

<b>Lee v No Frills Tire Inc.</b>
2012 NY Slip Op 30250(U)
January 25, 2012
Sup Ct, Queens County
Docket Number: 26498/08
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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JAMES S. LEE,  
  
Plaintiff,  
  
-against-  
  
NO FRILLS TIRE INCORPORATED and  
B.A. LAFFIN-ROSE,  
  
Defendants.  
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Index No. 26498/08  
  
Motion  
Date January 3, 2012  
  
Motion  
Cal. No. 2  
  
Motion  
Sequence No. 4

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Upon the foregoing papers it is ordered that defendants' motion to dismiss the Complaint of plaintiff, James S. Lee for failure to comply with discovery demands, or in the alternative, compelling plaintiff to produce James Lee for a continued deposition and to provide defendants with the following discovery is hereby decided as follows:

This is a personal injury action wherein plaintiff, James S. Lee alleges that he was seriously injured in a motor vehicle accident occurring on June 9, 2008 as a result of defendants' negligence.

In the instant motion defendants now seek the following items of discovery:

1. Duly executed authorizations to obtain the no-fault files for plaintiff's 2002/2003 and 2005 automobile accidents.

2. A duly executed transcript of plaintiff's deposition dated December 15, 2010.
3. A duly executed authorization, unlimited by date, to obtain the entire record, including medical records and insurance records, from plaintiff's medical insurance company prior to January 1, 2007.
4. A duly executed authorization, unlimited by date, to obtain the entire record, including medical records and insurance records, from Oxford Liberty Insurance, Policy Number 892530101.
5. A duly executed authorization for cell phone records for James Lee for the date of accident, June 9, 2008, for cell phone number 718-406-1300 from AT&T.
6. The last known address of Mr. Kuma whom plaintiff testified he saw just before and just after the herein accident.

At the outset, the Court notes that on the return date of this motion, January 3, 2012, the attorneys for plaintiff and defendants entered into a Stipulation whereby the defendants withdrew their request for #6 - The last known address of Mr. Kuma whom plaintiff testified he saw just before and just after the herein accident. As such, this branch of the motion is deemed withdrawn.

Under CPLR 3101 there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. The purpose of disclosure proceedings is to advance the function of trial, to ascertain truth and to accelerate disposition of suits. The CPLR further provides that disclosure should be construed broadly to effectuate this purpose (CPLR 3101[a][1][2]; Allen v Crowell-Collier Publishing Co., 21 NY2d 403 [1968]). "Evidence" is defined to mean not the equivalent to that evidence which might be admissible on trial of the action, but means evidence required in preparation for trial. The information sought need not qualify as evidence admissible at the trial of an action, but only lead to such evidence. Disclosure is required as to all relevant information calculated to lead to relevant evidence (Siegel, NY Prac § 344 at 550 [4<sup>th</sup> ed 2005]). It is well-established law that under CPLR 3101(a), the parties may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (see, Allen v. Crowell-Collier Publ. Co., 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of

any facts bearing on the controversy which will assist in the preparation for trial" (Anonymous v. High School for Environmental Studies et. al., 820 NYS2d 573, 578 [1<sup>st</sup> Dept 2006]) (citations omitted). The Court is given broad discretion to supervise discovery (Lewis v. Jones et. al., 182 AD2d 904 [3d Dept 1992]). "The test is one of usefulness and reason. CPLR 3101(subd [a]) should be construed . . .to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' (Weinstein-Korn-Miller, NY Civ Prac ¶3101.07, p. 31-13)" (Allen, supra). It is immaterial that the material sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to disclosure of admissible proof" (Twenty Four Hour Fuel Oil Corp v. Hunter Ambulance Inc., 226 AD2d 175 [1<sup>st</sup> Dept 1996]; Polygram Holding, Inc. v. Cafaro, 42 AD3d 339 [1<sup>st</sup> Dept 2007] ["disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, including materials which may be used in cross-examination"]). The CPLR directs full disclosure of all relevant material. The test is one of usefulness and reason (CPLR 3101[a]; Allen, supra; Andon v. 302-304 Mott Street Assoes., 94 NY2d 740 [2000]; Hoenig v. Westphal, 52 NY2d 605 [1981] [pre-trial discovery is to be encouraged, limited only by the test of *materiality of "usefulness and reason"*]; Spectrum Sys. Int'l. Corp. v. Chemical Bank, 78 NY2d 371, 376 [1991]). Moreover the adequacy and circumstances and reasons for the disclosure will ultimately be determined by the trial court, and the "determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests." (Id.; Santariga v. McCann, 161 AD2d 320 [1<sup>st</sup> Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

The Court finds as follows:

1. Duly executed authorizations to obtain the no-fault files for plaintiff's 2002/2003 and 2005 automobile accidents.

It is undisputed that defendants served a Notice to Produce dated January 6, 2011 wherein defendants requested duly executed authorizations to obtain the no-fault files for plaintiff's 2002/2003 and 2005 automobile accidents, and plaintiff served a Response on or about February 23, 2011, wherein plaintiff

objected to the production of authorizations allowing defendant to obtain the no-fault file for plaintiff's 2002, 2003, and 2005 automobile accidents via paragraphs 20-22 stating that such requests are unduly burdensome, vague, and seek irrelevant information and without waiving the objections, plaintiff testified at his deposition that he was not injured in any motor vehicle accident prior to the subject accident, nor did he file any no-fault claims. The Court finds the defendants are not entitled to such request as it is undisputed that plaintiff testified at his deposition that he was involved in two prior automobile accidents, one in 2005 and one seven or eight years prior to the deposition, but he was not injured in either of those accidents and did not file a no-fault claim for either accident. As defendants have presented no evidence of a good faith basis for the entitlement to such authorizations, in light of plaintiff's testimony, such requested relief is denied.

2. A duly executed transcript of plaintiff's deposition dated December 15, 2010.

It is undisputed that plaintiff James Lee was produced for a deposition on December 15, 2010, but in the middle of the deposition, the deposition was adjourned and on January 18, 2011, defendants sent plaintiff a letter, along with an original transcript and a copy of plaintiff's deposition requesting that plaintiff execute and return the original within sixty days. Plaintiff then sent a letter to defendants stating that an executed copy of the transcript with any changes would not be provided until a further deposition of Mr. Lee was completed. The Court finds that defendants are not entitled to such relief in that the deposition of plaintiff, James Lee has not been completed.

3. A duly executed authorization, unlimited by date, to obtain the entire record, including medical records and insurance records, from plaintiff's medical insurance company prior to January 1, 2007.

It is undisputed that defendants served a Notice to Produce dated April 5, 2011 seeking duly executed HIPAA authorizations for entire records, including medical records and insurance records, from Oxford Liberty Insurance, Policy Number 892530101, not limited by date, and via a Response dated August 24, 2011, plaintiff produced a Response, which response provided an authorization for Oxford Liberty Insurance for medical records

from June 9, 2007 to the present. As there is no evidence in the record that plaintiff treated for injuries prior to his neck injury in January of 2007, the request for such relief is denied.

4. A duly executed authorization, unlimited by date, to obtain the entire record, including medical records and insurance records, from Oxford Liberty Insurance, Policy Number 892530101.

It is undisputed that defendants served a Notice to Produce dated April 13, 2011, seeking duly executed HIPAA authorizations for entire records, including medical records and insurance records, from plaintiff's medical insurance company prior to January 1, 2007, not limited by date, and via a Response dated August 24, 2011, plaintiff produced a Response stating: "Plaintiff's medical insurance company prior to January 1, 2007 - objection; vague, overly broad and unduly burdensome demand. Without waiving the objection, an authorization for Oxford Liberty Insurance was previously provided". The Court finds that as it is undisputed that plaintiff testified that he injured his neck and shoulder in January 2007, plaintiff is required to provide a duly executed authorization, to obtain the entire record, including medical records and insurance records, from Oxford Liberty Insurance, Policy Number 892530101 from the date of January 1, 2007 to the present within thirty (30) days from the date of service of a copy of this Order with Notice of Entry.

5. A duly executed authorization for cell phone records for James Lee for the date of accident, June , 2008, for cell phone number 718-406-1300 from AT&T.

It is undisputed that defendants served a Notice to Produce dated July 29, 2011, seeking duly executed authorization for cell phone records for James Lee for the date of the accident, June 9, 2008 for cell phone number 718-406-1300 from AT&T, and via a Response dated September 19, 2011, plaintiff provided a Response dated July 29, 2011, which response objected to the cell phone records of plaintiff as improper inasmuch as plaintiff testified that he was not using his cell phone at the time of the accident. As plaintiff was asked at his deposition whether he was on the cell phone at the time of the accident and he responded "Yes", defendants are entitled to such relief requested and plaintiff is required to provide a duly executed authorization for cell phone records for James Lee for the date of accident, June 9, 2008, for cell phone number 718-406-1300 from AT&T within thirty (30) days of the date of service of a copy of this order with Notice of

Entry.

Additionally, it is ordered that plaintiff is to appear for a continued examination before trial and on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

This constitutes the decision and order of this Court.

Dated: January 25, 2012

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**Howard G. Lane, J.S.C.**