

Nadella v 353-357 Broadway LLC

2023 NY Slip Op 30505(U)

February 17, 2023

Supreme Court, New York County

Docket Number: Index No. 156701/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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ROBERT NADELLA, MELBA DOBLEDO,
Plaintiff,

INDEX NO. 156701/2018

MOTION DATE 01/25/2023

- v -

353-357 BROADWAY LLC, TOLL BROTHERS REAL
ESTATE, INC., TOLL BROTHERS, INC.

MOTION SEQ. NO. 003

Defendant.

**DECISION + ORDER ON
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE.

Defendants’ motion to vacate the note of issue and to compel plaintiff’s responses to discovery demands is denied.

Background

This case arises out of a left shoulder injury sustained by plaintiff Robert Nadella while he was working on a construction site. Nadella and his wife, Melba Doblede, filed a complaint against the owners of the property where he worked (defendant 353-357 Broadway LLC) and the general contractor (defendant Toll Brothers, Inc). Nadella alleged his left shoulder was injured during a workplace accident on August 10, 2017, after which he immediately went to the doctor for assistance.

During the course of litigation, defendants discovered that on August 10, 2017, Nadella met with his doctor for pain management but did not complain of pain to his left shoulder (supposedly the injured shoulder). Instead, he complained of pain to the right shoulder, which he had injured 6 years prior in a car accident. He complained of the same issue on September 7 and

on September 14. Defendants claim that it was not until September 15 that Nadella complained to his doctor of pain in his left shoulder, and he made no mention of the accident on that visit. According to defendants, the lapse in time from the injury to his initial complaint to the doctor contradicts Nadella's testimony, in which Nadella stated the pain to his left shoulder was so great he was screaming for help and could not move his arm (NYSCEF Doc. No. 72 Excerpt Nadella Dep. 58:11;62:10-11).

Defendants made post-deposition demands on January 24, 2022, requesting medical records from hospitals relating to Nadella's motor vehicle accident on March 4, 2011. Additionally, defendants sought medical records from "all physicians, therapists, chiropractors, and any other health-care providers who have provided care to plaintiff since January 1, 2015," (NYSCEF Doc. No. 98). On February 16, 2022, counsel for Nadella declined, stating that the records are protected by physician-patient privilege and the authorization do not seek records related to Nadella's left shoulder. Pursuant to a discovery stipulation dated December 6, 2022, the parties agreed that defendants reserved the right to compel plaintiffs within 21 days to provide authorizations for the medical records they sought. This stipulation also provided that a note of issue be filed by January 12, 2023 (that date was provided by the Court, not the parties). A note of issue was filed on December 8, 2022.

Defendants now timely move to vacate the note of issue and compel plaintiff Nadella to supply authorizations to access the requested medical records. Defendants contend that Nadella claims he suffered from permanent injuries, and such claims place his life expectancy into issue. Defendants assert that if life expectancy is at issue, they may seek medical records pertaining to the health, habits, employment, and activities that may relate to life expectancy of an individual. Defendants contend that plaintiff is demanding compensation for injuries and then refusing to

disclose information pertinent to the nature of said injuries, entitling defendants to the requested records. Finally, defendants contend that the records from the doctor's office contradict plaintiff's version of events regarding his injury. Defendants assert that the doctor noted that the pain in Nadella's left shoulder is "attributed to having used the left arm to compensate for the previous injury to the right shoulder," (NYSCEF Doc. No. 94).

In response, plaintiffs contend the authorizations sought by defendants are beyond the scope of the injuries alleged by Nadella. Plaintiffs cite pages of case law demonstrating that defendants may only seek discovery relating to the alleged injuries. According to plaintiffs, the alleged injury is to Nadella's left shoulder, and defendants failed to offer any expert evidence establishing a specific need for the inquiry into matters not related to the injuries alleged. Plaintiffs further assert that Nadella did not make any claim that his injuries affect his life expectancy. Finally, plaintiffs contend that defendants failed to offer any evidence that Nadella's injury is the result of "chronic wear and tear" as opposed to his workplace injury. Furthermore, plaintiffs point to a note left by an employee of the doctor's practice stating that the doctor should call Nadella's workplace. Plaintiffs contend this note is "undoubtedly" referencing filing a workers compensation claim, suggesting Nadella shared the information about his workplace injury with his doctor.

In reply, defendants contend that claiming a lifetime of compensation for permanent injury waives the physician-patient privilege and they argue that the fact that the First Department recently declined to accept that argument (*see Lindsay v CG Maiden Member, LLC*, 2022 NY Slip Op 07503 [1st Dept 2022]) was because that decision ignored the crux of the argument which they bring before this Court. Defendants contend that the Court of Appeals had previously issued a decision recognizing that where a claimant makes broad allegations of

serious and permanent injuries, it necessarily places other prior injuries at issue. Defendants further assert that even if their argument is rejected, they are entitled to seek medical records for all medical care relating to Nadella's left shoulder.

Discussion

“Trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced” (*Cabrera v Abaev*, 150 AD3d 588, 588, 55 NYS3d 207 [1st Dept 2017] [internal quotations and citation omitted]).

The Court declines to strike the note of issue under these circumstances. Defendants' contention that Nadella' left shoulder problem is due to wear and tear and/or overcompensating for not being able to use his right arm does not entitle them to records dating back to 2011. Defendants already have the records upon which they base those theories (that he did not complain to the doctor treating him for right shoulder pain about any left shoulder pain until weeks after the accident).

Notably, Nadella does not claim a loss in life expectancy; rather, he claims loss of enjoyment of life due to the injury allegedly suffered. And while the longer the life, the longer someone suffers with a permanent injury, that is not enough to get medical records unrelated to the injury at issue in the complaint. Without offering “proper expert evidence establishing a particularized need for the inquiry into matters not directly at issue in this action, the denial of its discovery request for plaintiff to produce medical records pertaining to his overall health, habits and activities was proper (citation omitted) *Lindsay v CG Maiden Member, LLC*, 2022 NY Slip Op 07503 [1st Dept 2022]). Defendants here did not sustain their burden in order to get the medical record they seek.

And contrary to defendants’ argument, the Court finds the very recent First Department case *Lindsay v CG Maiden Member, LLC*, 2022 NY Slip Op 07503 [1st Dept 2022]) is directly on point and compelling. The law is clear: a plaintiff does not place his entire medical condition in controversy by suing for orthopedic injuries and claiming that those injuries are permanent, especially where, as here, the plaintiff does not claim his life expectancy was lowered by the accident.

Accordingly, it is hereby

ORDERED that defendants’ motion to vacate the note of issue and compel plaintiff’s responses to its discovery demands dated January 24, 2022 is denied.

2/17/2023

DATE

ARLENE P. BLUTH, 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