this subsequent lawsuit; and duly executed HIPAA compliant authorizations to obtain plaintiff's records from those defendants. Plaintiff did not respond.

Plaintiff oppose the instant motion arguing that dismissal or preclusion is unavailable as there has been no prior court order providing for the discovery requested herein. Plaintiff further argues that Defendant's requests amount to a fishing expedition and that the information

requested is unavailable to Plaintiff, as Defendants in the subsequent action have failed to yet interpose an answer and no discovery has taken place.

A party is entitled to full disclosure of all evidence “material and necessary in the prosecution or defense of an action” (CPLR §3101[a]). CPLR §3101 is to be liberally construed to require disclosure where the matter sought will assist in trial preparation by sharpening the issues (*Kavanagh v Ogden Allied Maint. Corp.*, 92 NY2d 952, 954, 683 [1998]). “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” (*Allen v Cromwell-Collier Pub Co.*, 21 NY2d 403, 406 [1968]).

Dismissal for failure to provide discovery is warrant only where the conduct rises to the level of being “willful and contumacious” (*Postel v NY Univ Hosp.*, 262 AD2d 40, 42, [1st Dept 1999]). Willful, contumacious, or conduct that is in bad faith is described as “a pattern of default, lateness and failure to comply with court orders” (*Merchants T & F, Inc. v Kase & Druker*, 19 AD3d 134 [1st Dept 2005]). As no prior court order provided for the production of the discovery request, the Court finds Plaintiff’s failure to respond to Defendant’s discover demand was not willful, contumacious, or in bad faith.

Nevertheless, the court finds Defendants are entitled to the majority of discovery demanded.

According to the complaint in this action, as a result of the alleged accident, Plaintiff was caused to sustain serious injuries and to have suffered pain, shock, mental anguish, as well as permanent injuries.

When a plaintiff is claiming to be disabled as a result of an accident, the “defendants are entitled to discovery to determine the extent, if any, that plaintiff’s claimed injuries ‘are attributable to accidents other than the one at issue” *McGlone v Port Authority of New York and New Jersey*, 90 AD3d 479 (1st Dept 2022).

The court disagrees with Plaintiff in that the information requested by Defendants is unavailable to Plaintiff at this time. The nature of the alleged injuries and the involved body parts allegedly suffered by Plaintiff in a subsequent accident is without question available to Plaintiff. As is information regarding treating physicians for these alleged injuries, and Defendants are entitled to the same. Defendants’ request for the complete non-privileged portion of her attorney’s litigation file for this subsequent lawsuit is premature, as Defendants are unable at this point to establish any relationship between the injuries alleged herein and these alleged in the subsequent lawsuit

CONCLUSION

Based on the forgoing, it is hereby

ORDERED that plaintiff’s motion to dismiss is denied; and it is further

ORDERED plaintiff’s motion in the alternative to compel is granted; and it is further

ORDERED that defendant shall produce to plaintiff within forty-five (45) days, the following documents: the nature of the alleged injuries and the involved body parts; the identity (name, address, telephone number) of each and every medical doctor or facility that provided treatment for the plaintiff’s injuries from that lawsuit, along with duly executed HIPAA compliant authorizations to obtain the plaintiff’s medical records from each and every such provider;; and it is further

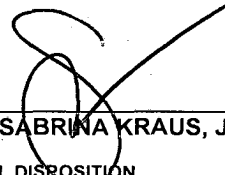
ORDERED that, within 20 days from entry of this order, Defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

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 counsel are directed to appear for a status conference via MS Teams on September 22, 2022, at 2:30 PM; and it is further

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

<u>7/22/2022</u>			
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