

Herrera v Boston Culinary Group, Inc.
2024 NY Slip Op 35550(U)
May 14, 2024
Supreme Court, Ulster County
Docket Number: Index No. EF2020-1345
Judge: Julian D. Schreibman
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STATE OF NEW YORK
SUPREME COURT

ULSTER COUNTY

KRISTEN M. HERRERA, AND HER HUSBAND, LUIS E.
HERRERA,

Plaintiff,

-against-

Decision & Order
Index No.: EF2020-1345

BOSTON CULINARY GROUP, INC. AND KEVIN E.
ZARAGOZA,

Defendants.

Supreme Court, Ulster County
Motion Return Date: May 13, 2024

Present: Julian D. Schreibman, JSC

Appearances:

Basch & Keegan LLP
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By: Thomas W. Comer, Esq.

Schreibman, J.:

This case is scheduled to be tried to a jury commencing May 20, 2024. Now pending before the Court are several motions *in limine* brought on by defendants Boston Culinary Group, Inc. and Kevin E. Zaragoza. They are disposed of as follows:

1. Lost Earnings/Lost Future Earning Capacity

Defendants contend that plaintiff Kristen Herrera lacks proof to sustain her claim for loss of future earnings or lost earnings capacity. This argument is addressed to the sufficiency of the evidence and amounts to an argument for summary judgment framed as a motion *in limine*. (No

summary judgment motion was brought.) The defendants may well be right and they may be entitled to keep such damages off the verdict sheet, but that determination should abide the presentation of evidence. The motion is denied without prejudice to a motion at the conclusion of the plaintiff's case.

2. 2016 Brain MRI

Plaintiff Kristen Herrera was given an MRI of the brain in 2016, approximately two years prior to the incident that is the subject of this lawsuit in which she seeks damages for, *inter alia*, traumatic brain injury. The 2016 MRI was not disclosed by the plaintiff¹ until this litigation had been in progress for years and not until several months had passed since the filing of the Note of Issue.

Defendants now move to preclude plaintiff from asserting claims of traumatic brain or neurological injury due to her failure to timely disclose the 2016 MRI or to timely facilitate defendants' investigation of her medical records in connection therewith. Alternatively, defendants seek either a spoliation charge or a missing documents charge.

While defendants' discovery demand for medical authorizations and medical information focused primarily on the subject incident, it did include a request to produce authorizations for "any physician or other health care provider . . . which may have examined or treated [the plaintiff] . . . for any condition or injury to the plaintiff" within the five-year period preceding the incident.² Plaintiffs did not object to this demand and should have made a diligent effort to identify such health care providers in response to this demand. Such an effort should have identified the 2016 MRI and any associated records.

¹ Unless otherwise specified, singular references to "plaintiff" herein are to plaintiff Kristen Herrera.

² Defendants' motion does not actually reference this demand, instead claiming that the 2016 MRI was responsive to its demand for treatment records in connection with the subject incident. The 2016 MRI is plainly not responsive to that demand and need not have been produced in response thereto.

There is nothing in the record, however, to suggest that plaintiffs' omission of this record was willful. Furthermore, plaintiffs' counsel notes that his client's mental condition itself has interfered with the ability to comprehensively assemble records.

Defendants argue that willfulness should be inferred because plaintiffs purportedly "expressly and routinely denied" any prior "treatment for plaintiff's brain and/or treatment for headaches." In their reply brief, defendants reiterate that plaintiff supposedly "completely denied any prior treatment" prior to disclosing the 2016 MRI. This allegation against the plaintiff is unsupported. In making this claim – repeatedly in their motion papers – the defendants do not cite to the record. The closest defendants come is to state that "at deposition, plaintiff denied any prior brain injury." Indeed, at deposition defense counsel asked plaintiff whether she "ever had a prior brain related injury" and she answered "no." This is not, however, inconsistent with the 2016 MRI which expressly states on its face that plaintiff was not being examined due to an injury. Defense counsel did not ask plaintiff whether she suffered from headaches prior to the incident, did not ask if she'd ever sought treatment relating to anything about her head or brain and did not, beyond that single question, inquire into plaintiff's brain-related medical history. No variation of the word "treat" or "treatment" was even used at her deposition. Other than the single question about a brain "injury," defendants do not appear to have explored plaintiff's medical history at all. As she was never asked, nothing plaintiff said at her deposition contradicted or denied seeking treatment for non-trauma induced headaches. Defendants' claim that during this litigation plaintiff "completely denied any prior treatment" appears to be entirely baseless.

Nor does the Court see any prejudice to the defendants in this regard. Trial was adjourned following the disclosure to facilitate further inquiry. Moreover, the MRI report reflects a "normal" result, so that there is no reasonable basis to conclude that plaintiff received prior treatment that would be relevant to this case. Defendants' reliance on *Davidson v Steer/Peanut Gallery*, 277

AD2d 965 [4th Dept. 2000], is misplaced: that case involved the failure to disclose records of doctors who examined the injury that was the subject of the lawsuit. Ultimately, there is no basis to dismiss plaintiff's claim – which has been the subject of extensive discovery – on the grounds that plaintiffs belatedly identified and disclosed an unrelated, prior MRI.

Accordingly, the Court denies defendants' motion to preclude plaintiff's brain injury claim.

In the alternative, defendants seek a spoliation instruction. Defendants have not identified anything that has been spoliated. Similarly, defendants have not identified what documents may have been negligently withheld to support an adverse inference charge. Thus, defendants have not established a basis on which the Court should exercise its discretion and grant the requested relief. (*See generally Weiss v Bellevue Maternity Hosp.*, 121 AD3d 1480 [3rd Dept. 2014]). Accordingly, the alternative relief is also denied, without prejudice to an application at trial should evidence of spoliation or negligent non-disclosure be developed.

Although defendants do not formally ask for this relief, their motion papers also argue that the plaintiff's expert should be precluded from offering an opinion because of his failure to examine the 2016 MRI test results. According to the defendants, this failure renders plaintiff's expert's conclusion speculative. But defendants' argument is itself speculative by suggesting that the 2016 MRI contains evidence of a prior injury or degenerative condition when in fact the 2016 MRI report, on its face, is entirely negative for any findings.

3. Recorded Conversation

Defendants seek preclusion of an audio recording purportedly made by one of the plaintiffs immediately following the incident when they spoke with defendant Zaragoza and his manager. As part of their formal discovery demands, served in February 2021, the defendants demanded production of "tape recordings, or other recorded communications of or by Defendant in your

possession.” Plaintiffs’ response, served in March 2021, expressly stated, “We have no written statements or recorded statements.”

The audio recording was first produced by the plaintiffs in December 2023. Plaintiffs essentially concede that they did not identify the recording until conducting their own trial preparation. This is not an acceptable answer or excuse for the delay. Plaintiffs were under an obligation to conduct a reasonably diligent search for responsive records. A contemporaneously made recording is a fairly obvious item to identify and produce. While plaintiffs point out that plaintiff Luis Herrera testified to the substance of the conversation at his deposition, he made no mention of recording it such that defendants could have been alerted to the possible existence of a recording.

Further, the Court agrees with defendants that they have not had the opportunity to properly investigate the recording’s provenance or accuracy. It is represented to the Court to be somewhat unclear, as confirmed by plaintiffs’ counsel’s attempted transcription.³

Having reviewed plaintiffs’ summary transcript of the recording, it is not obvious to the Court why the defendants want to suppress this evidence. Nevertheless, that is the remedy they have asked for and to which the Court concludes they are entitled. The motion to preclude the audio recording is granted.

4. Day in the Life

Plaintiffs, aided by their daughter, have apparently prepared a video montage titled “A Day in the Life” purporting to illustrate plaintiff Kristen Herrera’s daily experiences. Defendants state – and plaintiffs do not contest – that the nearly-three-minute video has been compiled from many

³ The Court has been provided with a compact disc containing this audio recording. The Court does not have the technical means to listen to a compact disc. Based on the thorough briefing, the Court has not found this to be an impediment to deciding the motion.

other videos over a multi-year period and contains a voice-over by the plaintiffs' adult daughter. The video was not disclosed until October 2023, long after discovery had closed.

The video suffers from numerous evidentiary defects, not least of which being the fact that it implies the existence of numerous other, lengthier videos from which segments, presumably favorable to the plaintiff, have been culled. Even had this been timely produced, the defendants would be entitled to production of all of the video footage in the plaintiffs' possession. Under these circumstances, cross-examination at trial is not a sufficient remedy. As this short montage is not the complete record, and as the complete record has not been produced, the video is not admissible. For the same reasons, the video is not a proper demonstrative exhibit and, in any event, has been produced well after Court-ordered discovery deadlines have passed.

Accordingly, the motion to preclude "A Day in the Life" is granted.

5. Loss of Services

Defendants assert that there is insufficient evidence to support plaintiff Luis Herrera's claims for loss of services, financial aid and for medical and other expenses. Defendants therefore seek dismissal of such claims. As with the claims regarding lost earnings, the Court will not adjudicate the sufficiency of the evidence on a motion *in limine*. Notably, defendants did not move for summary judgment. Defendants may, however, raise this argument at trial upon the close of plaintiff's case. Regarding the claim for loss of consortium, plaintiffs concedes that Luis Herrera may only recover such damages through the date of plaintiffs' divorce and the evidence presented must accordingly be limited to that timeframe.

Any arguments not specifically addressed herein have been considered by the Court and found to be unavailing, rendered academic, or unnecessary to reach at this juncture. Accordingly, based on the foregoing, it is hereby

ORDERED that the defendants' motion to dismiss, or preclude presentation of evidence in support of, plaintiffs' claims for damages related to lost earnings and/or lost future earning capacity; traumatic brain injury and neurological injury; loss of services and for financial aid, medical and other expenses is DENIED; and it is further

ORDERED that defendants' motion for a spoliation or missing document instruction is DENIED without prejudice; and it is further

ORDERED that defendants' motion to preclude introduction of an audio recording of a conversation between plaintiffs, defendant Zaragoza and his supervisor is GRANTED; and it is further

ORDERED that defendants' motion to preclude introduction of the "Day in the Life" video is GRANTED; and it is further

ORDERED that any relief not expressly granted herein is denied.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being filed with the Ulster County Clerk via NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: May 14, 2024
Kingston, New York

ENTER,


JULIAN D. SCHREIBMAN, JSC

Papers considered: Notice of Motion in Limine and Affirmation in Support by Thomas W. Comer, Esq. dated February 8, 2024, with Exhibits A-N; Affidavit by Eli B. Basch, Esq. dated February 15, 2024, with Exhibits A-I; and Reply Affirmation in Further Support by Thomas W. Comer, Esq. dated February 19, 2024.