

Marques v National R.R. Passenger Corp.

2017 NY Slip Op 30065(U)

January 12, 2017

Supreme Court, New York County

Docket Number: 155355/2015

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

GONCALO MARQUES,

INDEX NO. 155355/2015

Plaintiff,

MOTION DATE 01/09/17

MOTION SEQ. NO. 001

- v -

NATIONAL RAILROAD PASSENGER CORPORATION,
NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK, AMERICAN RAILROAD PASSENGER
CORPORATION d/b/a AMTRAK and NATIONAL RAIL
PASSENGER CORPORATION d/b/a AMTRAK,

Defendants.

The following papers, numbered 12-39, were read on this motion to compel and notice of cross-motion to strike the defendant's answer and / or compel.

Notice of Motion—Affirmation of Good Faith—Affirmation in Support—
Exhibits A-H—Affidavit of Service No(s). 12-23

Notice of Cross-Motion—Affirmation in Opposition to Motion and in Support
of Cross-Motion—Affirmation of Good Faith—Exhibits 1-9—Affidavit of
Service No(s). 24-36

Affirmation in Reply and in Opposition to Plaintiff's Cross-Motion—Exhibit
A—Affidavit of Service No(s). 37-39

Motion by Defendants (National Railroad Passenger Corporation, National Railroad Passenger Corporation d/b/a Amtrak, American Railroad Passenger Corporation d/b/a Amtrak and National Rail Passenger Corporation d/b/a Amtrak) pursuant to CPLR 3124 to compel Plaintiff to provide authorizations allowing the Defendants to obtain medical records of Plaintiff concerning prior medical treatment and Plaintiff's cross motion pursuant to CPLR 3216 and 3124 is resolved as follows:

BACKGROUND

Plaintiff alleges that, on August 11, 2013, he was pushing a wheelbarrow filled with cement and steel, when the wheelbarrow tipped over and fell on his leg, causing Plaintiff to fall on his back. (Shatzky Moving Affirm., Ex. A [Complaint] ¶¶ 17, 40, 65, 90.) Plaintiff alleges that the accident occurred on the Amtrak train tracks

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

designated as 9C and 10C at the western end of Penn Station, located underneath the United States Postal Service Building. (Shatzky Moving Affirm., Ex. A [Complaint] ¶¶ 88-90; Ex. C [Bill of Particulars] ¶¶ 1-2.) Plaintiff alleges that the subject accident caused him to suffer various injuries, including injuries to his back as well as a loss of enjoyment of life. (Shatzky Moving Affirm., Ex. C [Bill of Particulars] ¶ 8; Ex. D [First Supplemental Bill of Particulars] ¶ 8.)

In the instant motion, Defendants move to compel Plaintiff to provide authorizations requested in their September 1, 2016 Demand for Authorizations (attached to Defendants moving papers as Exhibit F), which they contend relate to back injuries plaintiff suffered in January 31, 1997 work-related accident and a June 6, 1998 motor vehicle accident. (Shatzky Moving Affirm. ¶¶ 7-9.)

In a November 8, 2016 response to Defendants' demand, Plaintiff objected in part to "defendant's demand as being vague, overbroad and burdensome in that 18 years is beyond the scope of relevant discovery and defendants have failed to demonstrate that these records would result in disclosure of relevant evidence or is reasonably calculated to lead to the discovery of relevant information." (Shatzky Moving Affirm., Ex. H [Response to Demand] ¶ 1-12.)

ARGUMENTS

Defendants argue that because Plaintiff has alleged injuries to his back from the subject accident, he has placed in issue the medical condition of his back, including any prior injuries to his back that may have existed at the time of his accident and / or been exacerbated by the accident. (Shatzky Moving Affirm. ¶ 12.) Moreover, Defendants argue that because Plaintiff has claimed "such extensive and serious personal injuries," including loss of enjoyment of life, Plaintiff has "put in issue his entire physical condition, prior to and subsequent to the date of his alleged accident." (*Id.* ¶¶ 12-13.)

Plaintiff opposes Defendants motion and argues the information requested "has absolutely no relation to the underlying action" because they involve "events which occurred in 1997 and 1998, almost 20 years ago." (Winograd Opp. Affirm. ¶¶ 9-10.) Plaintiff

argues that, to obtain the subject discovery, Defendants “must show by expert proof, a link between the alleged physical injuries and illness or treatment of other conditions for which discovery is sought.” (*Id.* ¶11.)

