

Franco v 800 E 173 LLC

2024 NY Slip Op 34713(U)

October 29, 2024

Supreme Court, Bronx County

Docket Number: Index No. 24580/2019E

Judge: Laura G. Douglas

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SCANNED BY COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 6

Elvin Franco,

Index No.

24580/2019E

-against-

Hon.

LAURA G. DOUGLAS
Justice Supreme Court

Justice Supreme Court

800 E 173 LLC,

The following papers numbered 1 to (3) were read on this motion (Seq. No. 3)
for Compel Deposition noticed on July 30, 2024
returnable

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s) <u>(1)</u>
Answering Affidavit and Exhibits	No(s) <u>(2)</u>
Replying Affidavit and Exhibits	No(s) <u>(3)</u>

Upon the foregoing papers, it is ordered that this motion ~~is~~ by the defendant is decided in accordance with the attached memorandum Decision/Order.

Dated:

Dated: 10-29-24

Hon.

LgJ

LAURA G. DOUGLAS
Justice Supreme Court

, J.S.C.

- HECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- HECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SCANNED TO
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 24580/2019E

ELVIN FRANCO,

Plaintiff,

-against-

800 E 173 LLC,

Defendant.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J. S. C.

Part 6

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion to compel deposition (seq. no. 3):

Papers

Numbered

Defendant’s Notice of Motion, Good Faith Affirmation of Kelly Griffin-Fromm, Esq. dated July 12, 2024, Affirmation of Kelly Griffin-Fromm, Esq. dated July 12, 2024 in Support of Motion, Exhibits (“A” through “F”), and Supplemental Affirmation of Kelly Griffin-Fromm, Esq. dated July 26, 2024 in Further Support of Motion..... 1

Affirmation of Paul H. Seidenstock, Esq. dated August 29, 2024 in Opposition to Motion..... 2

Reply Affirmation of Kelly Griffin-Fromm, Esq. dated September 12, 2024..... 3

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendant (“800 E”) seeks an order compelling the plaintiff (“Franco”) to submit to a further deposition. The motion is granted.

Franco seeks monetary damages for personal injuries allegedly sustained on December 23, 2018 when he purportedly slipped and fell on stairs located at premises owned and/or operated by 800 E. Franco was deposed on March 29, 2021. The basis for a further deposition is that certain of the physicians and medical offices which rendered treatment to Franco following his accident have recently been named as defendants in a civil action brought pursuant to the Racketeer Influenced and Corrupt Organizations Act (“RICO”) in the United States District Court for the Eastern District of New York.

The RICO complaint alleges that these medical providers conspired to defraud millions of dollars through nonexistent or illegitimate physical examinations of tort plaintiffs and medically unnecessary injections and surgeries performed at specific ambulatory surgery facilities, thereby enriching the patients' tort attorneys. 800 E avers that it only recently became aware of the RICO action, which was filed on March 1, 2024 some three years after Franco was deposed. 800 E served a notice of deposition on or about June 28, 2024 and then moved promptly for enforcement via the instant motion. Under these circumstances, 800 E maintains that Franco cannot complain of unfair prejudice or surprise by having to submit to a further deposition. Franco has refused to appear.

800 E contends that a further deposition may reveal additional information about Franco's treating physicians and the treatment that he actually received. 800 E believes that it should be afforded an opportunity to confirm or dispute the veracity of Franco's allegations, particularly since his treatment protocols are similar to those described in the RICO complaint. 800 E claims that it would be unduly prejudiced if denied the opportunity to probe these newly raised doubts as to the necessity and extent of Franco's claimed medical treatment.

800 E notes that this further deposition was made more relevant by the filing of a second RICO case on July 19, 2024 against Franco's attorney in this action. That RICO action alleges that Franco's attorneys engaged in a fraudulent scheme by filing and prosecuting hundreds of fraudulent personal injury lawsuits. In part, 800 E desires to probe conversations between and information shared by Franco and his attorneys related to this allegedly fraudulent scheme, which would arguably not be shielded by the attorney-client privilege or the work-product doctrine under the crime-fraud exception. In addition, Franco may possess documents or information that reveal that his attorneys and/or treating physicians have not been truthful and have misled the defendant in this action.

In opposition, Franco argues that the reasons stated for a further deposition are simply speculative and spurious. Franco notes that his medical records are available to 800 E, who can cross-examine the health care providers at trial about their veracity. Franco contends that the material sought to be obtained through this additional deposition is not material and necessary to the defense of this particular action.

Under these circumstances, Franco must submit to a further deposition. Since the basis for seeking Franco's further deposition only came to light recently, and well after his original deposition, 800 E cannot be said to have been dilatory in pursuing this additional disclosure. Moreover, Franco

does not deny that he availed himself of the services of several of the defendants named in the RICO actions. As a patient of the accused medical providers and the client of the accused attorneys, Franco is likely to possess information that would assist in a defense that his medical treatment was exaggerated or unnecessary. For example, Franco may reveal conversations with his medical care providers and/or attorney(s) regarding instructions and explanations for inflated medical treatment and/or procedures or his understanding that this was occurring. Such questioning is reasonably calculated to yield information bearing on the merits of Franco's claims in this action. Information sought for use in rebuttal or for cross-examination is considered evidence discoverable as material to the litigation (*see Keith v. Forest Laboratories, Inc.*, 72 AD3d 519 [1st Dept 2010]). How Franco chooses to respond to these lines of questioning is up to him and his attorney. However, the attorney-client privilege set forth in CPLR 4503 cannot be invoked where the subject communications may have been in furtherance of a fraudulent scheme or other wrongful conduct (*see Art Capital Group LLC v. Rose*, 54 AD3d 276 [1st Dept 2008]).

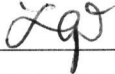
For these reasons, the motion is granted.

Accordingly, it is hereby

ORDERED that the plaintiff shall submit to a further examination before trial no later than December 13, 2024.

The foregoing constitutes the Decision/Order of this Court.

DATED: October 29, 2024
Bronx, New York



HON. LAURA G. DOUGLAS
J.S.C.