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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 105022/2011
STURGEON, MARTHA
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 001
STRIKE ANSWER

INDEX NO. 105022/11
MOTION DATE 6/3/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 9 were read on this motion to strike and to compel and cross motion for summary judgment

Notice of Motion— Affirmation — Affirmation of Good Faith— Exhibits 1-8 —Affidavit of Service	No(s). 1-4
Notice of Cross Motion— Affirmation — Exhibits A-E —Affidavit of Service	No(s). 5-7
Affirmation in Opposition & in Reply — Exhibit 9 —Affidavit of Service	No(s). 8-9

Upon the foregoing papers, plaintiff's motion and defendants' cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 9/7/13
New York, New York

_____, J.S.C.

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

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if 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: IAS PART 21

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MARTHA STURGEON,

Plaintiff,

Index No. 105022/2011

- against -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and PETER J. DALEY,

Decision and Order

Defendants.

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, plaintiff alleges that, on January 3, 2011, she was a bus passenger on the M66 bus and was injured when she was propelled to the floor of the bus due to an unusually sudden or abrupt start of the bus. Defendant Peter J. Daley was the alleged bus driver.

Plaintiff now moves to strike defendants' answer for noncompliance with plaintiff's discovery demands and to compel defendants to comply with post-EBT demands. Defendants cross-move for an order granting summary judgment dismissing the portion of plaintiff's complaint alleging negligent hiring, retention, and training, and an order compelling plaintiff to appear for a further deposition and to provide further discovery regarding prior injuries and surgeries.

BACKGROUND

The complaint sets forth three causes of action, each sounding in negligence. Generally speaking, the first alleges that Daley failed to operate the bus in a reasonably safe and suitable manner; the second alleges that the New York City Transit Authority and Metropolitan Transportation Authority (collectively, the Authorities) negligently hired, monitored, and retained Daley; the third alleges that the Authorities negligently entrusted the bus to Daley. (*See* Marber Affirm., Ex 2.)

According to the bill of particulars, plaintiff sustained an impacted fracture of the left humeral neck with anterior lateral displacement of the impacted distal fracture fragment, requiring surgery. (Marber Affirm., Ex 1 [Verified Bill of Particulars ¶ 10].) The bill of particulars also alleges that plaintiff sustained, among other things,

> "Psychological embarrassment due to the scarring, impairment and deformities causing the plaintiff to make both conscious and subconscious efforts to limit the use and visibility of those areas and impairments. . .
>
> Plaintiff has further suffered and continues to suffer severe pain and difficulty with prolonged walking, bending, climbing and descending stairs, lifting or carrying heavy objects, performing strenuous activities, finding a comfortable position or sleeping, dressing and bathing."

(*Id.*)

Plaintiff was deposed on January 26, 2012. At her examination before trial, plaintiff testified that, on January 3, 2011, an ambulance took plaintiff to New York

Presbyterian Hospital, where she was seen by an orthopedic surgeon, Dr. Lorich. (Berkowitz Affirm., Ex A [Sturgeon EBT], at 28, 30.) According to plaintiff, this surgeon previously performed surgery on plaintiff in June 2010, for a left clavicle fracture that happened in April 2010. (*Id.* at 32-33.)

When plaintiff was asked if any of the other surgeries that she had in the last ten years (not previously mentioned) caused her any scarring, plaintiff's counsel objected, and plaintiff did not answer that question. (*Id.* at 59-60.)

At a compliance conference on April 11, 2013, the parties agreed, in pertinent part:

> "Δ [defendant] to depose the plaintiff within 45 days, in a further deposition, limited to any prior injuries and/or treatment related to the part of the body which is the subject of this action, for three years prior to the subject accident, and to provide authorizations therefore."

(Berkowitz Affirm., Ex B.) In a letter dated April 15, 2013, plaintiff's attorney wrote,

> "Although I recognize that the Court has authorized a further deposition of plaintiff with respect to 'any prior injuries and/or treatment related to the part of the body which is the subject of this action, for three years prior to the subject accident,' I submit to you that there are no such injuries or treatment within (or without) that time relating to the 'left surgical humeral neck' at issue in this litigation.
>
> Regardless, on August 25, 2012, we disclose[d] to you authorizations for both New York Presbyterian Hospital and Dr. Dean Lorich for, among other things, an April 25, 2010 left sided clavicle fracture and June 4, 2010 surgical repair. The left clavicle fracture is not the same part of the body as the 'left surgical humeral neck' and,

therefore, an additional deposition is not warranted."

(Berkowitz Affirm., Ex C.) According to defendants' counsel, the authorization has since expired. (Berkowitz Affirm. ¶ 10.)

Defendants also sought a ruling at the compliance conference directing plaintiff to appear for a further deposition regarding plaintiff's prior medical conditions and surgeries. Defendants' counsel appeared to assert that plaintiff testified at her deposition that she was embarrassed about scarring resulting from her clavicle injury. In additional directives dated May 21, 2013, the Court reasoned, "If the clavicle injury had been to the same side of plaintiff's body as plaintiff's left humeral neck fracture, the embarrassment over the scarring that resulted from both surgeries would be a permissible area of inquiry." However, the Court denied defendants' application without prejudice to a motion, stating "The Court does not have enough information as to whether plaintiff's clavicle injury was to the left side of her body."

Meanwhile, Daley was deposed on March 29, 2012. (Marber Affirm., Ex 5.) Daley testified that he is a bus operator who has been with the New York City Transit Authority (NYCTA) for 19 years. (Marber Affirm., Ex 5 [Daley EBT], at 6.) Daley further testified that, on January 3, 2011, he was driving bus along the M66 route (*Id.* at 37), and that plaintiff boarded the bus at the bus stop on Second Avenue and East 67th Street. (*Id* at 55, 58.)

After Daley's examination before trial, plaintiff served a demand for discovery and inspection dated April 2, 2012, requesting 15 items. At issue here is item no. 1, which demanded Daley's entire personnel file, and item nos. 5-14, which demanded documents relating to certain requirements under the Vehicle and Traffic Law for bus drivers, such as a biennal examination of the bus driver, an annual check of the past driving record, and other reporting requirements.

In a response dated January 9, 2013, the Authorities objected to plaintiff's demand of Daley's personnel file as overly board, irrelevant, and patently, improper. (Marber Affirm., Ex 8.) With respect to item nos. 5-14, the Authorities stated, "Responses to be provided under separate cover." (*Id.*)

DISCUSSION

Defendants' Cross Motion for Summary Judgment

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the

opposing papers ."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

As a threshold matter, the Court rejects plaintiff's argument that summary judgment should be denied because defendants submitted the affirmation of an attorney. "The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form', e. g., documents, transcripts." (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980].) Contrary to plaintiff's argument, defendants were not required to attach a copy of the pleadings with their cross motion because plaintiff had already submitted such copies with her moving papers. (*Washington Realty Owners, LLC v 260 Washington St, LLC*, 105 AD3d 675, 675 [1st Dept 2013]["The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted"].)

Although plaintiff points out that the cross motion was served one day before the original return date of plaintiff's motion, the return date of both the motion and cross motion was adjourned for an additional 21 days, which cured any defect as to whether the cross motion was timely served. Lastly, plaintiff's argument that the

notice of cross motion is defective is without merit. "[T]here is no requirement that a movant identify a specific statute or rule in the notice of motion. . ." (*Blauman-Spindler v Blauman*, 68 AD3d 1105, 1106 [2d Dept 2009].)

> "Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training."

(*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997] [citation omitted]; *Segal v St. John's Univ.*, 69 AD3d 702 [2d Dept 2010]; *Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143 [4th Dept 2008]; *Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744 [3d Dept 2006].)

Karoon controls here. It is undisputed that Daley was acting within the scope of his employment at the time of plaintiff was allegedly injured.

Karoon recognized an exception, "where the injured plaintiff is seeking punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee." (*Karoon*, 214 AD2d at 324.) However, the exception does not apply to the Authorities, because "the State and its political subdivisions, as well as public benefit corporations such as the instant Transit Authority defendants,

are not subject to punitive damages." (*Id.*)

Contrary to plaintiff's argument, summary judgment is not premature because of Daley's unrebutted deposition testimony establishing that he was acting with the scope of his employment at the time of alleged incident.

Therefore, the second cause of action is dismissed. Defendants did not seek summary judgment dismissing the third cause of action, which alleges that the Authorities negligently entrusted the bus to Daley.

Turning to the branch of defendants' cross motion to compel plaintiff to appear for a further deposition and discovery,

> "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 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, 456-457 [1983][citations omitted].) "[A] party does not waive the [physician-patient] privilege with respect to unrelated illnesses or treatments." (*McLane v Damiano*, 307 AD2d 338, 338 [2d Dept 2003].)

Here, plaintiff asserts that her left clavicle fracture in April 2010 and the treatment she sought, including surgery, are unrelated to the left humeral neck fracture that plaintiff sustained. Plaintiff therefore concludes that defendants are not

entitled to a further deposition concerning the left clavicle fracture.

A defendant is entitled to discovery to determine the extent, if any, that plaintiff's claimed injuries are attributable to causes or circumstances other than the alleged accident. (*McGlone v Port Auth. of NY & NJ, 90 AD3d 479, 480 [1st Dept 2011]; Rega v Avon Prods., Inc.*, 49 AD3d 329 [1st Dept 2008].)

Here, the bill of particulars alleges not only that plaintiff sustained a left humeral neck fracture, but also that suffers from "[p]sychological embarrassment due to the scarring, impairment and deformities causing the plaintiff to make both conscious and subconscious efforts to limit the use and visibility of those areas and impairments. . ." (Marber Affirm., Ex 1.) The bill of particulars also states that plaintiff suffers "severe pain and difficulty with prolonged walking, bending, climbing and descending stairs, lifting or carrying heavy objects, performing strenuous activities, finding a comfortable position or sleeping, dressing and bathing." (*Id.*) The question presented is whether plaintiff's prior left clavicle fracture or the treatment of that fracture are related either to the scarring resulting from the surgery for the left humeral neck fracture, or to plaintiff's alleged pain and difficulties.

At the compliance conference on April 11, 2013, the Court did not have the benefit of plaintiff's entire deposition transcript. Here, based on a review of the entire

transcript of plaintiff, the Court concludes that the left clavicle fracture and the treatment of the left clavicle fracture are not related to injuries alleged in this action. A review of the entire deposition transcript reveals that plaintiff did not testify that she had any visible scars as a result of her left clavicle surgery, or that she had suffered embarrassment about such scars. Rather, plaintiff elected not to answer the question, "Did any of the other surgeries in the last ten years that you haven't discussed with me cause you any scarring?" (Sturgeon EBT, at 59.)

More importantly, plaintiff indicated at her deposition that the roughly "6-inch scar on my left arm", allegedly resulting from the surgery for the left humeral neck fracture, runs from plaintiff's left shoulder towards her left elbow. (Sturgeon EBT, at 72.) It is not argued that this scar is in the same area as any scar that might have resulted from her left clavicle surgery. Although plaintiff testified that she experienced some pain after her left clavicle surgery, she stated that her pain went away, and that she had no pain in the area of her left clavicle on the day of her deposition. (*Id.* at 44.) When asked if the injury to her clavicle affected her mobility for any period of time, plaintiff answered, "For a short period of time." (*Id.* at 44.)

Therefore, defendants are not entitled to an order compelling plaintiff to provide a new authorization for the release of medical records from all providers who treated plaintiff, including surgery, for a fractured left clavicle that occurred in April

2010. Neither are defendants entitled to a further deposition of plaintiff. Plaintiff already testified about how she allegedly injured her left clavicle, about her treatment for the broken clavicle, including surgery and physical therapy after the surgery, and about the pain and limitations allegedly resulting from breaking her clavicle. (Sturgeon EBT, at 34-43.)

Plaintiff's Motion to Strike and to Compel

> "'[I]t is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith'. Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses."

(*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [citation omitted].)

Plaintiff has not demonstrated that defendants' refusal to produce Daley's entire personnel file was willful, contumacious or due to bad faith. In light of Daley's deposition testimony indicating that Daley's operation of the bus was in the scope of his employment, the post-deposition demand for his personnel file was palpably improper on its face. (*Neiger v City of New York,* 72 AD3d 663 [2d Dept 2010][because the bus driver was acting within the scope of his employment when

the accident occurred, "the personnel records of the bus driver were not discoverable"].)

Plaintiff argues that information in Daley's personnel file would be material and necessary to her cause of action for negligent entrustment, which was not the subject of defendants' motion for summary judgment. However, it is clear that defendants did not provide the personnel file because the discovery sought was for causes of action that are ultimately not viable. This is a reasonable explanation for their refusal to comply with plaintiff's demand for Daley's personnel file.

Although *Karoon* did not mention the theory of negligent entrustment, the rationale in *Karoon* applies equally to a theory of negligent entrustment. Assuming, for argument's sake, that the bus had been negligently entrusted to Daley, there should be no employer liability if Daley did not, in fact, operate the vehicle negligently. Assuming, again for argument's sake, that Daley had operated the vehicle negligently, then his employer would be liable under respondeat superior regardless of whether his employer had negligently entrusted the bus to Daley. (*Cf. Cheng Feng Fong v New York City Tr. Auth.*, 83 AD3d 642 [2d Dept 2011] ["even if the bus driver's conduct is determined to have been an intentional tort, the Transit Authority would be vicariously liable to the plaintiff under the doctrine of respondeat superior, regardless of its knowledge of the bus driver's medical and work history"].)

Information contained in Daley's personnel file is neither relevant to the issue of whether Daley had operated the bus negligently, nor reasonably calculated to lead to admissible evidence of negligent operation of the bus in this action.

Plaintiff points out that, in their response dated January 9, 2013, defendants did not object to item nos. 5-14 of plaintiff's notice for discovery and inspection dated April 12, 2012, which demanded documents relating to certain requirements under the Vehicle and Traffic Law for bus drivers.

In their cross motion, defendants now argue that those demands are irrelevant. The documents demanded do not appear relevant to the issue of whether Daley operated the bus negligently when plaintiff was allegedly propelled to floor of the bus. For example, item no. 11 demands documents concerning a biennial examination required of motor carrier drivers under Vehicle and Traffic Law § 509-g in the four years preceding plaintiff's alleged accident.

However, "the failure of a party to challenge the propriety of a notice for discovery and inspection within the time prescribed by the CPLR forecloses inquiry into the propriety of the information sought, [but] there is an exception with regard to requests that are palpably improper." (*Accent Collections, Inc. v Cappelli Enter.*, 84 AD3d 1283, 1284 [2d Dept 2011]). This exception does not apply here because defendants apparently promised to provide the documents demanded. Defendants

responded, "Responses to be provided under separate cover." (Marber Affirm., Ex 8.) Given that defendants had objected in their response to other demands as "patently improper", defendants' response to these demands must therefore be interpreted as a response that the demanded documents would be provided.

Nevertheless, plaintiff has not demonstrated a pattern of non-compliance with court orders concerning defendants' failure to provide these documents, which would establish an inference of willful and contumacious behavior. In sum, the branch of plaintiff's motion to strike defendants' answer is denied.

However, plaintiff is entitled to an order compelling defendants to produce any documents in the their custody, possession, or control that are responsive to item nos. 5-14 of plaintiff's notice for discovery and inspection dated April 12, 2012,

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of plaintiff's motion to strike defendants' answer is denied; and it is further

ORDERED that, within 60 days, defendants must produce documents demanded in item nos. 5-14 of plaintiff's notice for discovery and inspection dated April 2, 2012; and it is further

ORDERED that the branch of defendants' cross motion for summary judgment

is granted, and the second and third causes of action of the complaint are dismissed, and the remainder of the motion is otherwise denied.

Dated: September 7, 2013
New York, New York

ENTER:

J.S.C.