

Carothers v New York City Tr. Auth.

2025 NY Slip Op 31039(U)

April 1, 2025

Supreme Court, New York County

Docket Number: Index No. 151076/2021

Judge: Lisa S. Headley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY PART 28

Justice

-----X

MICHAEL CAROTHERS,

Plaintiff,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY, MTA
CAPITAL CONSTRUCTION, CITY OF NEW YORK, MLJ
CONTRACTING CORP.

Defendant.

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INDEX NO. 151076/2021

MOTION DATE 10/08/2024

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70 were read on this motion to/for DISCOVERY.

In the Complaint, the plaintiff, Michael Carothers ("plaintiff"), alleges that he sustained serious injuries, as a result of the construction accident that occurred on July 2, 2020, while performing work at the MTA Chambers Street Station in New York, New York ("subject premises"). At the time of the accident, the plaintiff worked as a Union Structural Steel Ironworker employed by non-party, Tyrek Heights ("Tyrek"), to perform various steel duties at the subject premises. Plaintiff claims that when he was performing work on an elevator shaft, he was caused to slip and fall on debris, lost his balance and fell into a shaft opening. Plaintiff alleges that he fell down four to five feet and landed at the bottom of the elevator shaft. As a result of the incident, the plaintiff claims he had three surgeries and has been rendered disabled.

Before the Court is the motion filed by defendants, The New York City Transit Authority ("NYCTA"), Metropolitan Transportation Authority ("MTA"), MTA Capital Construction ("MTACC"), City of New York ("CNY"), MLJ Contracting Corp. ("MLJ") (collectively referred to as "defendants") for an Order, pursuant to 22 NYCRR 202.21(d), granting the defendants leave of the Court to conduct post-Note of Issue discovery. In addition, the defendants seek an Order, pursuant to CPLR §§3101, 3042, 3124 and 3126, compelling the plaintiff to appear for specific radiological examinations, including MRIs and X-Rays. Plaintiff filed opposition, and the defendants filed a reply.

In support of the motion, the defendants argue, *inter alia*, that the Court has discretion to allow post-Note of Issue discovery due to the unusual and unanticipated circumstances of a Racketeer Influenced & Corrupt Organizations Act ("RICO") lawsuit filed against the Plaintiff's treating physicians, who were accused of fraud and knowingly engaged in practices aimed at

subjecting patients to unwarranted medical procedures under the guise of workplace-related injuries. Specifically, the defendants argue that the physicians who evaluated plaintiff were accused of fraud for evaluating patients, performing medically unnecessary procedures and determining false positive findings on MRI reports and submitting fraudulent claims. (*See, NYSCEF Doc. No. 50, Exhibit J*).

In opposition, plaintiff argues the defendants' application for an Order to compel the plaintiff to undergo an independent medical evaluation ("IME") of his radiological examinations is substantially defective because the defendants' request was served five months after the filing of the Note of Issue, which is well beyond the time period set forth in the Court's orders. (*See, NYSCEF Doc. No. 62, Exhibit 7, Preliminary Conference Order*). Plaintiff also argues that the defendants have not demonstrated the legal necessity required to compel plaintiff to undergo eighteen separate radiological examinations after plaintiff has already appeared for four separate IMEs from Defendants' own IME doctors. Plaintiff asserts that the authorizations for all radiological studies have been freely provided and relied upon by the defendants' IME doctors, who have already conducted an independent examination of the plaintiff. (*See, NYSCEF Doc. No. 55*).

22 NYCRR 202.21(d)

Pursuant to 22 NYCRR 202.21(d), "the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems appropriate. Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." *See, 22 NYCRR 202.21(d)*.

In this case, plaintiff filed the Note of Issue on December 22, 2023. (*See, NYSCEF Doc. No. 66; see also, Exhibit 11*). Defendants subsequently filed this motion seeking post-Note of Issue discovery on July 17, 2024. (*See, NYSCEF Doc. No. 38*). Defendants assert that on March 1, 2024, the pending RICO lawsuit was filed against the plaintiff's spine surgeon Andrew Merola, MD, plaintiff's right ankle arthroscopy performed by Jeffrey Kaplan, MD, and pre-operative imaging performed at Lenox Hill Radiology and Kolb Radiology by Thomas Kolb, MD. (*See, NYSCEF Doc. Nos. 40 and 50, Exhibit J*). The Uniform Rules for the Trial Courts provide two distinct methods for obtaining disclosure after a note of issue is filed. (*See 22 NYCRR 202.21[d], [e]; Audiovox Corp. v. Benyamini, 707 N.Y.S.2d 137 [2000]*).

Pursuant to the Uniform Rules for Trial Courts (hereinafter the Uniform Rules) (22 NYCRR § 202.21(d)), provides, in pertinent part:

"Where unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." *Id.*

Defendants submit that the pending RICO lawsuit filed on March 1, 2024, in the United States District Court for the Eastern District of New York, against the plaintiff treating doctors and their medical facilities, alleges, *inter alia*, fraud. Defendants contend that two of plaintiff's treating doctors have falsely evaluated patients and performed medically unnecessary procedures. The doctors named in the pending RICO lawsuit were plaintiff's spine surgeon Andrew Merola, MD, Plaintiff's right ankle arthroscopy performed by Jeffrey Kaplan, MD, and pre-operative imaging performed at Lenox Hill Radiology and Kolb Radiology by Thomas Kolb, MD.

Defendants argue that since the RICO lawsuits are related to the plaintiff's treating physicians, further discovery is necessary to prevent prejudice to the defendants. Further, the defendants argue that the plaintiff must participate in additional post-note discovery, including independent medical examinations and MRIs and X-rays of the areas where the plaintiff claims he was injured and to verify the examinations performed by plaintiff's spine surgeon Andrew Merola, MD, Plaintiff's right ankle arthroscopy performed by Jeffrey Kaplan, MD, and pre-operative imaging performed at Lenox Hill Radiology and Kolb Radiology by Thomas Kolb, MD. Specifically, the plaintiff's treating doctors, Andrew Merola, MD, Jeffrey Kaplan, MD, and Thomas Kolb, MD, treated or performed the MRIs and x-rays of the plaintiff's head, cervical, lumbar and thoracic spine, right shoulder, and right hip.

In support of the motion, defendants submit the affirmations of David E. Lent, MD (*See, NYSCEF Doc No. 51, Exhibit K*) and Jared F. Brandoff, MD (*see, NYSCEF Doc No. 52, Exhibit L*), who opine that the MRI and X-rays of plaintiff are non-invasive and can be performed at the same facility on the same day, and the post note examinations are necessary to defendants' case.

Based on the foregoing argument, this Court finds the defendants have demonstrated an unusual or unanticipated circumstance warranting vacatur of the note of issue more than six months after it was served upon Defendants in accordance with 22 NYCRR 202.21(d). Specifically, the claims asserted in the RICO lawsuit that the plaintiff's treating physicians have provided false reports to support work-related accident claims supports the defendants' motion to seek further discovery. Here, the defendants submit the pending RICO lawsuit filed against 46 individuals and companies, including doctors, lawyers, and healthcare providers. (*See, NYSCEF Doc No. 50, Exhibit J*). The Rico lawsuit is based upon allegations that doctors and their staff knowingly engaged in practices aimed at subjecting claimants to unwarranted medical procedures under the guise of workplace-related injuries. Defendants assert the two doctors Andrew Merola, MD, and Jeff Kaplan, MD, who performed surgery on Plaintiff since the accident are alleged to have falsely evaluated patients and performed medically unnecessary procedures. Additionally, Thomas Kolb, MD, and Lenox Hill Radiology allegedly identified false positive findings on MRI reports and submitted fraudulent claims.

In *Diagne v. J.T.S. Trucking*, the Court held that the resignation of Plaintiff's expert accident reconstructionist following the filing of the note of issue ... is sufficient demonstration of an unusually or unanticipated circumstance within the meaning of 22 NYCRR 202.21(d), and the Court held that "the showing of substantial prejudice ... would arise in the absence of this requested discovery." *Diagne v. J.T.S. Trucking*, 134 A.D.3d 558 (1st Dep't 2015). Similarly, this

Court finds that the RICO fraud case involving the plaintiff's treating physicians creates a very unusual and unanticipated circumstance that requires further discovery. Accordingly, the defendants' motion for leave of court to conduct post-Note of Issue discovery is granted.

CPLR §3101

In the motion, the defendants seek to compel the plaintiff to appear for specific radiological examinations, including MRIs and X-Rays. Pursuant to *CPLR §3101*, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party[.]" *See, CPLR §3101*.

Here, the defendants have demonstrated that the physicians Andrew Merola, MD, Jeff Kaplan, MD, and Thomas Kolb, MD who treated Plaintiff are named defendants in the RICO lawsuit based on the plaintiff's 50h transcript (*See, NYSCEF DOC No. 44, Exhibit D*), the pending RICO lawsuit (*See, NYSCEF Doc. No. 50, Exhibit J*), the affirmation of David E. Lent, MD (*See, NYSCEF Doc. No. 51, Exhibit K*) and the affirmation of Jared F. Brandoff, MD (*See, NYSCEF Doc. No. 52, Exhibit L*). The defendants have demonstrated that additional discovery, post-note of issue, is necessary in order to obtain full disclosure of all matters material in this case. As such, the defendants' motion seeking deposition of the plaintiff, pursuant to *CPLR § 3101*, is granted.

CPLR §3042(a) and CPLR §3124

CPLR §3042(a) states, in pertinent part that:

"[w]ithin thirty days of service of a demand for a bill of particulars, the party on whom the demand is made shall serve a bill of particulars complying with each item of the demand, except any item to which the party objects, in which event the reasons for the objection shall be stated with reasonable particularity. The assertion of an objection to one or more of the items in the demand shall not relieve the party on whom the demand is made from the obligation to respond in full within thirty days of service of the demand to the items of the demand to which no objection has been made."

See, CPLR §3042.

CPLR §3124 states, "if a person fails to respond or comply with any request, notice, interrogatory, demand, or question...the party seeking disclosure may move to compel compliance or a response." *CPLR §3124*. A party may move to compel further discovery under this provision when the movant demonstrates that it has made a "good faith effort to bring about a non-judicial resolution to any remaining discovery disputes." *Barber v. Ford Motor Co.*, 250 A.D.2d 552, 553 (1st Dep't 1998). "While the disclosure provisions of the CPLR are ordinarily to be construed liberally, the scope of permissible discovery is not entirely unlimited, and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as that phrase is used in *CPLR 3101(a)*." *Auerbach v. Klein*, 30 A.D.3d 451, 452 (2d Dep't 2006). Here, the Court has determined hereinabove that additional discovery would be necessary given the RICO litigation that involves plaintiff's treating doctors, and the palpability of fraud in the

doctor's treatment and findings. As such, the Court is within its discretion, and hereby compels plaintiff to submit to additional medical examinations and MRIs and X-rays of the plaintiff's head, cervical, lumbar and thoracic spine, right shoulder, and right hip.

Accordingly, it is hereby

ORDERED that the portion of the Defendants, The New York City Transit Authority, Metropolitan Transportation Authority MTA Capital Construction, City of New York, MLJ Contracting Corp's motion pursuant to 22 NYCRR 202.21(d), requesting the Defendants leave of court to conduct post-Note of Issue discovery of Plaintiff Michael Carothers, is GRANTED; and it is further

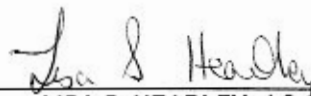
ORDERED that the portion of the Defendants' motion pursuant to CPLR §§3101, 3042, 3124 and 3126, compelling the Plaintiff to appear for specific radiological examinations, including MRIs and X-Rays GRANTED; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this Decision/Order upon all parties with notice of entry.

4/1/2025

DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: