

**Palmiero v 417 East 9th St. Assoc., LLC**

2012 NY Slip Op 32836(U)

November 16, 2012

Sup Ct, New York County

Docket Number: 106138/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER  
Justice

PART 15

Index Number : 106138/2010  
PALMIERO, JOHN  
vs.  
417 EAST 9TH STREET ASSOCIATES  
SEQUENCE NUMBER : 001  
ORDER OF PROTECTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

# FILED

NOV 26 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/16/12

  
**HON. EILEEN A. RAKOWER** 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 15

-----X  
JOHN PALMIERO and JOHN PALMIERO AS  
TEMPORARY GUARDIAN OF HIS SON JOHN  
PALMIERO,

Plaintiffs,

- against -

417 EAST 9<sup>TH</sup> STREET ASSOCIATES, LLC,  
JAKOBSON PROPERTIES, LLC, PETER  
JAKOBSON, PETER JAKOBSON, JR,  
THOMAS C. TUNG and CD DESIGN, INC.,

Defendants.

-----X  
417 EAST 9<sup>TH</sup> STREET ASSOCIATES, LLC,  
JAKOBSON PROPERTIES, LLC, PETER  
JAKOBSON, PETER JAKOBSON, JR,

Third-Party Plaintiffs,

-against-

DAVID MAHLER,

Third-Party Defendant.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Index No.  
106138/10

**DECISION  
and ORDER**

Mot. Seq. 001

THIRD PARTY

**FILED**

**NOV 26 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

This action was commenced to recover damages for personal injuries sustained by plaintiff, John Palmiero, on December 3, 3009, as a result of a fire that occurred in the apartment that he rented from defendants/landlords 417 E. 9<sup>th</sup> Street Associates, LLC, Jakobson Properties, LLC, Peter Jacobson, and Peter Jackobson, Jr. At the time

of the incident, Plaintiff alleges that construction work was being done under the supervision of defendants Thomas C. Dung and CD Design, Inc. As a result of the fire, Plaintiff alleges that he was placed in coma that required him to be hospitalized for several months due to the effects of smoke inhalation that he had sustained. In Plaintiff's Verified Bill of Particulars, Plaintiff alleges to have sustained permanent neurological injuries and permanent injuries to his lungs, pancreas, lymph nodes, arteries, and colon, as well as other injuries, as a result of the fire. Plaintiff also alleges fatigue, "associated and concomitant impairments and negative effects upon plaintiff's pre-accident enjoyment of life, day to day existence, activities, functions and involvements," "inability to resume pre-fire modus vivendi," and "inability to resume pre-fire social relations, contacts, and participation."

Plaintiff moves, pursuant to CPLR §3101, 3103, and 3122, for an Order granting Plaintiff a protective order from Defendants' Notice of Discovery and Inspection, which demand records prior to the date of the loss, including employment records from Plaintiff's prior employer, GFI Group, treatment records from a social worker, Marilyn Siegal, and other pre date of loss records. Plaintiff claims that these records have no relevance to the issues concerning the alleged negligence. Plaintiff requests that it be allowed to present the records in dispute to this Court for an in-camera inspection.

Defendants 417 East 9<sup>th</sup> Street Associates, LLC, and Jakobson Properties, LLC, oppose Plaintiff's motion for a protective order and cross move to strike Plaintiff's complaint for violating three Court Orders, or in the alternative, to compel Plaintiff to provide discovery. Defendants CD Design, Inc. and Thomas C. Tung also oppose Plaintiff's motion and support the cross motion.

Specifically, Defendants seek an Order directing that Plaintiff be compelled to provide an authorization for the release of Plaintiff's employment records from GFI Group and for the records regarding his treatment for alcohol and drug abuse prior to the date of the incident and appear for the Court ordered physical examinations.

Defendants contend that Plaintiff's file from GFI Group are relevant as to plaintiff's credibility. Defendants contend that while Plaintiff testified under oath that he voluntarily resigned from his position, was not terminated, and that his alcohol use had nothing to do with his departure, the hospital records contradict his testimony and states that plaintiff was abusing alcohol during this period and was fired from his

job in July 2009. Defendants also contend that Plaintiff failed to appeal either the Preliminary Conference Order dated September 21, 2010, wherein plaintiff was to provide employment authorizations for the two years before the date of the accident and one year after the accident, or the March 15, 2011 Compliance Conference Order, wherein plaintiff was to provide these employment authorizations within 30 days, or the March 20, 2012 Compliance Conference Order, wherein plaintiff was to provide authorizations for Bear Stearns and any employment records for two years prior to the date of the accident and 1 year after within 30 days.

In addition, Defendants contend that authorizations for the release of Plaintiff's treatment for his prior alcohol and drug abuse are relevant in order to determine the extent to which such use may have contributed and/or complicated the Plaintiff's injuries and his recovery. Defendants annex hospital records from New York Presbyterian Hospital from December 2009 that state that "patient is a heavy ETOH user, up to one handle [half-gallon] of rum per day at times. He is also a heavy smoker." Defendants state that the information is also admissible to support an expert's opinion that a plaintiff was under the influence of drugs or the effects of withdrawal at the time of an incident. Defendants state that the information is also relevant as to Plaintiff's credibility.

Furthermore, Defendants state that the Preliminary Conference Order and Compliance Conference Orders directed the Plaintiff to appear for physical examinations and that they designed Drs. Adler, Dr. Block, and Dr. Lubliner to examine the plaintiff. Defendants state that Plaintiff failed to appear. Plaintiff's papers do not address the portion of Defendants' cross motion that seek to compel Plaintiff to appear for the Court ordered physical examinations. As such, Plaintiff has not opposed the relief.

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason" (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

"It is well settled that a party must provide duly executed and acknowledged

written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR [3101] . . . when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue." *Garcia v. 145 Edwards LLC*, 2012 N.Y. Misc. LEXIS 757 (N.Y. Sup. Ct. Feb. 15, 2012) (citations omitted). "Substance abuse treatment records are generally confidential and not subject to disclosure unless certain requirements are met. As a predicate for ordering the disclosure of such records, the court must find that the interests of justice significantly outweigh the need for confidentiality." (*Id.*).(citations omitted).

However, CPLR §3103(a) 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.

The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept. 1998]). "It is well established that failure to move timely for a protective order precludes inquiry into the propriety of the discovery demands unless they are 'palpably improper.'" (*Alaten Co. v. Solil Management Corp.*, 181 A.D. 2d 466 [1st Dept. 1992]).

Here, as for Defendants' request that Plaintiff be compelled to provide an authorization for the release of Plaintiff's employment records from GFI Group, not only did Plaintiff fail to timely move for a protective order, but Plaintiff agreed to produce them in the Preliminary Conference Order dated September 21, 2010 and subsequent Compliance Conference Orders. As such, the Court finds that Plaintiff has waived the asserted lack of relevancy and privilege and is not entitled to the protective order that it seeks with respect to the requested authorization.

As for Defendants' request that Plaintiff be compelled to provide an authorization for the release of Plaintiff's records regarding his treatment for alcohol and drug abuse prior to the date of the incident, Plaintiff does not dispute that he has placed his mental condition in issue by, for example, asserting a claim based on "associated and concomitant impairments and negative effects upon plaintiff's pre-accident enjoyment of life, day to day existence, activities, functions and involvements," "inability to resume pre-fire modus vivendi," and "inability to resume pre-fire social relations, contacts, and participation." However, due to the confidential nature of these records sought, the Court will review the documents *in camera* to ensure that only material and necessary information is disclosed.

Turning now to Defendants' motion to strike or preclude, pursuant to CPLR §3126, a court may impose sanctions when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1st Dept. 2006]). Plaintiff does not show how Defendants' failure to produce requested discovery rises to the level of noncompliance necessary to impose the sanctions permitted under CPLR §3126. However, Defendants are entitled to all outstanding discovery as set forth in this decision.

The parties are reminded that there is a compliance conference in this matter scheduled on December 18, 2012 at 9:30 a.m. at 80 Centre Street, Room 327.

Wherefore, it is hereby,

ORDERED that Plaintiff John Palmiero's motion for a protective order is granted only to the extent that Plaintiff's records regarding his treatment for alcohol and drug abuse prior to the date of the incident shall be produced for an *in camera* inspection; and it is further

ORDERED that Defendants 417 E. 9<sup>th</sup> Street Associates, LLC, Jakobson Properties, LLC, Peter Jacobson, and Peter Jackobson, Jr.'s motion is granted to the extent that Plaintiff John Palmiero shall produce the requested employment and medical authorizations within 20 days of receipt of this order with notice of entry; and it is further,

ORDERED that Plaintiff John Palmiero shall appear for the court-ordered physical examinations.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED:

11/16/12



EILEEN A. RAKOWER, J.S.C.

**FILED**

NOV 26 2012

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