Notwithstanding the Plaintiff’s objections to the requested authorizations, Plaintiff has “provided authorizations for [his] records maintained by Clarendon National Insurance Company and Liberty Mutual.” (Winograd Opp. Affirm. ¶ 14.) Plaintiff further states that he “would be more than happy to provide the remaining authorizations” but that he needs a more “specific” demand because he “simply does not recall which hospital, diagnostic facilities or physical therapy facility treated him as a result of these 20 year old accidents.” (*Id.*)

In addition to opposing Defendants motion to compel Plaintiff has cross-moved to strike Defendants’ answer or, in the alternative, to compel Defendants to complete discovery. (*Id.* ¶ 2.) Plaintiff also argues that the Defendants have failed to go forward with scheduled depositions. (*Id.* ¶¶ 2, 15-20.)

In opposition to Plaintiff’s cross-motion, Defendants argues that it was Plaintiff—not Defendants—who adjourned Plaintiff’s deposition on three separate occasions, detailing the circumstances of each adjournment. (Shatzky Reply Affirm. ¶¶ 9-10.) In regard to the documentary discovery, Defendants state that they are attempting to locate documents responsive to Plaintiffs outstanding demands and that “a response will be provided as soon as all responsive documents are located, to the extent they exist and are in possession of the defendants.” (*Id.* ¶ 11.)

DISCUSSION

I. Defendants’ Motion to Compel

“It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records . . . when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue.” (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456–57 [1983].) “The waiver extends not only to records of

post accident treatment, but also to records of preaccident treatment of the same anatomical parts to which plaintiff claims injury.” (*McLeod v Metro. Transp. Auth.*, 47 Misc 3d 1219(A) [Sup Ct 2015] [Stallman, J.], quoting *Geraci v National Fuel Gas Distrib. Corp.*, 255 AD2d 945, 946 [4th Dept 1998].)

Here, Plaintiff has asserted claims for, among other things, injuries to his back. (Shatzky Moving Affirm., Ex. C [Bill of Particulars] ¶ 8; Ex. D [First Supplemental Bill of Particulars] ¶ 8.) Defendants Demand specifically seeks authorizations for records related to two alleged events in 1997 and 1998 when Plaintiff injured his back. (Shatzky Moving Affirm. Ex. F [September 1, 2016 Demand] ¶¶ 1-12.)

As such, the subject records are subject to discovery.

Plaintiff’s counsel has already provided authorizations to Defendants for his records maintained by Clarendon National Insurance Company and Liberty Mutual, but states that Plaintiff “simply does not recall which hospital, diagnostic facilities or physical therapy facility treated him as a result of these 20 year old accidents.” (Winograd Opp. Affirm. ¶ 14.)

II. Plaintiff’s Cross-Motion

With regard to Plaintiff’s motion to strike/compel Defendants to complete discovery, Plaintiff has not provided sufficient details regarding the outstanding items of discovery owed by Defendants for this Court to make any determination on the papers. However, in their reply, Defendants concede that they still owe document discovery to Plaintiff. (Shatzky Reply Affirm. ¶ 11 [stating that “a response will be provided as soon as all responsive documents are located, to the extent they exist and are in possession of the defendants”].)

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff shall submit to the Defendants the remaining ten (10) authorizations if Plaintiff recalls the name of the

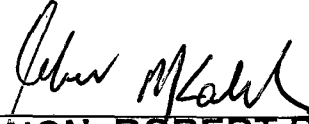
doctors and / or the facilities that he was treated at within 10 days of this order; and it is further

ORDERED that Defendants may conduct their deposition(s) of Plaintiff and question Plaintiff as to any treatment that he allegedly had for the accidents of 1997 and 1998, concerning his back injuries as well as his claims for loss of enjoyment of life. If Plaintiff remembers the names at his deposition and or gives further information allowing Defendants to obtain the requested medical records after the deposition, then Defendants may request that the Court order a further deposition of Plaintiff if additional records are later obtained; and it is further

ORDERED that Plaintiff's cross-motion is denied; and it is further

ORDERED that parties shall appear for a compliance conference on January 23, 2017 in part 29 at 9:30 AM at which time the court will designate firm deposition dates of all parties and a date for the completion of discovery.

Dated: January 12, 2017
New York, New York


HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE