

Safier v Wakefern Food Corp.

2022 NY Slip Op 34679(U)

December 16, 2022

Supreme Court, Westchester County

Docket Number: Index No. 52693/2018

Judge: Damaris E. Torrent

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
STEFANY SAFIER,

Plaintiff,

-against-

WAKEFERN FOOD CORP. and SHOPRITE
SUPERMARKETS, INC., ADVANCE BUILDING
SOLUTIONS, INC., and CORPORATE BUILDING
SERVICES INC.,

Defendants.
-----X

DECISION AND ORDER

Index No.: 52693/2018

Motion Date: 10/04/2022

Seq. No. 8

WAKEFERN FOOD CORP. and SHOPRITE
SUPERMARKETS, INC.,

Third-Party Plaintiffs,

-against-

ADVANCE BUILDING SOLUTIONS, INC., and
CORPORATE BUILDING SERVICES INC.,

Third-Party Defendants.
-----X

ADVANCE BUILDING SOLUTIONS, INC., and
CORPORATE BUILDING SERVICES INC.,

Second Third-Party Plaintiffs,

-against-

FLOOR MAINTENANCE PROFESSIONALS, LLC,

Second Third-Party Defendants.
-----X

-----X

WAKEFERN FOOD CORP. and SHOPRITE
SUPERMARKETS, INC.,

Third Third-Party Plaintiffs,

-against-

FLOOR MAINTENANCE PROFESSIONALS, LLC,

Third Third-Party Defendants.

-----X

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 29 were read on this motion (Seq. No. 3) by defendants Wakefern Food Corp. and Shoprite Supermarkets, Inc. (defendants) for an order compelling plaintiff to provide discovery:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion / Affirmation (Maola) / Affirmation of Good Faith (Maola) / Exhibits A – O	1 – 18
Affirmation in Opposition (Ronemus) / Exhibits A – J	19 – 28
Affirmation in Reply (Maola)	29

Upon the foregoing papers, the motion is granted.

This is an action for personal injuries arising out of a slip and fall accident. Defendants on this motion seek an order compelling plaintiff to provide discovery responsive to defendants’ Notice of Discovery and Inspection dated August 9, 2022 and defendants’ Post-Deposition Demands of the same date. Defendants contend that the items sought are material and necessary in the defense of the action, and that plaintiff’s filing of a Supplemental Bill of Particulars after the filing of the Note of Issue triggered the need for such discovery.¹ Defendants further contend

¹ By Decision and Order dated March 16, 2022, this Court granted defendants’ motion to vacate the note of issue and plaintiff’s motion to compel defendants to accept the Supplemental Bill of Particulars.

that, to the extent that authorizations for medical records were provided in the name of defendants' former counsel, current counsel cannot view records obtained pursuant to those authorizations without violating HIPAA, and thus that fresh authorizations in the name of current defense counsel are necessary. Defendants also contend that plaintiff is required to provide authorizations in advance of examinations by medical experts designated on August 16, 2022.

Plaintiff in opposition contends that the motion should be denied, as defendants' demands seek discovery which has already been provided, the post-deposition demands are untimely, the demands seek information outside the scope of the further discovery permitted by the March 16, 2022 Decision and Order, and defendants have previously represented to the Court that paper discovery was complete. Plaintiff further contends that some of the information demanded is irrelevant and/or unrelated to plaintiff's medical treatment from the date of her prior deposition. Plaintiff submits that defense counsel can simply review the file transferred from prior counsel and will not be prejudiced by an order denying the instant motion.

In reply, defendants argue that the two compliance conference orders on which plaintiff relies in objecting to defendants' demands do not contain any language indicating that paper discovery is completed or otherwise closed. Defendants reiterate their argument that authorizations provided in the name of prior counsel do not permit current counsel to view or obtain plaintiff's medical records without violating HIPAA. Defendants contend that all items included in their post-deposition demands seek information to which plaintiff directly testified at her continued deposition and which post-dates plaintiff's prior deposition. Defendants contend that plaintiff's opposition sets forth no basis for a finding that plaintiff will be prejudiced if directed to provide the disclosure sought. Defendants finally contend that plaintiff's opposition does not

address her obligation to provide medical reports and authorizations in advance of further medical examinations.

The Court has fully considered the submissions of the parties.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The phrase “material and necessary” is “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” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *see also Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to ‘uncontrolled and unfettered disclosure’” (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408, 410 [2d Dept 2009], *quoting Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 531 [2d Dept 2007]).

The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1139). This burden exists regardless of whether discovery is sought from another party pursuant to CPLR 3101(a)(1), or a nonparty pursuant to CPLR 3101(a)(4) (*Forman v Henkin*, 30 NY3d 656 [2018]; *Matter of Kapon v Koch*, 23 NY3d 32 [2014]). “The statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise” (*Forman*, 30 NY3d at 661 [2018])(internal citations and quotations omitted). “If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or for cross-examination or in rebuttal, it should be considered [matter]

material in the action” (*Matter of Metro-North Train Acc. of February 3, 2015*, 178 AD3d 931, 933-934 [2d Dept 2019], quoting *Vargas v Lee*, 170 AD3d 1073, 1075 [2d Dept 2019]).

“It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue” (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983] [citation and footnote omitted]). Allegations in a party’s pleading are sufficient to put a party’s physical or mental condition in issue (*see e.g. O’Rourke v Chew*, 84 ad3d 1193 [2d Dept 2011] [allegations in complaint and bill of particulars]; *see also e.g. Kakharov v Archer*, 166 AD3d 746 [2d Dept 2018] [allegations contained in plaintiff’s bill of particulars]; *Avila v 106 Corona Realty Corp.*, 300 AD2d 266 [2d Dept 2002] [same]).

Defendants on their motion met their burden of establishing that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1139). In opposition, plaintiff asserts, in essence, that she will be prejudiced by the delay inherent in providing such disclosure. However, any delay in this action is attributable in large part to plaintiff’s service of a Supplemental Bill of Particulars alleging new and continuing injuries after the Note of Issue had been filed.

Plaintiff’s opposition is silent on the issue of authorizations in the name of prior defense counsel being insufficient to permit current counsel to obtain or view plaintiff’s medical records without violating HIPAA. Plaintiff’s opposition also does not dispute that the information sought in the post-deposition demands relates to matters to which plaintiff testified at her further deposition or otherwise relates to plaintiff’s continued medical treatment after the date of her prior

deposition. Plaintiff's blanket assertion that certain information is irrelevant, without any support, is insufficient to warrant the Court finding that defendants are not entitled to the information sought. Plaintiff's assertion that prior orders deemed paper discovery complete or otherwise closed is belied by the absence in those orders of any language to that effect. Plaintiff's assertion that the post-deposition demands are untimely is unavailing, as the Court did not impose any timeframe on the service of such demands after the further deposition ordered in the March 16, 2022 Decision and Order or at any subsequent compliance conference.

Accordingly, it is hereby

ORDERED that the motion is granted; and it is further

ORDERED that, within twenty (20) days of the entry of this Decision and Order, plaintiff shall provide to defendants complete responses to the Notice of Discovery and Inspection dated August 9, 2022 and the Post-Deposition Demands dated August 9, 2022; and it is further

ORDERED that, within ten (10) days of the date hereof, defendants shall serve a copy of this Decision and Order, with notice of entry, upon all other parties; and it is further

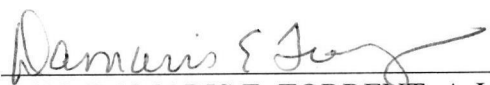
ORDERED that within ten (10) days of service of notice of entry, defendant shall file proof of said service via NYSCEF; and it is further

ORDERED that the parties shall appear for virtual compliance conference on March 15, 2023 at 2:30 pm.

The foregoing constitutes the Decision and Order of the Court.

Dated: December 16, 2022
White Plains, New York

ENTER:


HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF