

Rosario v 75 Ft. Wash. Prop. LLC

2023 NY Slip Op 34395(U)

December 11, 2023

Supreme Court, New York County

Docket Number: Index No. 156339/2020

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH
Justice

PART 12

-----X
JACQUELINE ROSARIO,

INDEX NO. 156339/2020

Plaintiff,

MOTION DATE N/A

- v -

MOTION SEQ. NO. 001

75 FT. WASHINGTON PROPERTY LLC, COLTON
PROPERTIES LLC, COLTOWN ASSOCIATES INC.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 were read on this motion to/for DISCOVERY

The instant action arises out of personal injuries allegedly sustained by Jaqueline Rosario (plaintiff) when the ceiling allegedly fell in her apartment located at 75 Ft. Washington Avenue, New York, New York 10032 (the building), Apartment 52 (the subject premises), which she rents from defendants 75 Ft. Washington Property LLC, Colton Properties LLC, Coltown Associates Inc. (collectively, defendants), on July 25, 2020. Plaintiff claims to have sustained serious injuries necessitating, *inter alia*, cervical fusion surgery.

Plaintiff moves pursuant to CPLR 3214 to compel defendants to produce Hector Regalado, the building's handyman at the time of the alleged accident, for a deposition on the grounds that he performed an investigation/inspection to try to determine the source of a water leak into plaintiff's ceiling that caused the subject ceiling collapse.¹

¹ Plaintiff also moves to compel post-deposition demands dated June 2, 2022. In their opposition, defendants consent to provide responses. See NYSCEF doc. no. 43. As such, that part of the motion is not addressed herein.

Defendants oppose and cross-move to strike plaintiff's complaint and dismiss the action for plaintiff's failure to provide authorizations for records of prior psychological and psychiatric injuries.² In the alternative, defendants seek a conditional order of dismissal requiring plaintiff to provide the authorizations for plaintiff's mental health treatment for 3 years prior to the date of the accident and for any mental health treatment plaintiff had following the accident, which if not complied with would result in the striking of plaintiff's complaint, the case being dismissed, and an award of costs in the amount of \$2,500.00. Plaintiff replies and opposes defendants' cross motion.

I. Plaintiff's Motion to Compel

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." However, "...unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts'." *Suchorzepka v Mukhtarzad*, 103 AD3d 878, 879 (2d Dept 2013), quoting *County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 946 (2012), citing CPLR 3103. "The delicate balance between allowing liberal disclosure and protecting the parties from unnecessary intrusions, is left to the sound discretion of the lower courts." *Sgambelluri v Recinos*, 192 Misc 2d 777, 779 (Sup Ct, Nassau County 2002), citing *Andon ex rel. Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 (2000).

When disclosure is sought from a corporation through a deposition, the corporation has the right to designate, in the first instance, the employee to be examined. *See Rector, Church Wardens and*

² Defendants also move for records relating to a motor vehicle accident in which they alleged that plaintiff was involved in 2014. However, defendants concede that plaintiff sufficiently establishes that she was not involved in a motor vehicle accident in 2014. As such, defendants no longer seek records with respect to any alleged 2014 accident.

Vestrymen of St. Bartholomew's Church in City of New York v Comm. to Preserve St. Bartholomew's Church, Inc., 84 AD2d 516, 516 (1st Dept 1981). Further,

[i]t is well settled that once a party has deposed a defendant's witness, depositions of additional witness employed by that defendant is only warranted when it is established that (1) the witness deposed had insufficient knowledge relative to the issues in the case or was otherwise inadequate; and (2) there is a substantial likelihood that the additional witness sought to be deposed possess information which is material and necessary to the prosecution of the case. *Perez v City of New York*, 43 Misc 3d 1217(A) (Sup Ct, Bronx County 2014), *affd sub nom. Epperson v City of New York*, 133 AD3d 522 (1st Dept 2015).

Here, plaintiff argues that she is entitled to a deposition of Mr. Regalado, as both of the above requirements have been met. First, the witness produced for deposition, Jonathan Ramirez, the building manager, testified that he did not know what caused the longstanding water damage he observed in plaintiff's ceiling and/or what caused the ceiling to collapse. Second, Mr. Ramirez himself testified that Mr. Relagado, the building's handyman,³ performed an investigation/inspection of plaintiff's apartment to try to determine the cause of the ceiling collapse. Moreover, plaintiff testified that, with respect to notice, she notified Mr. Relagado by making complaints about the ceiling to him.

In opposition to plaintiff's cross-motion, defendants argue that they have already produced Mr. Ramirez, who is a witness with sufficient knowledge. Defendants maintain that plaintiff's testimony as to her complaints made to Mr. Regalado is inconsistent and unreliable. Further, Mr. Ramirez testified that neither plaintiff nor anyone else made complaints about the ceiling prior to the accident, and that he had been inside her apartment three to five times before the accident for general inspections. Therefore, defendants assert that plaintiff provides no compelling reason for defendants to produce an additional witness.

The Court finds that plaintiff has established that Mr. Ramirez's testimony is inadequate in that he testified that he did not know what caused the water damage that he observed in plaintiff's ceiling and that he did not personally perform the investigation of plaintiff's apartment following the ceiling collapse.

³ Mr. Regalado is now the building's superintendent.

Further, it is clear that there is a substantial likelihood that Mr. Regalado would have information regarding any notice provided to him regarding a ceiling leak and he can testify as to his own personal observations of the ceiling following plaintiff's accident, information which is plainly material and necessary to plaintiff's case. Thus, plaintiff has demonstrated her entitlement to depose Mr. Regalado, and her motion to compel defendants to produce him for a deposition is granted.

II. Defendants' Motion to Strike

Defendants cross-move to strike plaintiff's complaint and dismiss the action for plaintiff's failure to provide authorizations relating to her prior psychological and psychiatric injuries, which authorizations were duly demanded. Pursuant to CPLR 3216, if a party willfully fails to disclose information which should have been disclosed, the Court may make "such orders with regard to the failure or refusal as are just, among them...an order striking out pleadings or parts thereof...or dismissing the action or any part thereof..."

It is well settled that records of mental health treatment are protected by statute (*see* CPLR 4507 and Mental Hygiene Law § 33.13 [c][1]) and will only be discoverable if the party seeking same can establish a "compelling need" and demonstrate the plaintiffs mental health condition is in controversy. *See James v 1620 Westchester Avenue, LLC*, 147 AD3d (1st Dept 2017); *Alford v City of New York*, 116 AD3d 483 (1st Dept 2014); *Budano v Gurdon*, 97 AD3d 497 (1st Dept 2012).

Defendants argue that plaintiff put her mental condition at issue, warranting authorizations for her psychiatric records as follows: plaintiff's first bill of particulars alleges that plaintiff "...suffered anxiety and mental anguish, all of which substantially prevents this plaintiff from enjoying the normal fruits of activities [social, emotional and economical] and plaintiff's enjoyment of life has been permanently impaired." Further, at her deposition, plaintiff testified that she suffered from various psychological/psychiatric injuries that pre-dated this accident. As plaintiff pleads that she suffers from

anxiety and mental anguish that she alleges are a result of the accident, and considering her testimony that she suffered from psychiatric issues that predated the accident, defendants maintain that there is a compelling need for her mental health records.

In opposition, plaintiff argues that she is not claiming damages for emotional or psychological injury, or aggravation of a preexisting emotional or mental condition. Plaintiff claims that the testimony elicited at her deposition regarding her mental health was in response to the questions asked by defense counsel and that such testimony does not establish that she has sufficiently put her mental health condition in controversy. Plaintiff further contends that general allegations in a bill of particulars of “anxiety and mental anguish” and loss of enjoyment of life are insufficient to place a party’s mental health history into contention so as warrant the production of authorizations for mental health treatment records.

The Court finds that plaintiff has not put her mental condition at issue such that the interests of justice outweigh the need to maintain the confidentiality of her mental health records. She has not alleged that she sustained cognitive and psychological injuries or impairments as a result of her accident, but rather, pleads that she generally suffers from anxiety and mental anguish leading to loss of enjoyment of life. *Contra Del Grosso v Jimmy Jazz Staten Is., LLC*, 190 AD3d 409, 410 (1st Dept 2021). The First Department, Appellate Division has made clear that allegations of specific physical injuries accompanied by general allegations of anxiety and mental anguish resulting therefrom do not place a plaintiff’s entire mental health history into contention. *See Serra v The Goldman Sachs Group, Inc.*, 116 AD3d 639, 985 (1st Dept 2014); *see also James v 1620 Westchester Avenue LLC*, 147 AD3d 575 (1st Dept 2017) (“plaintiff’s alleged general anxiety and mental anguish from back and leg injuries do not place her entire mental and physical health into contention”); *Abrew v Triple C Properties, LLC*, 178 AD3d 526 (1st Dept 2019).

For the foregoing reasons, defendants' motion to strike is denied, as plaintiff's mental health records are not subject to disclosure pursuant to CPLR 3126.

III. Conclusion

Accordingly, it is

ORDERED that plaintiff's motion to compel is granted; and it is further

ORDERED that defendants shall, within 45 days from the date of this decision and order, produce Hector Regalado for deposition, on a date and at a time convenient for the parties; and it is further

ORDERED that, on consent, defendants shall produce and deliver to plaintiff, on or before January 7, 2024, responses to plaintiff's post-deposition demands dated June 2, 2022, to the extent not already provided; and it is further

ORDERED that defendants' cross-motion is denied in all respects; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 328, 80 Centre Street, on February 20, 2024, at 2:15 p.m.

The foregoing constitutes the decision and order of the Court.

12/11/2023
DATE



LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: