

Merlo v LCOR 55 Bank St. LLC

2023 NY Slip Op 30015(U)

January 4, 2023

Supreme Court, New York County

Docket Number: Index No. 152443/2017

Judge: Frank P. Nervo

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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

Justice

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DANIEL MERLO,

Plaintiff,

- v -

LCOR 55 BANK STREET LLC,LCOR INCORPORATED,
WP NORTH TOWER, LLC,LRC CONSTRUCTION
LLC,ECKER WINDOW CORP, PARKVIEW PLUMBING &
HEATING, INC.,BAKER CONCRETE CONSTRUCTION,
INC.,PRECISION CARPENTRY OF WESTCHESTER, INC,

Defendant.

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INDEX NO. 152443/2017

MOTION DATE 09/29/2022

MOTION SEQ. NO. 008

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 008) 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 361, 376, 377, 435

were read on this motion to/for PSYCHIATRIC & PHYSICAL EXAM.

The instant application represents motion practice déjà vu.

This Court was presented with the same patently meritless arguments, in the same matter, by the same counsel for plaintiff and, unsurprisingly, in its decision and order dated February 7, 2022, the Court rejected such absurdities under long established appellate authority (NYSCEF Doc. No. 301). Notably, plaintiff did not appeal this decision, nor move for reconsideration. Instead, plaintiff’s counsel continued the prior pattern of claiming additional injuries, which were not the subject of prior depositions or exams, and then refusing defendants additional discovery of these injuries, asserting that defendants are

not entitled to basic discovery of these newly claimed injuries because plaintiff was deposed or examined regarding unrelated injuries. *In essentia*, plaintiff's counsel has taken the same position already rejected by this Court, and indeed the Appellate Divisions, that once plaintiff was deposed or examined he was free to assert additional injuries not disclosed in prior pleadings and defendants are precluded from seeking discovery on these never before disclosed injuries (*id.*; see also *Brown v. Brink El. Corp.*, 125 AD3d 421 [1st Dept 2015]; *Torre v. Cifarelli*, 157 AD2d 713 [2d Dept 1990]).

The Court notes that plaintiff's counsel has repeatedly argued in this, and in other matters before this Court, that a defendant is not entitled to further discovery following the addition of further claims of injuries. As stated by movant, this Court notes that plaintiff's counsel routinely takes the erroneous position that this issue is novel and requires motion practice. Clearly, plaintiff's assertion of novelty is in direct contravention of well-established authority from the Appellate Divisions, and common sense, that a defendant is entitled to further discovery when a plaintiff asserts a new injury. Andrew Diamond, Esq.'s repeated and continued assertion of the meritless argument otherwise on behalf of the well-respected firm of Sacks & Sacks serves only to bewilder this Court.

22 NYCRR Part 130 requires that an attorney's conduct not be frivolous, and further declares that conduct is frivolous if it is, inter alia, completely without merit. Given that plaintiff's counsel's conduct has, again, necessitated a flurry of entirely avoidable motion practice (mot. seqs. 008, 009, 010, and 011) surrounding an issue already decided by this Court, and plaintiff's counsel's argument is directly at odds with the long-established law by the Appellate Divisions, plaintiff's counsel shall show cause before the Court, on its own motion, why sanctions should not be imposed for such frivolity, as below. The Court's limited resources are not well spent on serial motions related to the same fundamental discovery. As the Court of Appeals has repeatedly declared, frivolous conduct and the failure to abide by the Court's prior orders "impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent" (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]).

[continued on following page]

Accordingly, it is

ORDERED that the motion is granted for the reasons set forth herein and as previously addressed by the Court's February 7, 2022, Decision and Order; and it is further

ORDERED that plaintiff shall appear for further deposition no later than February 24, 2023, at the time and manner as defendants shall designate; and it is further

ORDERED that defendants shall serve notice of plaintiff's further deposition, if any, no later than January 20, 2022; and it is further

ORDERED that failure to timely notice plaintiff's further deposition shall constitute waiver of same, absent further order of the Court; and it is further

ORDERED that post-deposition demands related to the further deposition of plaintiff shall be served within 10 days following deposition, or shall be deemed waived; and it is further

ORDERED that plaintiff's responses to post-deposition demands shall be served within 10 days of receipt of demand; and it is further

ORDERED that plaintiff shall appear for further vocational rehabilitation evaluation no later than March 31, 2023; and it is further

ORDERED that defendants shall serve notice of plaintiff's further vocational rehabilitation evaluation no later than February 24, 2023; and it is further

ORDERED that the vocational rehabilitation report shall be served by defendants within 30 days of examination date; and it is further

ORDERED that plaintiff's complaint is conditionally stricken absent timely appearance for a timely noticed further deposition, timely response to timely post-deposition demand(s), and timely appearance for a timely noticed further vocational rehabilitation evaluation; and it is further


ORDERED that all parties shall show cause before this court on February 13, 2023, via paper submissions only, why sanctions should not be imposed against plaintiff's counsel, Sacks and Sacks, LLP, for the frivolous conduct of Andrew

Diamond, Esq., as outlined herein, pursuant to 22 NYCRR Part 130. Papers in support of the Court’s motion, including the proposed appropriate sanction if any, shall be filed via NYSCEF, with courtesy copy to chambers, no later than January 27, 2023. Papers in opposition, if any, shall be filed via NYSCEF, with courtesy copy to chambers, no later than February 10, 2023; and it is further

ORDERED that the dates set forth herein may not be adjourned, modified, or extended absent the Court’s written prior approval; and it is further

ORDERED that counsel are reminded of the Part Rules, available on the Court’s website, including those related to correspondence to the Court.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

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|---------------------------|-------------------------------------|----------------------------|-------------------------------------|-----------------------|--|
| <u>01/04/2023</u> DATE | | | | |  HON. FRANK P. NERVO J.S.C. |
| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> |
| | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
| | | | | REFERENCE | |