

Cooke v Greenhouse Hudson, LLC
2024 NY Slip Op 35549(U)
November 12, 2024
Supreme Court, Columbia County
Docket Number: Index No. E012022018190
Judge: Richard L. Mott
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF COLUMBIA

ERIN GOLDMAN COOKE,

Plaintiff,

-against-

GREENHOUSE HUDSON, LLC; GREEN STREET
FLORAL, LLC; JENNIFER MOJO, individually as
aider and abettor; and DAVID MOJO, individually as
aider and abettor,

Defendants.

DECISION/ORDER

Index #: E012022018190

Richard Mott, J.S.C.

GREEN STREET FLORAL, LLC,

Third-Party Plaintiff,

-against-

ERIN GOLDMAN COOKE,

Counterclaim Defendant,

-and-

DARRYN COOKE,

Third-Party Defendant.

Motion Return Date:

October 7, 2024 (Motion seq. # 13)

APPEARANCES:

Plaintiff and Third-party Defendant:

Carlo A.C. deOliveira, Esq.
Cooper, Erving & Savage LLP
20 Corporate Woods Boulevard, Suite 501
Albany, NY 12211

Defendants:

Edward J. Phillips, Esq.
Robert C. Zitt, Esq.,
Keane & Beane, P.C.
Attorneys for Defendants and Third-party Plaintiff
445 Hamilton Avenue, Suite 1500
White Plains, NY 10601

Mott, J.

This action arises from the July 2021 sale of a retail flower shop (hereinafter “the Shop”) and the real estate upon which the Shop is situated, from Plaintiff, Erin Goldman Cooke, who owned same with her husband, Third-Party Defendant, Darryn Cooke, to Defendants, Jennifer and David Mojo. By Decision/Order dated September 9, 2024, this Court denied Defendants’ motion to strike the Note of Issue without prejudice and with leave to resubmit, because Defendants had raised an issue in their reply papers to which Plaintiff was unable to respond.

Cooke asserts causes of action based on discrimination, failure to provide a reasonable accommodation of her disability, and retaliation pursuant to New York’s Human Rights Law (Executive Law Article 15). An element of her damages claim is for emotional distress. The prior motion alleged that two doctors identified in Cooke’s Expert Witness Disclosure had examined her but had not been previously disclosed, depriving the Mojos of an opportunity to subpoena their records. The Mojos have now resubmitted their motion to strike the Note of Issue. Cooke opposes.

BACKGROUND

As part of the sale, Cooke agreed to manage the day-to-day operations of the Shop because the Mojos were residing in Seattle, WA, and could not move to New York until June 2022. Cooke and the Mojos executed a post-closing Employment Agreement in September 2021 which provided that Cooke would work a minimum of 30 hours per week as an “at will” employee through June 30, 2022.

In December 2021, Cooke advised the Mojos that she suffered from asthma, anemia, and a blood disorder, rendering her more susceptible to COVID-19. Cooke requested reasonable accommodations in the form of a socially distanced workstation and permission to work from home. The Mojos agreed to some accommodations, including a plexiglass divider at the front

register, vaccination requirements for employees and a mask requirement for customers. They denied Cooke's request to work at home because essential functions of her employment required her physical presence in the Shop.

In February 2022, the Mojos unilaterally removed the plexiglass divider and other COVID-19 safety measures. Consequently, Cooke advised them on February 12, 2022, that she was terminating her employment effective February 14, 2022.

DEFENDANTS' CONTENTIONS

The Mojos claim that Cooke's Expert Witness Disclosure identifies three health care providers who have treated her, including the two at issue herein, Dr. Jocelyn Celestin and Dr. Jacqueline Bashkoff. They claim that these two doctors were not identified during discovery. Their First Set of Interrogatories to Cooke requested disclosure of all of Plaintiff's medical and psychological health care providers for the past ten years. The interrogatories were served May 13, 2023. Cooke's response identified 6 health care providers but did not include Doctors Celestin and Bashkoff.

As a result of this alleged omission, the Mojos assert they have been deprived of "an opportunity to subpoena records from either Dr. Bashkoff or Dr. Celestin as related to their treatment and evaluation of Plaintiff". Cooke has asserted claims which place her physical and emotional health in issue. Thus, the medical records they seek to obtain from the two doctors are material and relevant to the claims in this action. They were able to obtain such disclosure from Cooke's identified health care providers, but they will be prejudiced if they are not afforded an opportunity to obtain medical records from the two additional doctors.

PLAINTIFF'S CONTENTIONS

Cooke argues that the Interrogatory was correctly answered because it sought the identification of all health providers who treated her for the 10 years prior to the date of the Demand, May 13, 2022. She did not begin seeing Dr. Celestin until August 1, 2023, and thus the visit falls outside of the timeframe of the Interrogatory. Cooke further asserts that Dr. Celestin treated Plaintiff only for allergy symptoms, not her asthma, and such treatment is unrelated to the claims herein. Cooke intends to call Dr. Celestin to testify “about [Cooke’s] asthma conditions and how such conditions required special attention and accommodations during the COVID-19 pandemic”. She claims that Dr. Celestin’s “treatment of Plaintiff of allergy symptoms, while monitoring her asthma after Plaintiff’s termination, has no relevancy as to whether in 2021 and 2022 it was the standard of care in the medical community to advise patients with asthma to avoid exposure to COVID-19. The Mojors have in their possession all of Plaintiff’s medical records related to her asthma diagnosis and treatment during the relevant period in the Complaint, September 2021 through February 2022.

As to Dr. Bashkoff, Cooke argues that the Mojors’ request to strike the Note of Issue runs contrary to this Court’s previous Decision/Order, which found the Expert Witness disclosure was timely under the Third Judicial District’s rule and that there was no claim that said disclosure was insufficient.

DEFENDANTS’ REPLY

The Mojors assert that CPLR § 3101(h) requires that Cooke amend or supplement a response previously given to a request for disclosure promptly upon the party’s thereafter obtaining information that the response was incorrect or incomplete when made, or that the response, though correct and complete when made, no longer is correct and complete.

DISCUSSION/MOTION TO STRIKE THE NOTE OF ISSUE

“While a note of issue will generally be stricken if the case is not ready for trial, the motion to strike can be denied where the parties had sufficient time to complete discovery (*see Simmons v Kemble*, 150 A.D.2d 986, 987, 541 N.Y.S.2d 875 [1989]; *Bycomp, Inc. v New York Racing Assn.*, 116 A.D.2d 895, 498 N.Y.S.2d 274 [1986]). To vacate the note of issue, discovery requests must be legitimate and pending (*see Tilden Fin. Corp. v Muffoletto*, 161 A.D.2d 583, 555 N.Y.S.2d 161 [1990]), not resolved or contrived.” *Ireland v. GEICO Corp.*, 2 A.D.3d 917, 917-918 (3d Dept., 2003); *Jablonsky v Nerlich*, 189 AD3d 1561, 1563 (3d Dept., 2020).

With respect to Dr. Celestin, although a referral was made on December 5, 2013, for Cooke to see Dr. Celestin to address a question of a rash/food allergy, Cooke has averred that she did not treat with him until after the period specified in the Interrogatory. Thus, the Court agrees that Cooke responded to the Interrogatory, as phrased, accurately at the time.

Nonetheless, Cooke’s Expert Witness Disclosure states that Dr. Celestin “will testify to his examinations and treatment of the Plaintiff” which differs from the description of his anticipated testimony provided on this motion. The disclosure further states that Dr. Celestin will “testify about the effects of such asthma on Plaintiff’s health, and the capabilities and/or limitations of the Plaintiff and/or the absence thereof.”

With respect to Dr. Bashkoff, the Expert Witness Disclosure states that she will testify as to her examination and diagnosis of Cooke, as well as her prognosis and need for continued treatment. Dr. Bashkoff’s testimony is anticipated to establish “a causal relationship between the current health conditions of Plaintiff and her employment with the Defendants”. She is expected to testify to a diagnosis of Adjustment Disorder with Mixed Anxiety and Depression. Clearly, Dr. Bashkoff is expected to establish Cooke’s emotional distress damages.

Contrary to Cooke's argument, the Court's previous Decision/Order did not preclude the Mojors from moving to vacate the Note of Issue relative to Dr. Bashkoff. The prior Decision/Order simply found the disclosure to be timely under the Third District Expert Disclosure rule. The previous Decision/Order denied the motion to strike the Note of Issue without prejudice, which applies to both Dr. Celestin and Dr. Bashkoff. Under these circumstances, the Court finds that CPLR § 3101(h) is relevant. It provides that when a response to a discovery demand is correct and complete when made but no longer is correct and complete, and the circumstances are such that a failure to supplement would be materially misleading, the party shall amend or supplement the response.

A trial court has broad discretion to supervise discovery and determine what is "material and necessary". See, *Murphy v Hamilton*, 90 AD3d 1294, 1295 (3d Dept., 2011). As Cooke's Expert Witness Disclosure indicates that the doctors will testify as to examinations and treatment for health conditions relevant to Cooke's claims, she should have supplemented her answer to the Interrogatory. The Court finds the Mojors are entitled to the specific disclosure they are seeking, which is to be able to subpoena the records from the two doctors. To accomplish this, all that is required is for Cooke to provide duly executed medical authorizations allowing the Mojors access to the records. The Mojors can then subpoena the records. The Court, in the exercise of its discretion, declines to strike the Note of Issue under these circumstances.

Accordingly, it is hereby

ORDERED, that Cooke is to provide the Mojors duly executed medical records authorizations for Drs. Celestin and Bashkoff within one week of the date of this Decision/Order; and it is further

ORDERED, that the motion to strike Cooke's Note of Issue is denied.

This matter remains scheduled for trial commencing with jury selection on February 3, 2025. A settlement conference remains scheduled for January 7, 2025 at 1:00 PM.

This shall constitute the Decision/Order of the Court. The Court is e-filing the original of this Decision/Order, relieving the parties of their obligations, pursuant to CPLR § 2220, regarding filing and entry of same but that does not relieve the parties of their obligations, if any, regarding service of same with notice of entry thereon.

ENTER



Dated: November 12, 2024
Hudson, NY

Richard Mott, J.S.C.

Papers considered:

1. Notice of Motion dated September 18, 2024; and Affirmation of Edward J. Phillips, Esq., in Support, dated September 18, 2024, with Exhibits A-D.
2. Affirmation of Carlo A.C. deOliveira, Esq., in Opposition, dated September 20, 2024, with Exhibit A; and Affirmation of Erin Goldman Cooke in Opposition, dated September 20, 2024, with Exhibit 1; and Memorandum of Law in Opposition.
3. Reply Affirmation of Robert C. Zitt, Esq., dated October 5, 2024.