

Breton v Dishi

2025 NY Slip Op 31536(U)

April 23, 2025

Supreme Court, New York County

Docket Number: Index No. 157760/2016

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

LEIDY BRETON,

Plaintiff,

- v -

AVI DISHI,

Defendant.

-----X

INDEX NO. 157760/2016

MOTION DATE 03/04/2025

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 252, 253, 254, 255, 256, 257, 258, 259, 260, 262, 263, 264, 265, 266

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

This is a premises liability action to recover for alleged personal injuries purportedly suffered by plaintiff when she was struck by a falling ceiling in the apartment she sublet in defendant’s building. Plaintiff filed a Note of Issue in March 2021. Defendant moved for summary judgment dismissing the complaint (MOT SEQ 004), arguing, *inter alia*, that plaintiff’s medical records and the testimony of fact witnesses and defendant’s medical expert demonstrated that the alleged ceiling collapse did not in fact occur and/or that plaintiff’s claimed injuries were not caused by it. The court granted defendant’s summary judgment motion but the First Department reversed, holding, in pertinent part, that plaintiff’s deposition testimony was sufficient to raise a triable issue of fact as to whether her injuries were caused by the alleged ceiling collapse. Defendant thereafter sought leave to amend his answer to assert a counterclaim for fraud based on allegations that plaintiff’s complaint was premised on misrepresentations regarding the alleged accident and her injuries (MOT SEQ 006). The court granted defendant’s motion but was once again reversed by the First Department, which held that the proposed fraud counterclaim was patently devoid of merit.

The day after the First Department issued its decision denying his motion to amend, defendant issued subpoenas seeking the depositions of two of plaintiff’s treating physicians, non-parties Dr. Michael Gerling and Dr. Thomas M. Kolb. Defendant also submitted a letter

requesting that the court so-order these subpoenas. Defendant's letter explained that "[a]llegations of fraud have been made against Dr. Gerling and Dr. Kolb in federal civil RICO lawsuits," in which they were "accused of rendering unnecessary treatment to plaintiffs in personal injury actions similar to this case," and that it is thus necessary to depose these physicians with regard to whether the treatment they rendered to plaintiff "was unnecessary because the accident alleged by plaintiff did not occur[.]" Notably, defendant has not moved either to vacate the note of issue or for permission to conduct additional post-note of issue discovery (*see* 22 NYCRR 202.21[d] & [e]).

Plaintiff now moves pursuant to CPLR 2304 and 3103(a) to quash the non-party subpoenas served upon Drs. Gerling and Kolb, and pursuant to 22 NYCRR 130-1.1 for costs and sanctions against defendant (MOT SEQ 007). Defendant opposes the motion.

Plaintiff's motion is granted to the extent it seeks to quash the subject subpoenas. Discovery closed with plaintiff's filing of the Note of Issue in March 2021, almost four years prior to service of these subpoenas (*see Signature Fin. LLC v Garber*, 200 AD3d 439, 440 [1st Dept. 2021]). The additional non-party depositions now sought by defendant were precluded once the Note of Issue was filed, and post-note discovery is not permitted absent unusual or unanticipated circumstances and substantial prejudice (*see* 22 NYCRR 202.21[d]; *Peterson v City of New York*, 222 AD3d 564, 564-65 [1st Dept. 2023]; *Feiner & Lavy, P.C. v Zohar*, 210 AD3d 408, 408 [1st Dept. 2022]; *Bour v 259 Bleecker LLC*, 104 AD3d 454, 455 [1st Dept. 2013]).

Defendant contends the recently filed civil RICO complaints, which name Drs. Gerling and Kolb as defendants and accuse them of fraudulently rendering unnecessary treatment to plaintiffs in other personal injury actions similar to this case, constitute unusual and unanticipated circumstances. He further contends that substantial prejudice will result if he is not now permitted to depose these physicians, as this would deprive him of an opportunity to explore whether "the injuries alleged by plaintiff were actually caused by the accident and/or are as serious as alleged and the purported treatment [rendered by Drs. Gerling and Kolb] were all medically necessary." These contentions are unavailing.

The RICO complaints cited by defendant do not name plaintiff as a party or concern the medical treatment rendered to her, and their unproven allegations of fraud against Drs. Gerling and Kolb, neither of whom is a party to the present action, do not constitute new facts or evidence sufficient to warrant additional post-note discovery (*see Linares v City of New York*, 233 AD3d 479, 480 [1st Dept. 2024] [filing of RICO complaint alleging fraud against plaintiff's attorney and medical providers did not warrant granting defendant's motion to amend its answer to assert a fraud counterclaim, vacate the note of issue, and allow additional discovery]). Nor does defendant submit any new evidence that plaintiff herself perpetrated any alleged fraud. Rather, defendant rehashes his contention that "the accident alleged by plaintiff did not occur," and thus the medical treatment rendered to her was unnecessary, relying on the same evidence that formed the basis of his motions for summary judgment and to amend his answer, both of which were denied by the First Department. Indeed, the extended discussion of this evidence in defendant's opposition papers demonstrates that no additional post-note discovery is needed to prevent substantial prejudice, as defendant already had ample opportunity to seek, and has in fact taken, discovery regarding the cause of plaintiff's alleged injuries and the medical necessity of the treatment she received (*see* 22 NYCRR 202.21[d]; *Peterson*, 222 AD3d at 564-65 [defendant "was on notice of plaintiff's claimed injury . . . years before the filing of the note of issue" but "waived any right it had to additional discovery" by failing to diligently seek such discovery despite ample opportunity to do so]).

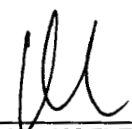
For these reasons, the "post-note of issue subpoenas that plaintiff served on non-parties" must be quashed as "plaintiff [is] improperly using them to secure discovery that [he] failed to obtain in pre-trial disclosure" (*Bour*, 104 AD3d at 455; *see Peterson*, 222 AD3d at 565; *Feiner & Lavy, P.C.*, 210 AD3d at 408). The extent to which the allegations raised in the RICO complaints may be introduced by defendant at trial is for the trial court to determine via *in limine* motion(s) (*see Linares*, 233 AD3d at 480).

Plaintiff's motion is denied to the extent it seeks sanctions against defendant pursuant to 22 NYCRR 130-1.1, as the court finds that plaintiff has not demonstrated that defendant's service of the subject subpoenas was so frivolous or vexatious as to warrant sanctions (*see id.* at 480-81; 22 NYCRR 130-1.1[c]).

Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent it seeks to quash defendant's subpoenas seeking to depose non-parties Dr. Michael Gerling and Dr. Thomas M. Kolb, the subpoenas are quashed and those non-parties need not respond to the subpoenas, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

<u>4/23/2025</u> DATE	 LYNN R. KOTLER, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT