

Graham v Kone, Inc.

2012 NY Slip Op 33821(U)

November 16, 2012

Supreme Court, Suffolk County

Docket Number: 34609/2009

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX NO. 34609/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 47 - SUFFOLK COUNTY

PRESENT:

HON. JERRY GARGUILO
 Supreme Court Justice

 VIANA GRAHAM,

Plaintiff,

-against-

KONE, INC.,

Defendant.

ORIG. RETURN DATE: July 26, 2012
 FINAL SUBMISSION DATE: October 17, 2012
 MTN. SEQ. # 003, 004
 MOTION: #003 MD
 #004 MOTNDECD

PLAINTIFF'S ATTORNEY:

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Before the Court are a series of petitions. In the most generic sense, the Petitions all spring from discovery and allegations of a lack thereof. From a factual stand point, the case is rather straight forward. The case is a personal injury action in which Plaintiff alleges that on or about January 7, 2008, she tripped and fell while exiting a freight elevator at the J.C. Penny's store (her employer). Factual allegations concerning liability deal with leveling or misleveling of the elevator.

The barrage of motions commenced with the Defendant, KONE, Inc., (hereinafter KONE) petitioning the Court for an order pursuant to CPLR § 3126, striking Plaintiff's complaint and dismissing her causes of action for "refusal to comply with four (4) prior orders of this Court and provide vital and necessary discovery which would enable KONE to properly defend this matter."

In support of Defendant's motion, the Court is provided with the Affirmation of Thomas O. O'Connor, Esq., accompanied by Exhibits A through Q.

The Plaintiff, Viana Graham, opposes the application in all respects and petitions the Court for an order, pursuant to CPLR § 3103(b), for a Protective Order pertaining to KONE's subpoena and Notice of Deposition of Dr. Marvin Reid.

In support of the Plaintiff's own petition, the Court is provided with the Affirmation of Bryan P. Kujawski with Exhibits A through C.

Thereafter, and almost simultaneously, the Court received a Reply Affirmation In Further Support of Motion To Strike on behalf of KONE consisting of the Affirmation of Thomas O. O'Connor with Exhibits A through H; a further Affirmation In Opposition filed on behalf of the Plaintiff, Viana Graham, by Shaun M. Malone, Esq., accompanied by Exhibits 1 through 5; the Affirmation of Thomas O. O'Connor, on behalf of the Defendant, KONE, Inc., In Opposition of the Petition For A Protective Order accompanied with Exhibits A through E and lastly, a Memorandum of Law In Opposition To Plaintiff's Motion For A Protective Order authored by Thomas O. O'Connor, Esq.

The unwitting player of all this motion practice, is one doctor, Marvin Reid.

Dr. Reid is a family physician practicing outside the Continental United States, Kingston Jamaica.

The first motion in the sequence is by the Defendant seeking relief pursuant to CPLR § 3126 striking plaintiff's complaint and dismissing her causes of action for "refusal to comply with four (4) prior orders of this Court and provide vital and necessary discovery which would enable KONE to properly defend this matter."

In particular, the Defendant claims plaintiff has failed to comply with an April 1, 2010 Preliminary Conference Order, a December 15, 2010 Court-Ordered Discovery Schedule, an October 5, 2011 Status Conference Order and a February 11, 2012 Status Conference Order.

The Defendant claims the plaintiff has refused to provide her pharmacy records for a period predating the incident, provide authorizations enabling the Defendant to obtain these records; and to identify all of her treating physicians for "prior similar injuries."

The underlying event occurred on January 7, 2008 where plaintiff claims she tripped and fell while exiting the freight elevator at a J.C. Penny store (her employer).

A verified bill of particulars describes plaintiff's injuries. More particularly, plaintiff

claims injuries to her right knee requiring knee replacement surgery; injuries to her left knee (tear of the centerior horn of the lateral meniscus); severe degenerative changes; a fractured sternum; chest wall contusion; ribs dysfunction; multiple cervical disc herniations with radiculopathy; shoulder strain; multilevel moderate spondylosthenosis; lumbar radiculitis and lower back strain.

The Defense writes "Plaintiff has a long history of pre-existing medical conditions, the nature and severity of which are material and necessary to KONE's assessment of Plaintiff's damages and preparation for trial."

Plaintiff opposes defendant's petition contending she has complied with the Court's prior discovery orders. To date, Defendant has received authorizations allowing access to the Plaintiff's treatment records at New Island Hospital, Nassau Suffolk Neurology, Amy Rose Physical Therapy, Island Musculoskeletal Care, M.D. P.C., Craig L. Shalmi, M.D., Zwanger-Pesiri Radiology Group, Glenn Arvan, M.D., Octavian G. Austriacu, D.O., AIG Domestic Claims, Inc., Tri Community Health Center, Stony Brook University Hospital and Medical Center Pharmacy.

Additionally, plaintiff has provided the Defense with an authorization for the aforementioned Dr. Marvin Reid who rendered care to plaintiff in the past. Plaintiff notes "To the contrary, the fact is that when defendant's counsel found a notation in one of plaintiff's other medical records indicating that she had treated in Jamaica for arthritis, and requested access to those records, it was the undersigned counsel that conducted a tedious effort to identify Dr. Reid as the plaintiff's doctor in Jamaica and to ascertain his current address.... As soon as undersigned counsel obtained the requisite information, plaintiff provided Defendant's counsel with an authorization for Dr. Reid's records." The authorization is dated October 31, 2011.

As concerns Defendant's application, it appears to this Court that the discoverable things fueling Defendant's petition are "prior" pharmacy records. "Prior" in the sense that those records pre-date the causative event. Plaintiff claims the premise of the Defendant's petition is "the incorrect assumption...that because no other pharmacy records have been produced (CVS pharmacy records since the date of the event have been produced), it must mean that other records nonetheless exist and the plaintiff must be intentionally withholding them." Plaintiff goes on to note "Plaintiff is not aware of any other pharmacy that she used in the U.S. since she moved here from Jamaica in 2006. She may have received medications directly from medical providers in the U.S., such as, at Tri-Community Health Center, Martin Luther King Jr. Community Health Center, or Stony Brook University Hospital."

Defendant suggests the smoking gun is the report of Dr. Reid of Jamaica, West Indies. The Court has studied the report and pharmaceutical trail. Six office visits: two involving arthritis of the knees with mild bilateral venous insufficiency. The other four: warts, high cholesterol, menopausal bleed and a urinary tract infection. The visits commence in March of 2001 and end in December of 2005. Sixty percent (60%) of the visits have nothing to do with injuries claimed in plaintiff's Bill of Particulars.

One probability not considered by the Defense is that plaintiff and her counsel are indeed being truthful. The Court denies Defendant's petition in its entirety. However, a door remains open. At the latest status conference the Court directed the Defendant to depose the plaintiff while reserving the right to renew, its Petition. Therefore, it is

ORDERED that Defendant's Petition is denied and; it is further

ORDERED that Plaintiff be produced for an examination under oath and will answer all questions concerning medications, prior aches, pains, injuries, underlying conditions, all doctor, hospital, clinic, all physical therapy, surgical and rehabilitation services. Defendant may make all appropriate demands thereafter, as to any materials disclosed in that process.

The second petition before the Court is Plaintiff's seeking a Protective Order, pursuant to CPLR § 3103(b) pertaining to Defendant's subpoena and Notice of Deposition of Dr. Marvin Reid. Both sides have submitted papers, however, it appears that by virtue of this Petition the issue is rendered moot for the time being.

This Court, of course, is without jurisdiction to direct and/or order Dr. Reid, a foreign national, to do anything. The parties are free to cooperate with each other to arrange an examination of Dr. Reid at a mutually convenient time. The parties are directed to consider a tele-conference type of examination if they so desire. The Court allows the parties to reserve all rights as concerns Dr. Reid. It being the intent of the Court to address his deposition and/or its necessity during the future status conference.

The foregoing constitutes the decision and Order of this Court.

Dated: November 16, 2012


HON. JERRY GARGUILO, SCJ

HON. JERRY GARGUILO