

Komuves v Cucinotto
2012 NY Slip Op 30303(U)
January 25, 2012
Supreme Court, Suffolk County
Docket Number: 07-17576
Judge: Jeffrey Arlen Spinner
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 7-28-10 (#005)
MOTION DATE 10-20-10 (#006)
MOTION DATE 7-13-11 (#007)
MOTION DATE 6-17-11 (#008 & #009)
MOTION DATE 7-28-11 (#010)
MOTION DATE 7-27-11 (#011)
ADJ. DATE 10-12-11
Mot. Seq. # 005 - MD # 009 - XMD
006 - MotD # 010 - XMotD
007 - MotD #011 - XMotD
008 - MotD

-----X
IRINA KOMUVES AND IULIU ROTH, :
 :
 : Plaintiffs, :
 :
 :
 : - against - :
 :
 ANGELA CUCINOTTO, RONALD BROWRIGG :
 and UNITECH ELEVATOR, :
 :
 : Defendants. :
-----X

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Upon the following papers numbered 1 to 64 read on these motions and cross motions regarding discovery; Notices of Motions/ Order to Show Cause and supporting papers 1 - 22; Notices of Cross Motions and supporting papers 23 - 38; Answering Affidavits and supporting papers 39 - 50; Replying Affidavits and supporting papers 51 - 64; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (#005) by plaintiffs for an order striking the answer of defendant Alliance Elevator Company s/h/a Unitech Elevator ("Unitech") or compelling it to comply with discovery demands, is denied as moot; and it is further

ORDERED that the motion (#006) by Unitech for an order dismissing the complaint, precluding plaintiff Iuliu Roth from testifying at trial or compelling him to appear for a further examination before trial is granted to the extent that Roth is directed to appear for a continued deposition within 90 days of the date

(Handwritten initials)

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of this order with notice of entry at a time and place mutually agreed upon by Unitech's and plaintiffs' counsel, and is otherwise denied; and it is further

ORDERED that the motion (#007) by Unitech for an order holding nonparty Brookdale University Hospital and Medical Center ("Brookdale Hospital") in contempt for failure to comply with deposition and document production subpoenas and vacating Brookdale Hospital's Workers' Compensation lien, or compelling Brookdale Hospital to produce Elizabeth Marslow for EBT and to produce the subpoenaed documents and records is granted to the extent that Brookdale Hospital is directed to produce Marslow for deposition within 45 days of the date of this order with notice of entry, and is otherwise denied; and it is further

ORDERED that the motion (#008) by Unitech for an order precluding plaintiff Irinia Komuves from introducing testimony or evidence as to certain conditions, or compelling her to appear for a further examination before trial, to provide certain authorizations and to comply with the November 12, 2010 notice of discovery and inspection is granted to the extent that Komuves is directed to appear for a continued deposition within 45 days of the date of this order with notice of entry at a place mutually agreed upon by Unitech's and plaintiffs' counsel, to provide HIPAA complaint authorizations without restriction as to the date of service, and to comply with the November 12, 2010 discovery demand, and the motion is otherwise denied; and it is further

ORDERED that the cross motion (#009) by plaintiffs for an order precluding further discovery by Unitech, quashing the notice to admit, and granting leave to file a note of issue and certificate of readiness is denied in its entirety; and it is further

ORDERED that the cross motion (#010) by nonparty Brookdale Hospital for an order quashing the subpoena to depose nonparty witness Elizabeth Marslow and the subpoena for documentation, and for a protective order barring the taking of Elizabeth Marslow's deposition and the production of documents is granted to the extent the subpoena for the production of documents is quashed, and the cross motion is otherwise denied; and it is further

ORDERED that the cross motion (#011) by defendants Angela Cucinotto and Ronald Browrigg for an order compelling plaintiff Komuves to provide outstanding discovery or precluding her from offering evidence at trial as to claimed psychological injuries, is granted to the extent that Komuves is precluded from offering any evidence regarding loss of enjoyment of life, mental anguish or other psychological injuries, and the cross motion is otherwise denied.

This case arises as a result of a three-car motor vehicle accident which occurred on November 18, 2005 on the westbound upper level of the Queensboro Bridge. The vehicle owned by defendant Angela Cucinotto while being operated by defendant Ronald Browrigg in the course of his employment with defendant Unitech, hit plaintiffs' stopped vehicle in the rear, causing plaintiffs' vehicle to hit the vehicle in front of it. Plaintiff Irina Komuves ("Komuves") the operator and owner of, and plaintiff Iuliu Roth ("Roth") the passenger in, the middle vehicle, seek damages for injuries allegedly sustained in the accident.

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It is alleged in the bill of particulars dated February 4, 2009 that as a result of the subject motor vehicle accident, Roth sustained injuries to his right shoulder and his back, and was confined to bed for one day and to home for five days. It is alleged in the bill of particulars that Komuves incurred injuries to her back and neck, underwent cervical spine surgery on May 27, 2008, was confined to bed for seven days and to home for seven days, and was disabled from her job as a nurse technician at Brookdale Hospital for five months and 15 days. However, during her EBT Komuves testified that she returned to full-time employment several days after the subject motor vehicle accident. In August 2006 and July 2007, Komuves had accidents while on her job at Brookdale Hospital, and in 2007 she was in another motor vehicle accident. Specifically, on August 8, 2006, Komuves injured her back lifting a patient, and as a result was on medical leave from work until October 19, 2006. Komuves resumed her regular full time work at Brookdale Hospital until July 31, 2007 when she hurt her back trying to lift a heavy patient off the floor. Komuves has not returned to work and has been receiving Workers' Compensation and Social Security Disability since the July 2007 incident.

Plaintiffs' motion (sequence #005) pursuant to CPLR 3126 and 3124 to strike the answer of defendant Unitech, and for alternative relief is denied in its entirety as moot. Plaintiffs seek from Unitech the identity of defendant Robert Browrigg's supervisor. In its opposing papers, Unitech asserts that after the motion was made, the supervisor's identity was ascertained and provided to plaintiffs, and on October 13, 2010 the supervisor was deposed. Plaintiffs have not submitted a reply disputing Unitech's assertions. Therefore, the motion is denied.

Unitech moves (sequence #006) pursuant to CPLR 3126 to dismiss the complaint on the ground that Roth failed to comply with the March 10, 2009 preliminary conference order by refusing to respond to numerous questions during his examinations before trial ("EBT"). Alternatively, Unitech moves to compel Roth to appear for a further EBT to respond to questions marked for rulings and follow-up inquiry, or to preclude Roth from testifying at trial as to Komuves' physical and emotional conditions.

Unitech also moves (sequence #008) pursuant to CPLR 3126 and 22 NYCRR § 202.17 to preclude Komuves from testifying or introducing evidence concerning injuries and treatment of her physical and mental conditions on the ground that she failed to timely and properly provide authorizations and disclosure of her Workers' Compensation claims, collateral sources and medical providers. In the alternative, Unitech moves (a) to compel Komuves' further and continued for inquiry regarding her employment at Brookdale Hospital, her Workers' Compensation claims, Social Security disability claim, and other collateral sources, or (b) to deem the February 11, 2011 notice to admit admitted by Komuves. Unitech also moves to compel Komuves to produce HIPAA-compliant authorizations not limited by date of the accident, and to compel Komuves to comply with the November 12, 2010 notice of discovery and inspection concerning her Social Security disability claim, award and benefits paid. Unitech also seeks to preclude Komuves from introducing at trial evidence or testimony of any mental, psychiatric or emotional claim, injury or damage unless she serves an amended bill of particulars including such claim, injury or damage, produces HIPAA-compliant authorizations for medical providers, and appears for a defense psychiatric exam.

Plaintiffs cross-move (#009) pursuant to CPLR 3103 for an order precluding further discovery by Unitech, quashing Unitech's notice to admit and deeming it a nullity, and permitting them to file a note of issue and certificate of readiness. Defendants Angela Cucinotto and Ronald Browrigg (hereinafter collectively referred to as the "Browrigg defendants") cross-move (#011) to compel plaintiff Komuves to

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provide the psychological records based upon her claimed loss of enjoyment of life and mental anguish. In the alternative, the Browrigg defendants move to compel Komuves to withdraw any claimed psychological damages from the bill or particulars, and to preclude plaintiffs from offering any testimony or evidence as to such claimed injuries.

In support of its motions, and in opposition to plaintiffs' cross motion, Unitech asserts that at the EBT of Komuves and of Roth, plaintiffs' counsel objected to questions and directed the deponents not to respond numerous times and with sufficient regularity to thwart its examinations. Unitech maintains that a further EBT is needed as Komuves supplemented her bill of particulars several times and provided authorizations and information regarding collateral sources after her EBT was completed. Most recently, Unitech points out, Komuves served a supplemental bill of particulars dated March 16, 2011 in which she alleges lost wages of \$225,000 and hospital/medical expenses of \$62,396.65. Unitech also asserts that Komuves has not provided a proper sworn response to the notice to admit.

Similarly, in support of their cross motion, the Browrigg defendants assert that they joined in Unitech's discovery demand dated November 12, 2010, and also served demands dated December 23, 2009 and April 4, 2011. The Browrigg defendants assert that plaintiffs have not fully complied with the demand as Social Security information has not been supplied, and an authorization with the correct address for Dr. Ram Wadhawa has not been received. Therefore, Unitech and the Browrigg defendants assert plaintiffs should be compelled to provide the outstanding discovery and appear for a further EBT, and that the plaintiffs' cross motion should be denied in its entirety.

In support of the cross motion, and in opposition to Unitech's motion, counsel for plaintiffs asks this Court to "find that the prejudice, delay, harassment, unnecessary expense and fishing expedition sought is unwarranted." Specifically as to Roth, plaintiffs' counsel asserts Unitech waived its right to further questioning when it refused to complete the EBT on June 10, 2010. Additionally, it is argued that during the EBT, plaintiffs' counsel made multiple requests to Unitech's counsel to clarify the questions posed to Roth because they were ambiguous, unclear or misleading. Plaintiffs' counsel states that Roth was advised not to respond to questions (which were marked for a ruling) regarding his visitor's visa because his immigration status is irrelevant, improper and prejudicial. The questions regarding Roth's observations of Komuves' mental or emotional condition after each accident, counsel argues, were not only vague, but were improper as Roth is not a psychiatrist, psychologist, social worker, or otherwise competent to provide such testimony.

With regard to Komuves, plaintiffs' counsel maintains that the Workers' Compensation, Social Security, collateral source and medical provider authorizations have been provided. Counsel points out that Komuves appeared for five days of testimony and that she should not have to appear again to answer overly broad, vague and unduly burdensome questions to which Unitech already knows the answers. Counsel states the notice to admit is improper and should be quashed because the requested admissions go to the heart of the matter and call for legal conclusions. Finally, plaintiffs' counsel argues that Komuves has not placed her psychiatric/psychological condition in issue, thus, authorizations do not need to be provided. Counsel argues that Komuves claims loss of enjoyment of life and mental anguish to the extent her injuries have caused pain. However, counsel asserts, expert witnesses will not be called during trial to testify or introduce any treatment or medical records as to her mental or emotional condition. Therefore, counsel posits, as Unitech has substantially all of the information needed to proceed to trial, plaintiffs cross motion

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for a protective order and for leave to file the note of issue and certificate of readiness should be granted, and Unitech's motions denied in their entirety.

In opposition to the cross motion, Unitech argues that the application for a protective order as to the February 11, 2011 notice to admit is untimely, and that discovery is still outstanding. Unitech points out, if it is granted permission to continue the EBT of Komuves, the notice to admit would be unnecessary.

CPLR 3101(a) directs that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (*Kooper v Kooper*, 74 AD3d 6, 10, 901 NYS2d 312 [2d Dept 2010]). The Court of Appeals has stated the words "material and necessary" are to be interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). However, a court has discretion to limit disclosure and issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]; *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]). The burden of showing that discovery is improper is upon the party asserting it (*Koump v Smith*, 25 NY2d 297 [1969]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 783 NYS2d 85 [2d Dept 2004]). Plaintiffs have failed to satisfy this burden.

Effective October 1, 2006, the Uniform Rules for the Conduct of Depositions (the Deposition Rules"), provides that an objection raised to a question must be succinctly stated and framed, but nonetheless answered by the deponent who may thereafter apply for appropriate relief pursuant to Article 31 of the CPLR (22 NYCRR § 221.1[a], [b]). Additionally, 22 NYCRR § 221.2 limits the right of the witness to refuse to answer on the advice of counsel. This section states that a "deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person" (22 NYCRR § 221.2). The Rule prohibits any other comments or statements that interfere with questioning the deponent.

Here, plaintiff's counsel acted improperly during the questioning of both Komuves and Roth by making "speaking objections," directing the deponents not to respond to certain questions, and otherwise interrupting the EBT by correcting and suggesting to Unitech's counsel how to phrase questions. The questions to which objections were made did not fall within one of the aforementioned exceptions under the Deposition Rules. Thus, such objections are not authorized by 22 NYCRR 221.2 (see *Parker v Ollivierre*, 60 AD3d 1023, 876 NYS2d 134 [2d Dept 2009]). Therefore, Unitech's motions (sequence #006 and #008) are granted to the extent that Komuves and Roth are directed to appear for a further EBT.

The questions regarding Roth's observations of Komuves' mental and emotional condition after the accident also do not fall into any of the exceptions set forth in 22 NYCRR § 221.2, and Unitech's line of questioning did not seek to elicit expert opinion. Nevertheless, plaintiffs' counsel asserts that no psychiatrist or psychologist will be called to testify or records proffered into evidence as to Komuves' mental and emotional conditions. Thus, the branch of Unitech's motions (sequence #006 and #008) and the Browrigg defendants' cross motion (sequence #011) to preclude Komuves and Roth from offering any evidence or testimony as to Komuves' mental and emotional conditions are granted.

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Counsel for plaintiffs' characterization of questions regarding Roth's immigration status as prejudicial and irrelevant because Roth has not made a claim for lost wages, at this stage of the case, is not persuasive. Plaintiffs have not shown that such line of questioning is plainly improper under the Deposition Rules and CPLR 3101(a). Moreover, CPLR 3115 makes clear that discovery of information before trial is not tantamount to the admissibility of such information at trial (*see generally Suk Ching Chan v Otis El. Co.*, 147 AD2d 395, 538 NYS2d 449 [1st Dept 1989]). If there is some doubt as to admissibility, discovery of evidence should be permitted and the ultimate decision of admissibility left to the trial court.

A plaintiff's immigration status may be material and relevant to the determination of all items of damages (*see e.g., Maliqi v 17 East 89th St. Tenants, Inc.*, 25 Misc 3d 182, 880 NYS2d 917 [Sup Ct Bronx County 2009]). Plaintiffs have not cited any cases which hold that absent a claim for lost wages, disclosing a party's immigration status, during the discovery phase of litigation, is prejudicial or irrelevant. While *Balbuena v IDR Realty, LLC* (6 NY3d 338, 812 NYS2d 416 [2006]) and *Angamarca v New York City Partnership Housing Development Fund, Inc.* (87 AD3d 206, 927 NYS2d 2 [1st Dept 2011]) are distinguishable procedurally and factually from the case at bar, the plaintiff's immigration status in both cases was disclosed during discovery. In *Balbuena*, on a motion for summary judgment, the Court of Appeals found that an injured worker's immigration status may be a factor in litigating a lost wages claim; it did not discuss any other item of damages. In the *Angamarca* case, which also involved an injured worker, the First Department reviewed the jury's award of damages, and found based on the facts of the case that the trial court providently exercised its discretion in precluding defendant from cross-examining the plaintiff and other witnesses about plaintiff's immigration status.

Thus, Roth's immigration status appears to have at least threshold relevance and plaintiffs have not shown that such discovery is wholly improper. Therefore, this court will exercise its discretion under the liberal discovery standards set forth in the CPLR and Roth is directed to answer questions pertaining to his visitor's visa, and follow-up questions engendered by his answer.

Plaintiffs' counsel asserts that Unitech was provided authorizations without date restrictions, as well as an authorization for Komuves' Social Security earnings information for the years 2002 through 2010. Plaintiffs' counsel also states that they "are willing to provide authorizations without restriction to date of care." However, plaintiffs do not assert that all of the authorizations requested by Unitech have been provided, including the authorization for Dr. Patrick, one of the first physicians to treat Komuves after the accident. Thus, the branches of Unitech's motion (sequence # 008) and the Browrigg defendants' cross motion (sequence #011) to compel the plaintiffs to fully comply with the discovery demands are granted. As the EBT of Komuves and Roth will be continued as directed herein, and discovery remains outstanding, the cross motion by plaintiffs for a protective order and to file a note of issue and certificate of readiness must be denied (*see Arons v Jutkowitz*, 9 NY3d 393 [2007] [the filing of the note of issue denotes the completion of discovery]; 22 NYCRR 202.21[b][8] [reads "[t]here are no outstanding requests for discovery"]).

Turning to Unitech's motion (sequence #007) and Brookdale Hospital's cross motion (sequence #010). Unitech seeks to hold Brookdale Hospital in contempt for failure to comply with its November 10, 2010, January 4, 2011 and April 1, 2011 subpoenas seeking the production of records and reports concerning Komuves' employment and workplace accident, and to depose the person with knowledge of the workplace accident and Komuves' physical condition. Alternatively, Unitech moves to compel

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Brookdale Hospital to comply with the subpoenas and to produce Elizabeth Marslow (“Marslow”). Brookdale cross-moves to quash the subpoenas and for a protective order barring the production of records and the taking of the deposition of Marslow.

Unitech argues that Komuves is attempting to connect injuries she alleges occurred in the subject motor vehicle accident to her alleged total disability. Thus, Unitech posits, it is entitled to discovery from Brookdale Hospital concerning the twenty months between the subject motor vehicle accident and the July 31, 2007 workplace accident. Unitech argues it is entitled to depose Marslow as to her personal knowledge and observations regarding Komuves as Marslow was her supervisor and completed the incident report for the July 31, 2007 workplace accident.

Brookdale Hospital maintains that it has already responded to Unitech’s discovery requests and produced the incident reports, employment file and attendance records, but not the employee handbook as it is not relevant or material to the subject motor vehicle accident. Brookdale Hospital also asserts that it produced two nurses still in its employ, both of whom were deposed by Unitech and supervised Komuves prior to the July 31, 2007 workplace accident. Moreover, Brookdale Hospital argues, Unitech has failed to establish the required special circumstances to warrant deposing Marslow.

CPLR 3122[a] requires a party or nonparty challenging a subpoena to come forward with objections within 20 days, or else waive them where the information sought is not privileged, and the request is not palpably improper (see *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 934 NYS2d 545 [2d Dept 2011]; *Garcia v Jomber Rlty., Inc.*, 264 AD2d 809, 695 NYS2d 607 [2d Dept 1999]). As Brookdale Hospital did not make a timely objection to the subpoenas, the only issue is whether the information sought is privileged or palpably improper. “A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case” (*Saratoga Harness Races, Inc. v Roemer* 274 AD2d 887, 711 NYS2d 603 [3d Dept 2000]).

Here, Brookdale Hospital does not contend that the documents subpoenaed are confidential or private. Brookdale Hospital maintains, however, that it has already responded to Unitech’s discovery requests and produced the incident reports, employment file and attendance records, but not the employee handbook as it is not relevant or material to the subject motor vehicle accident. Unitech has failed to demonstrate that the requested documents have not already been provided and that it cannot obtain the evidence sought from other sources (see *Kooper v Kooper, supra*). Therefore, the branch of Brookdale Hospital’s cross motion (sequence #010) to quash the subpoena for documentation is granted. It follows, therefore, that the branch of Unitech’s motion (sequence #007) seeking to punish Brookdale Hospital for contempt for failing to comply with the document production subpoena and to vacate Brookdale Hospital’s Workers’ Compensation lien is denied.

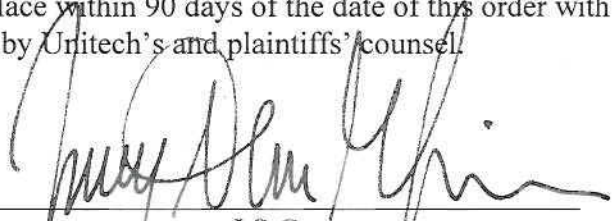
Contrary to Brookdale Hospital’s contention, Unitech need not demonstrate “special circumstances” to depose Marslow (see CPLR 3101[a][4]; *Kooper v Kooper, supra* at 16 [holding that “[o]n a motion to quash a subpoena duces tecum or for a protective order, in assessing whether the circumstances or reasons for a particular demand warrant discovery from a nonparty, those circumstances and reasons need not be shown to be ‘special circumstances’”). Unitech has demonstrated that the information it seeks during the deposition of Marslow is specific to her as she completed the incident report and supervised Komuves at the time of the July 31, 2007 accident. Therefore, information as to Marslow’s personal knowledge and

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observations should be made available to Unitech (see *Desideri v Brown*, 184 AD2d 247, 584 NYS2d 815 [1st Dept 1992]). Moreover, Unitech maintains that the deposition of Marslow will not be burdensome as it will be located at Brookdale Hospital or a location and time convenient for the nonparty witness, and will not last long. Thus, Brookdale Hospital is directed to produce Marslow to be deposed.

In light of the delays, and to expedite the completion of discovery, all outstanding documents and/or authorizations demanded by Unitech and by the Browrigg defendants shall be produced by plaintiffs and by nonparty Brookdale Hospital within 30 days of the date of this order with notice of entry. Brookdale Hospital is directed to produce Marslow for deposition within 45 days of the date of this order with notice of entry; the deposition shall take place at Brookdale Hospital at a time convenient to Marslow. The continued depositions of Komuves and Roth shall take place within 90 days of the date of this order with notice of entry at a time and place mutually agreed upon by Unitech's and plaintiffs' counsel.

Dated: JAN 25 2012



J.S.C.
HON. JEFFREY ARLEN SPINNER
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