

DiMauro v DOLP 205 Props. 11

2012 NY Slip Op 31263(U)

May 11, 2012

Sup Ct, New York County

Docket Number: 111748/08

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**
J.S.C.
Justice

PART 1

Index Number : 111748/2008
DIMAURO, LOUIS
vs.
DOLP 205 PROPERTIES
SEQUENCE NUMBER : 001
VACATE NOTE OF ISSUE/READINESS

INDEX NO. 111748/08

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to vacate note of issue + compel

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-I No(s) 1, 2

Answering Affidavits — Exhibits A-B No(s) 3

Replying Affidavits - Exh. A No(s) 4

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 11, 2012


_____, J.S.C.
MARTIN SHULMAN
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
LOUIS DIMAURO and RENEE DIMAURO,

Plaintiffs,

Index No. 111748/08

-against-

DOLP 205 PROPERTIES 11, DURST ORGANIZATION,
INC. and ROYAL REALTY CORP.,

Defendants.
-----X

FILED

MAY 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

MARTIN SHULMAN, J.:

In this personal injury action defendants moves to vacate plaintiffs' note of issue and compel plaintiffs to provide outstanding discovery. Plaintiffs filed the note of issue on November 30, 2011. Defendants' motion contends that the following discovery is outstanding from plaintiffs: 1) authorizations for various medical providers, diagnostic facilities, collateral source providers, Workers Compensation records, federal tax returns for the period 2005-2007 and Social Security Disability records; 2) photographs taken by plaintiffs' expert witnesses; and 3) photographs produced at John Ramberg's deposition.

Plaintiff Louis DiMauro ("Louis") injured his left arm in a work related accident and alleges he has been unable to work as a result. Defendants' motion primarily seeks authorizations for medical providers who treated Louis for a lower back condition which is not at issue in this action. Defendants contend that Louis' back condition contributes to his alleged inability to work. In accordance with court orders, plaintiffs' counsel previously provided an authorization for Dr. Kenneth Chapman, who treated Louis' back condition. Dr. Chapman's records, which Defendants received in

November 2011, indicate that other providers have treated Louis' lower back condition. Defendants seek authorizations and/or the identities of these providers.

Plaintiffs' counsel opposes the request for further authorizations, contending in relevant part that: 1) Louis has not affirmatively placed his back condition in controversy; 2) the request is overbroad and burdensome; and 3) records from physicians who treated Louis for incidental back pain are irrelevant. Plaintiffs' counsel states that Louis' back injuries "have not contributed to his current and ongoing disability, as reflected by the fact that he continued to work after his back injury and throughout treatment for his back without complaint."

It is well settled that, although "[a] plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his physical or mental condition is affirmatively placed in controversy" (*Carter v. Fantauzzo*, 256 AD2d 1189, 1190 [4th Dept 1998]; *Mayer v. Cusyck*, 284 AD2d 937, 938 [4th Dept 2001]), the waiver of that privilege "does not permit discovery of information involving unrelated illnesses and treatments" (*Carter*, 256 AD2d at 1190). "The determinative factor is whether the records sought to be discovered are 'material and necessary' in defense of the action" (*Wachtman v. Trocaire Coll.*, 143 AD2d 527, 528 [4th Dept 1988], quoting *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 457 [1983]; see CPLR §3101[a]), or whether the records "may contain information reasonably calculated to lead to relevant evidence" (*Zydel v. Manges*, 83 AD2d 987 [4th Dept 1981]).

Here, defendants respond to plaintiffs' arguments by pointing to a notation in Dr. Chapman's records indicating that Louis "cannot work secondary to his low back and

lumbar radicular pain” and “based on the workers compensation guidelines the patient is markedly partially disabled.” See Exh. B to Harris Reply Aff., at page 32. In light of the foregoing, this court concludes that the authorizations and records sought are relevant to Louis’ claimed disability and as such are material and necessary to the defense of this action. As such, plaintiffs are directed to provide the outstanding authorizations for the providers identified at paragraph 5 of the supporting affidavit within 20 days of the date hereof.

With respect to defendants’ remaining outstanding discovery demands, it appears plaintiffs have supplied an authorization for the Social Security Disability records (see Exh. B to Landa Aff. in Opp.), thus rendering this portion of the motion moot. Additionally, plaintiffs do not address defendants’ request for copies of the photographs produced at John Ramberg’s deposition and thus are directed to produce same within 20 days of the date hereof, if they have not already done so.

Turning to plaintiffs’ expert witnesses’ photographs, Plaintiffs contend that defendants’ own expert took the same photos at the same time as plaintiffs’ experts during an on-site inspection. Defendants do not address plaintiffs’ arguments opposing this demand and as such defendants’ request is denied.

Finally, plaintiffs do not address the requests for Workers Compensation records and plaintiffs’ federal tax returns for the period 2005-2007. Plaintiffs are directed to produce same within 20 days of the date hereof, if they have not already done so.

Defendants’ request to strike the note of issue is denied. This action can remain on the trial calendar, and be adjourned if necessary, pending the completion of the discovery set forth above. Accordingly, it is hereby

ORDERED that the portion of defendants' motion seeking an order vacating the note of issue and striking this case from the trial calendar is denied, and the portion of defendants' motion to compel discovery is granted in part and denied in part to the extent set forth above.

This constitutes this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
May 11, 2012



HON. MARTIN SHULMAN, J.S.C.

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MAY 15 2012

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