

Hernandez v New York City Tr. Auth.

2024 NY Slip Op 32658(U)

July 29, 2024

Supreme Court, New York County

Docket Number: Index No. 162197/2018

Judge: Richard Tsai

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This opinion is uncorrected and not selected for official publication.

At plaintiff's statutory hearing, plaintiff testified that, at the time of the incident, he was with his co-worker, non-party Errol Freemantle, who purportedly saw plaintiff's fall (plaintiff's Exhibit D in support of motion [NYSCEF Doc. No. 57], statutory hearing tr at 7; see *also* plaintiff's Exhibit E [NYSCEF Doc. No. 58], statutory hearing tr at 18, lines 12-13). According to plaintiff, his supervisor was non-party Alex Pullo (plaintiff's Exhibit D in support of motion, statutory hearing tr at 12, lines 16-19). On or about June 7, 2019, in response to the preliminary conference order, defendant produced a supervisor's accident investigation reported completed by non-party Malik Brady (see defendant's Exhibit F in opposition [NYSCEF Doc No. 59]).

On April 15, 2022, plaintiff filed the note of issue (see NYSCEF Doc. No. 30). Defendant's prior counsel of record moved to vacate the note of issue on the grounds that plaintiff failed to attend an orthopedic examination and vocational rehabilitation examination (see NYSCEF Doc No. 36), and the motion was resolved by a so-ordered stipulation which scheduled the orthopedic examination and directed the exchange of the vocational rehabilitation report (see NYSCEF Doc. Nos. 49, 50).

On December 29, 2023, defendant filed a consent to change counsel (see NYSCEF Doc No. 51, 91). On or about March 25, 2024, 23 months and 10 days after the note of issue was filed, defendant's new counsel served subpoenas for the non-party depositions of Freemantle, Pulla, and Brady (see plaintiff's Exhibit B and C in support [NYSCEF Doc. Nos. 55-56]).

Meanwhile, on or about February 7, 2024, plaintiff served a supplemental bill of particulars specifying a total economic loss of earnings and benefits in the amount of \$649,506.00 (see defendant's Exhibit I in support of motion [NYSCEF Doc. 75]).

This case is now scheduled for a settlement conference on August 7, 2024. At oral argument on the motions on July 25, 2024, counsel informed the court that the case is scheduled for trial in Part 40 on October 28, 2024 (see affirmation of defendant's counsel in support ¶ 25 [NYSCEF Doc. No. 66]).

I. Plaintiff's Motion to Quash the Non-Party Subpoenas (Seq. No. 003)

As plaintiff's counsel points out, the non-party discovery is sought long after the note of issue was filed. In opposition, defendant's counsel argues that, as a matter of discretion, trial courts can permit post-note of issue discovery, so long as neither party will be prejudiced (affirmation of defendant's counsel in opposition ¶ 13 [NYSCEF Doc. No. 89]).

Because defendant did not move to vacate the note of issue within 20 days after its filing on the ground that non-party depositions were outstanding, defendant "was required to demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness requiring

additional pretrial proceedings to prevent substantial prejudice” (*Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 794 [2d Dept 2006]).

As plaintiff points out, the record establishes that defendant was well aware of the nonparty witnesses several years prior to the filing of the note of issue, yet defendant’s counsel never sought their non-party depositions before the note of issue was filed, nor sought to vacate the note of issue on that ground (*cf. Miller v Metro. 810 7th Ave.*, 50 AD3d 474, 475 [1st Dept 2008] [court providently denied defendants’ motion for an open commission to conduct post-note of issue deposit of an out-of-state nonparty]; see also *Crandall v Equinox Holdings, Inc.*, 224 AD3d 436, 437 [1st Dept 2024] [notices were filed after the court-ordered deadline]). “A lack of diligence in seeking discovery does not constitute unusual or unanticipated circumstances” (*Peterson v City of New York*, 222 AD3d 564, 565 [1st Dept 2023]). This court also notes that “[t]he substitution of new counsel or the delinquencies of predecessor counsel alone is insufficient to show the presence of unusual or unanticipated circumstances” (*Utica Mut. Ins. Co.*, 34 AD3d at 794). Thus, defendant has not demonstrated any unusual or unanticipated circumstances that would warrant the post-note of issue non-party depositions (*Singh v Finneran*, 100 AD3d 735, 736 [2d Dept 2012]).

“Nevertheless, in certain circumstances where no prejudice would result, a party may be relieved of its waiver” (*Dominguez v Manhattan and Bronx Surface Tr. Operating Auth.*, 168 AD2d 376, 376 [1st Dept 1990]). Thus, “[t]rial 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” (*Cuprill v Citywide Towing and Auto Repair Servs.*, 149 AD3d 442, 443 [1st Dept 2017]). Defendant essentially argues that, because it is unlikely that the trial will occur in the next few months, there would be no prejudice to plaintiff if defendant were allowed to conduct the non-party discovery.

Defendant’s argument is unpersuasive. To allow defendant to conduct the non-party discovery under these circumstances would allow the exception to swallow the rule, and would reward defendant for its prior counsel’s lack of diligence in pursuing non-party discovery. Defendant gave no offer of proof as to whether these non-party depositions would have any probative value. According to defendant’s counsel, plaintiff’s accident was unwitnessed.

Therefore, the branch of plaintiff’s motion seeking to quash the non-party subpoenas is granted.

The branch of plaintiff’s motion seeking a protective order enjoining defendant from conducting post note of issue discovery is denied. The relief sought is overly broad. Although the non-party subpoenas are quashed, defendant would nevertheless be permitted to engage in *ex parte*, informal discovery to obtain any witness statements, “which the Court of Appeals has long recognized as a permissible and invaluable

avenue by which litigants prepare for trial” (*Everett v Equinox Holdings, Inc.*, 226 AD3d 617, 618-19 [1st Dept 2024], citing *Arons v Jutkowitz*, 9 NY3d 393 [2007]).

II. Defendant’s Motion for an Order to Compel plaintiff to provide trial authorizations, a further EBT of plaintiff, and a stay of the trial (Seq. No. 004)

A. Trial Authorizations

At the oral argument on July 25, 2024, plaintiff did not oppose the branch of defendant’s motion to provide authorizations from five sources within 5 days, and to provide authorizations and trial authorizations for the records of his current employer, which were memorialized in the conference order dated July 25, 2024.

The branch of defendant’s motion for trial authorizations for the records from PJS Construction Company, Oliveira Construction Company, and Creamer Environment Inc. (i.e., items 29, 30 and 31 of defendant’s demand dated March 27, 2024 [NYSCEF Doc. No. 77]), from the period from 2013 to the present, is denied.

Plaintiff provided defendant with trial authorizations for the release of records from January 1, 2017 to present (see plaintiff’s Exhibit A in opposition [NYSCEF Doc. No 96]). Although this was not responsive to the time period which defendant sought authorizations, defendant gave no rationale for the time frame requested to justify an order compelling plaintiff to provide the authorizations from 2013 to present.

The preliminary conference order directed plaintiff to provide authorizations for plaintiff’s employment records for “2 years prior to [date of accident] to 2 years post” (see NYSCEF Doc. No. 9), i.e., from June 10, 2016 to June 10, 2020. In the absence of any explanation as to why records from 2013 to present are being sought, and in absence of any proof that the records for that time period were previously provided during discovery, defendant is not permitted to conduct post-note of issue discovery under the guise of obtaining trial authorizations.

However, plaintiff is directed to provide, within 10 days, authorizations for trial purposes for the release of records from PJS Construction Company, Oliveira Construction Company, and Creamer Environment Inc. for the period from June 10, 2016 to present.

Similarly, the branch of defendant’s motion for trial authorizations from the sources set forth in items 8 through 26 of defendant’s demand dated March 27, 2024 [NYSCEF No. 77] is denied. At oral argument, defendant’s counsel claimed that plaintiff was involved in a motor vehicle collision on December 27, 2017, six months before the alleged incident in this case, and these records are sought to determine whether plaintiff’s alleged injuries were caused or aggravated by the prior motor vehicle collision. Because it appears that defendant did not seek these authorizations during the discovery phase, and defendant did not raise it in its motion to vacate the note of issue,

defendant is not permitted to conduct post-note of issue discovery under the guise of obtaining trial authorizations about the December 27, 2017 motor vehicle collision.

Finally, the branch of defendant's motion for a trial authorization from the workers compensation file from Glacier Bay, Claim No. 0131042651, for a November 8, 2004 accident (item 27 defendant's demand dated March 27, 2024 [NYSCEF No. 77]) is similarly denied, for defendant's failure to seek these records during discovery. The delay of the trial would outweigh the probative value of these records. Defendant has no offer of proof that the records from 20 years ago (assuming they still exist) would have any probative value.

B. A further EBT of plaintiff

Defendant is entitled to a further deposition of plaintiff with regard to lost future earnings.

Because plaintiff supplemented the bill of particulars as of right, CPLR 3043 (b) entitles defendant to exercise "any and all rights of discovery" with respect to such continuing special damages "upon seven days notice." Here, defendant noticed plaintiff's additional EBT on or about May 24, 2024, for a deposition scheduled on June 18, 2024 (see defendant's Exhibit Q in support [NYSCEF Doc. No. 83]). Thus, defendant is entitled to a further deposition of plaintiff with regard to lost future earnings (*Karanikolas v Elias Tavena, LLC*, 128 AD3d 905, 906 [2d Dept 2015] [court providently exercised discretion to compel plaintiff to submit to a further deposition on the issue of future lost earnings]).

In any event, it is undisputed that, after the note of issue was filed, plaintiff's physician indicated in a report dated December 20, 2023 that plaintiff "is now working as a safety inspector full time" (see defendant's Exhibit N in support of motion [NYSCEF Doc. No. 80]). Plaintiff's return to work—which was not disclosed nor supplemented prior to the filing of the note of issue—constitutes an unanticipated circumstance that warrant post-note of issue discovery (22 NYCRR 202.21 [d]). Plaintiff's return to work is relevant to the calculation of the plaintiff's future lost earnings.

Thus, the branch of defendant's motion to compel plaintiff to appear for a further EBT as to lost earnings is granted, and the additional EBT must be held on or before August 28, 2024, which was memorialized in the conference order dated July 25, 2024.

Upon the court's own initiative, the additional EBT is limited to four hours, and to damages claimed in the supplemental bill of particulars dated February 7, 2024 for lost earnings, and loss of future pension benefits. Defendant is also permitted to inquire about plaintiff's current employment, including the tasks and activities that plaintiff is required to perform or is part of plaintiff's job description.

C. A stay of the trial

The branch of defendant's motion for a stay of the trial is denied.

The basis for a stay of the trial was largely premised on the large number of trial authorizations for records which defendant sought. As discussed above, this court denied defendant's request for many of these trial authorizations. Moreover, plaintiff's additional EBT will be held on or before August 28, 2024, well before the current trial date of October 28, 2024.

However, should the records from any providers for whom trial authorizations were ordered remain outstanding, either side may make an application in Part 40 for an adjournment of the trial in contemplation of the receipt of those records.



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7/29/2024

DATE

RICHARD TSAI, J.S.C.

CHECK ONE:

SEQ. NO. 003

SEQ. NO. 004

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

OTHER

REFERENCE