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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

NELIDA CABRERA, Plaintiff, -against- JOSEPH P. RIVERA, STAR DIGITAL COMMUNICATIONS, INC., CABLEVISION SYSTEMS CORPORATION and CABLEVISION SYSTEMS LONG ISLAND CORPORATION, Defendants.	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 22796-10 MOTION SUBMISSION DATE: 3-8-12 MOTION SEQUENCE NOS. 2, 3, 4

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits (Seq. 2)	X
Notice of Motion and Affirmation (Seq. 3)	X
Notice of Motion, Affirmation, and Exhibits (Seq. 4)	X
Affirmation in Opposition to Motion to Compel	X
Affirmation in Further Support	X
Affirmation in Opposition to Motion for Leave to Amend Complaint	X

Motion Sequence # 2, by plaintiff, Nelida Cabrera, for an Order of this Court: striking the pleadings of the defendants, pursuant to CPLR §3216, Cablevision Systems Long Island Corporation and CSC Holdings, sued as Cablevision Systems Corporation (collectively, "Cablevision defendants"); compelling the Cablevision defendants to produce outstanding discovery, pursuant to CPLR §3124; compelling Cablevision to produce documents demanded in the

November, 2011 Supplemental Combined Discovery Demands, pursuant to CPLR §3214; and awarding costs of the instant motion and attorney fees to plaintiff, pursuant to 22 NYCRR 130–1.1, is granted in part.

Motion, sequence #3, by plaintiff, for an Order of this Court, directing that a default judgment be entered against defendant, Star Digital Communications, Inc. ("Star") pursuant to CPLR §3215(a), or alternatively setting the matter down for an inquest, is denied.

Motion, sequence #4, by plaintiff, for an Order of this Court: permitting plaintiff to amend the complaint and serve the amended complaint upon the defendant pursuant to CPLR §3025(b); directing that CSC Holdings, Inc, be substituted as defendants in the stead of Cablevision Systems Corporations; and directing that non party Yasiria Hernandez Agency comply with the Subpoena Duces Tecum served upon them, is granted in part.

The instant motions arise out of an underlying personal injury matter where the plaintiff was struck by a vehicle operated by, Joseph Rivera. Rivera, at the time of the accident, was employed by Star Digital, a company contracted to perform services on behalf of the Cablevision defendants.

FACTS

On November 4, 2010 at 1:50 p.m., plaintiff, a pedestrian, was crossing near the intersection and out of the crosswalk at Front St. and Kodma Pl., in East Meadow, New York., when she was struck by a vehicle operated by defendant, Rivera. Plaintiff was transported to Nassau University Medical Center by emergency personnel. She is alleged to have sustained serious and permanent injuries, pursuant to Insurance Law §5102(d).

PROCEDURE

Cabrera commenced the underlying action by filing a summons and complaint in May, 2011 in this Court, initially against Rivera. In July, 2011, by way of stipulation, the complaint was amended to include Star and the Cablevision defendants and the same was served upon those defendants shortly thereafter. Star was served through the Secretary of State of New York on July 25, 2011. The Cablevision defendants, in their Verified Answer, issued general denials and cross claims against each co-defendant. Star never appeared nor did it respond to plaintiff's letters advising them of the pending litigation against it[1]. As of this

[1]In May, 2011, Star filed a Chapter 11 petition in the Bankruptcy Court of the Southern District of New York. In June, 2011, it moved for dismissal of its petition, claiming insolvency. (See Notice of Motion, seq. 4, Exhibit J). Such motion was granted.

date, Star has not appeared in the underlying action or submitted opposition to the instant motion.

Discovery demands were served upon all defendants in September, 2011 and pursuant to a preliminary conference held in this Court, also in September, 2011, the defendants were ordered to provide copies of its insurance coverage and respond to the plaintiff's discovery demands. Supplemental Combined Discovery Demands were served on defendants in November, 2011, which are set forth as follows:

> "...1. Any and all documents, electronic or otherwise, relating to the installs, service repair, replace and/or disconnect of broadband communication and interface equipment including any other type of work assigned by any Defendant to Star... during 2010.
>
> 2. Any and all documents, electronic or otherwise relating to invoices paid for installs service, repair, replace and/or disconnect of broadband communication and interface equipment including any other type of work assigned by any Defendant to Star during 2010.
>
> ...3. Any and all copies, electronic or otherwise, of training materials provided by any Defendant to assist Star in the development of training programs for Star's workforce.
>
> ...4. Any and all copies, electronic or otherwise [of] any list provided by Star to any Defendant of each employee, or agent who would be performing installs, service, repair and/or disconnects related to broadband equipment or any other service provided to a customer by any Defendant during 2010.
>
> 5. A copy of the identification badge provided by any Defendant to be used by Defendant Joseph Rivera.

> 6. All pre placement inquiries, screenings, credit report(s); investigations, evaluations, and determinations including but not limited to the current address and social security verifications, inmate database search, lexis nexis express-criminal database check, complete criminal history report, statewide criminal courthouse check, prior employment verifications, public records search, news media search, and Department of Motor Vehicle Record searches provided by Star to any Defendant relating to (a) Joseph Rivera or (b) any other employee, agent, or independent contractor of Star
>
> ...7. All checks, wire transfer records, other evidence of consideration, and invoices related to work performed by Star for any Defendant during 2010.
>
> ...8. All reports and records related to any audit conducted by a Defendant of Star's books, plans, or records during 2010.
>
> ...9. Any and all insurance policies, including umbrella liability coverage, comprehensive general liability, comprehensive automotive liability, and any other type of insurance policy provided by and behalf of Star to any Defendant..."

The Cablevision defendants, with the exception of demand #5, objected to each demand on the basis that they were overly broad and an unreasonable annoyance. The plaintiff responded to the objections by letter dated November 22, 2011.

The plaintiff alleged in her initial complaint, that defendant Rivera was negligent in the operation of his vehicle when he made contact with the her. The first amended complaint alleged that Star and/or the Cablevision defendants owned the vehicle and Rivera operated the vehicle in the course of his

employment. In addition, plaintiff alleged that Star was contracted by the Cablevision defendants to perform certain services. Plaintiff is now seeking a second amendment to the complaint to allege that Cablevision is vicariously liable as Rivera and Star were agents/employees of Cablevision at the time of the subject accident and were acting within the scope of such employment.

ARGUMENTS

The plaintiff argued that the Cablevision defendants willfully failed to comply with the discovery demands, and the Court should strike its pleadings as the penalty of issue preclusion, would not have as much impact. Further, the Court has discretion in permitting amendments to the complaint, and such should be granted in the instant matter.

The Cablevision defendants argue that Rivera admits in his Verified Answer, that he owned the vehicle he was operating at the time of the accident. Further, he was operating the same within the course of his employment with Star. The plaintiff, therefore, has no cognizable cause of action against the defendants by law, as an employer is not liable for the acts of its contractor's employees. Additionally, the defendants have already provided the discovery to which the plaintiff is entitled based on her complaint. The outstanding items have no relevance or bearing to or on the prosecution of the underlying matter.

DISCUSSION

MOTION TO COMPEL DISCOVERY, STRIKE PLEADINGS

It is well known and accepted that pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (*see generally Allen v. Crowell–Collier Publishing Co.,* 21 N.Y.2d 403 [1968]). It is equally well settled that "unlimited disclosure is not permitted" (*LaPierre v. Jewish Bd. of Family & Children Servs.,* 47 AD3d 896, 896 [2008]). Further, "information which is privileged is not subject to disclosure no matter how strong the showing of need or relevancy" (*Lilly v. Turecki,* 112 A.D.2d 788, 789 [1985],; *Matter of Love Canal,* 92 A.D.2d 416, 422 [1983]).

CPLR §3103(a) in pertinent part, provides that the court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. It is also noted that, the Court has broad discretion in limiting or regulating the use of disclosure devices (see *Brignola v. PeiFei Lee, M.D., P.C.*, 192 AD2d 1008 [3d Dept. 1993]).

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The key words are "material and necessary." In the leading case, *Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]), the New York Court of Appeals interpreted the New York CPLR phrase "material and necessary" to mean nothing more or less than "relevant," saying that the phrase must be "interpreted liberally 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. *The test is one of usefulness and reason.*" (see Allen, 21 NYd at 406, *Friel v. Papa* 87AD3d 1108. 2nd Dept 2011).

Further, while the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the court, to invoke the drastic remedy of striking a pleading, a court must determine that the party's failure to comply with a disclosure order was the result of willful and contumacious conduct (*Diel v. Rosenfeld,* 12 AD3d 558,[2nd Dept, 2004]; *Walter B. Melvin, Architects, LLC v. 24 Aqueduct Lane Condominium,* 857 NYS2d 69[2nd Dept, 2008]). The plaintiff has not met her burden of demonstrating that the defendants' conduct was willful and contumacious, although dilatory.

It is noted that in its responses to plaintiff's initial demands , the Cablevision defendants submitted a copy of Certificate of Liability Insurance policy issued to CSC Holdings Inc, and all entities, with Star listed as insured. However, that policy expired before the date of the accident. As such, it is not unreasonable to comply with requests for current policies, if they do exist.

As such, the outstanding demands are modified accordingly: Demands #4, is limited to the time period between 8/4/2010 and 11/4/2010; Demands #6, is limited only to Joseph Rivera; and Demand #7, is limited to the time period between 8/4/2010 and 11/4/2010. The remaining outstanding discovery demands are deemed to be relevant and proper, and the defendants are ordered to comply accordingly.

As to the branch of the motion seeking the award of court costs and attorney fees from the Cablevision defendants, N.Y.Ct.Rules § 130-1.1. states provides in relevant part:

> "... The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part..."

The statute also provides that conduct is frivolous if, ".. it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;... undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or... asserts material factual statements that are false..."(see N.Y. Ct. Rules § 130-1.1 (c)(1)(2)(3).

As already stated, the plaintiff has not demonstrated that the defendants' conduct is contumacious and willful. The court notes that there is evidence of dilatory conduct, but it does not rise to the level of frivolous conduct. This branch of the motion is denied without prejudice.

MOTION FOR DEFAULT JUDGMENT

To obtain a default judgment against a corporation which has been [served with process though the secretary of state pursuant to Business Corporation Law § 306]..., a plaintiff must mail an additional copy of the summons and complaint to the corporation "at its last known address at least twenty days before the entry of judgment" (CPLR 3215 [g] [4][i]). Furthermore, the plaintiff's application for a default judgment must be accompanied by an affidavit attesting to the satisfaction of this additional mailing requirement (*see* CPLR 3215[g][4][i]).

CPLR §3215(g)(4)(i) provides in relevant part:

> "...[w]hen a default judgment based upon non-appearance is sought against a domestic or authorized foreign corporation which has been served [by mailing to the Secretary of State] pursuant to paragraph (b)of section three hundred six of the business corporation law, an affidavit shall be submitted that an additional service of the summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment..."

If such an affidavit is lacking, the application for leave to enter a default judgment is defective and should be denied (see *Aydin v. New Super Gujrat Auto* Repair, Inc., 34 Misc3d 1221(A),[NY.Sup Ct 2012]).

Here, even though the plaintiff sent a "good faith letter", with a courtesy copy of the pleading (see Notice of Motion for Default Judgment, Exhibit G), there is no affidavit attesting to an additional service by mail to Star's last known address. Since the plaintiff failed to submit any proof of their compliance with CPLR 3215(g)(4)(i), its application for leave to enter a default judgment on the issue of liability against the defendant Star is defective.

Further, even if the good faith letters are sufficient, the issue as to whether the plaintiff sustained a serious injury has not been resolved. The law does not remove plaintiff's burden simply because defendants have not addressed the issue. Serious injury, like negligence, is an element that must be proven, if not admitted by defendant. There is no remedy under the law by which a plaintiff is relieved of

his burden, regardless of defendants' position. It is the equivalent of a prosecutor's burden of proving the elements of a crime, despite a defendant's silence (see *Zecca v. Riccardelli*, 293 AD2d 31 [2nd Dept 2002], *Gallera v. Parra*, 2002 WL 1058570).

Even if this Court found that a default judgment should be entered against the defendant on the issue of liability, the plaintiff must submit proof at the inquest on damages that he or she has sustained a serious injury within meaning of the no-fault law, except when the defaulting defendant has, in effect, conceded the issue of serious injury after same has been pleaded and raised by the plaintiff (see McKinney's Insurance Law § 5102(d), *Abbas v. Cole*, 44 AD3d 31, [2nd Dept 2007]).

However, based on the foregoing, the Court does not have to reach the foregoing issues as the plaintiff has failed to comply with the required statutory procedural grounds prior to making its application for a default judgment against the defendant STAR. Accordingly, this motion is denied.

MOTION TO AMEND COMPLAINT AND SUBPOENA NON PARTY WITNESS

Although the defendants' opposition is not a motion to dismiss for failure to state a cause of action, pursuant to CPLR §3211(a)(7), the Cablevision defendants

set forth arguments that evince the same rationale to oppose the proposed amendment. The Court will review and apply the rationale, accordingly. The court's scope of review of a pleading is narrow and it is limited to ascertaining as to whether the pleading states any cognizable cause of action (see *Hogan v. New York State Office of Mental Health,* 115 AD2d 638 [2nd Dept 1985]).

"The sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (see *Heffez v. L & G General Const., Inc.*, 56 AD3d 526 [2nd Dept 2008]). The complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (see *Holly v. Pennysaver Corp.*, 98 AD2d 570 [2nd Dept1984], *Wayne S. v County of Nassau, Dept. of Social Servs.*, 83 AD2d 628[2nd Dept 1981]). The nonmoving party is granted the benefit of every possible favorable inference (see *Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793 [2nd Dept 2011]).

CPLR §3013, states in relevant part, " statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." More importantly, the Court notes

the commentary following the statute:

> "...[t]he basic requirement..is that the pleading be 'sufficiently particular' to give 'notice' to the other side of the 'transactions' or 'occurrences' as seen by the pleader. As long as the pleading may be said to give such 'notice', in whatever terminology it chooses, this aspect of the CPLR 3013 requirement is satisfied...the practitioner need only see to it that the material elements are somewhere verbalized within the four corners of the complaint [citing *Gershon v. Goldberg*, 30 AD3d, 372 (2nd Dept 2006)]...Often today, a pleading is sustained with a mere reminder that the other side can get what further detail is needed from the disclosure devices..*Sometimes the bill and the disclosure devices are cited together as covering gaps that the liberalization of pleadings is thought to have opened.* [citing Serio v. Rhulen, 24 AD3d 1092 (3rd Dept 2005; Pernet v. Peabody Eng'g Corp., 20 AD2d 781 (1st Dept 1964)]..."(see Practice Commentaries, CPLR §3013, Patrick M. Connors, C3013:2, C3013:3, C3013:8)

Furthermore, CPLR §3211(d) allows for latitude in pleading requirements for facts unavailable to the plaintiff (see *Pludeman v. Northern Leasing Sys.*, 10 NY3d 486 [2008]). There are not enough facts in the record to determine the extent of the relationship between Star and the Cablevision defendants. The existence of personnel pre screening documents, and training materials distributed to Star employees from Cablevision, speak to the issue of control and whether the Star's duties were in furtherance of Cablevision's service to its customers.

Here, leave to amend personal injury complaint against defendants is warranted. Even though plaintiff had initially failed to plead that defendants, Star and Rivera were agents/employees of Cablevision at the time of the subject

accident and were acting within the scope of such employment, the defendants failed to demonstrate that they would be prejudiced by the proposed amendment, particularly since the amendment would not change the fundamental nature of the allegations in complaint (see *Pepe v. Tannenbaum* 262 AD2d 381[2nd Dept 1999]).

While it is well settled that one who hires an independent contractor is not liable for the independent contractor's negligent acts *because the employer has no right to control the manner in which the work is to be done" (see Dente v. Staten Island University Hosp.*, 252 AD2d 534 (2nd Dept 1998), courts have recognized numerous exceptions to the general rule. For instance, the court in *Sandra M. v. St. Luke's Roosevelt Hosp. Center,* 33 AD3d 875 (2nd Dept 2006) cited two cases illustrative of such exceptions.

In *Mduba v. Benedictine Hosp.*, 52 AD2d 450 [3rd Dept 1976] the court held that a hospital could be vicariously liable for the negligence of an emergency room doctor, even if he was an independent contractor, since the decedent entered the hospital for hospital treatment, the hospital held itself out as a provider of hospital services, *Sandra M. v. St. Luke's Roosevelt Hosp. Center*33 AD3d 875 (2nd Dept 2006). In *Kleeman v. Rheingold,* 81 NY2d 270 (1992), the court held

that the defendant law firm could be held liable for the failure of the process serving company with which it contracted to properly serve papers, resulting in the dismissal of a client's action. The Court reasoned that the duty to properly serve process was so integral to the practice of law as to be non-delegable, and that the law firm therefore could not avoid liability for the breach of that duty by "farming out" the task to an independent contractor (*Sandra M. v. St. Luke's Roosevelt Hosp. Center,* supra).

Additionally, a special employee is described as one who is transferred for a limited time of whatever duration to the service of another. General employment is presumed to continue, but this presumption is overcome upon clear demonstration of surrender of control by the general employer and assumption of control by the special employer. Although not a per se rule, generally, *whether a special employment relationship existed is a question of fact.* While no single factor is determinative, "a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work"(see *Franco v Kaled Mgt. Corp*, 74 AD3d 1142, [2nd Dept 2010]).

It is noteworthy that the discovery demands requested of the defendants, speak to the foregoing issues which defendants have deemed as not relevant and

overbroad. Here, the seminal issue is whether the Cablevision defendants had sufficient control over Star's and Rivera's activities and/or duties that one would conclude that Rivera was performing his duties on Cablevision's behalf. The plaintiff, through discovery, is attempting to gather facts to establish that such a relationship existed.

Leave to amend pleadings should be freely granted (*see,* CPLR 3025 [b] ; *Podeszedlik v. Mid–Hudson Civic Center*, 162 AD2d 921 [3rd Dept 1990]). As such the Court can permit the amendment of the complaint. The defendants argue that the proposed amendment is defective in that it alleges that Star is a employee, when it is not an actual person. Such allegation, however, may be due to inartful pleading. The plaintiff is clearly claiming that Star has an employment relation with the Cablevision defendants through a contractual relationship; therefore, that particular allegation is not fatal to plaintiff's instant motion (see *Ragto, Inc. v. Schneiderman,* 69 AD2d 815 [2nd Dept 1979]).

As the opposition is limited to the amendment of the complaint, and there is no stated objection to the substitution of party, CSC Holdings, Inc, in the place of Cablevision Systems Corporations, this branch of the motion is granted. The complaint is to be amended, accordingly.

Generally, a subpoena *duces tecum* may be issued by an attorney "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding." *(* see *Matter of Terry D.,* 81 NY2d 1042 [1993]). However, a trial subpoena may not be used as a "'fishing expedition" to obtain materials that could have been obtained in pretrial disclosure (see *Mestel & Co. v. Smythe Masterson & Judd,* 215 AD2d 329 [1st Dep't 1995]).

Here, the subpoena is demanding the production of any and all policies pertaining to Star Digital Communications, Inc., and any and all policies pertaining to Braulio Rivera and all relevant information regarding Star Digital Communication and Braulio Rivera (See Notice of Motion, seq. 4, Exhibit K). However, there is no explanation in the record as to who Braulio Rivera is. Notwithstanding the foregoing, the subpoena is too far reaching and constitutes an improper "fishing expedition" on the plaintiff's part. Even assuming that plaintiff means, in actuality, Joseph Rivera, this Court is not empowered to make that correction. Accordingly, this branch of the motion is denied without prejudice.

CONCLUSION

Accordingly, plaintiff's motion to strike the defendants' pleadings, and motion for attorney fees is denied. Plaintiff's motion to compel discovery is

granted to the extent as set forth herein. Plaintiff's motion for a default judgment against Star, is denied in its entirety. Plaintiff's motion to amend complaint and substitute party, is granted, and such amended complaint is to be served upon defendants on or before five (5) days of the date of this motion. Plaintiff's motion directing non party witness to comply with Subpoena Duces Tecum is denied without prejudice.

Dated: May 9, 2012

STEVEN M. JAEGER, A.J.S.C.

ENTERED
MAY 11 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE