

Deleon v Martinez

2018 NY Slip Op 33305(U)

December 18, 2018

Supreme Court, New York County

Docket Number: 162409/2014

Judge: Adam Silvera

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

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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JESENIA DELEON, MARIA MARTINEZ,
Plaintiff,

- v -

JOHNNY MARTINEZ, JEFFREY SHANK, ALL CAR TOWING AND
RECOVERY

Defendant.

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INDEX NO. 162409/2014
MOTION DATE 10/24/2018
MOTION SEQ. NO. 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 71, 73, 74, 75, 76, 77, 78, 79, 80
were read on this motion to/for PROTECTIVE ORDER.

Upon the foregoing documents, it is ordered that plaintiffs' motion for a protective order and to quash a subpoena is granted in part and denied in part for the reasons stated below.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on July 14, 2014. Discovery ensued, and plaintiff Maria Martinez, accompanied by an employee of IME Watchdog, Inc., attended an Independent Medical Examination (hereinafter referred to as "IME") conducted by a doctor designated by the defendants. Thereafter, plaintiffs sent a letter to defendants listing Jorge Rolon, the IME Watchdog employee that attended plaintiff Martinez's IME, as a potential witness at trial. Subsequently, movants sent a subpoena to take the deposition of Mr. Rolon, and for the production of the notes taken by Mr. Rolon during the deposition. Plaintiffs now move to quash the subpoena and for a protective order. Defendants All Car Towing and Recovery (hereinafter referred to as the defendant "All Car Towing") and Jeffrey Shank oppose. Defendant Johnny Martinez, Jr., having failed to submit any papers, takes no position. Plaintiffs reply.

Here, plaintiffs seek to quash the subpoena for Mr. Rolon's deposition, and for a

protective order pertaining to any and all of the documents generated by Mr. Rolon as a result of plaintiff Martinez's IME. Plaintiffs argue, *inter alia*, that such documents and Mr. Rolon's testimony are protected as attorney-client work product and material prepared for litigation. In opposition, the Defendants Shank and All Car Towing argue that they are entitled to subpoena non-party witnesses to appear for a deposition. According to such defendants, Mr. Rolon's testimony and records are not attorney work product, and not protected under attorney-client privilege, as Mr. Rolon is not an attorney and there was a third party present at the IME.

In *Barahona v Continental Hosts, Ltd.*, this Court found, that "New York State Supreme Court, New York County Justices are split on the issue [of whether IME Watchdog notes are discoverable]. ... Thus, ... a determination on whether a document is discoverable or privileged necessitates a fact specific analysis". 59 Misc3d 1001, 1004-1005 (Sup Ct, New York County 2018). In the months since this Court decided *Barahona v Continental Hosts, Ltd.*, the state of the law regarding IME Watchdog notes has not changed, and Supreme Court Justices are still split on the issue. As such, taking into account the specific circumstances of the instant case, the Court finds that any and all of Mr. Rolon's notes and/or documents related to plaintiff Martinez's IME are not discoverable. However, defendants Shank and All Car Towing are entitled to a deposition of Mr. Rolon as a non-party witness.

CPLR §3101(d)(2) states that:

Materials...prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, ...or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Here, it is undisputed that plaintiffs' counsel hired the IME Watchdog to accompany plaintiff Martinez to her IME, and to obtain their notes taken during the IME, in anticipation of litigation or trial. Defendants Shank and All Car Towing failed to articulate a substantial need for the notes of Mr. Rolon as required by CPLR §3101(d)(2). Rather, such defendants argue that Mr. Rolon's notes are discoverable as they are not protected by attorney-client privilege or attorney work product. However, the Court notes that it is unrefuted that plaintiffs employed IME Watchdog for the purpose of accompanying plaintiff Martinez to the IME designated by defendants, to take notes during the IME, and to be called as a witness to refute defendants' IME physician if needed. Thus, plaintiffs employed IME Watchdog to provide material in anticipation of litigation and trial. As such, Mr. Rolon's notes are not discoverable pursuant to CPLR §3101(d)(2) such that plaintiffs' motion for a protective order is granted as to Mr. Rolon's notes.

As to the portion of plaintiffs' motion seeking to quash the subpoena for Mr. Rolon's deposition, "[i]t is...well settled that a motion to quash a subpoena duces tecum should be granted only where the materials sought are utterly irrelevant to any proper inquiry". *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 103, 112 (1st Dep't 2006). CPLR §3101(a)(4) states that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required." The Court of Appeals has held that:

"[t]he words 'material and necessary' as used in section 3103 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. Section CPLR 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty." *Matter of Kapon v Koch*, 23 NY3d 32, 38 (2014)(internal citations and quotations omitted).

A review of the subpoena reveals that defendants Shank and All Car Towing state the reasons the deposition was sought as required by CPLR §3101(a)(4); namely that Mr. Rolon was an eyewitness to plaintiff Martinez’s IMEs, and had conversations with her regarding her medical condition. Thus, the burden here rests with plaintiffs to establish that a deposition of Mr. Rolon is “utterly irrelevant to any proper inquiry”. *Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d at 112. The Court notes that Mr. Rolon’s testimony is not protected as attorney work product and there is no attorney-client privilege between Mr. Rolon and plaintiff Martinez. Here, plaintiffs have failed to meet their burden. As such, the portion of plaintiffs’ motion to quash the subpoena for the deposition of Mr. Rolon is denied.

Accordingly, it is

ORDERED that plaintiffs’ motion for a protective order is granted only as to any and all of Mr. Jorge Rolon’s notes and documents with regards to the IME of plaintiff Martinez; and it is further

ORDERED that plaintiffs’ motion to quash the subpoena for the deposition of Mr. Jorge Rolon is denied; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 45 days of entry.

This constitutes the decision/order of the Court.

12/18/2018

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: