SCAN

SUPREME COURT OF THE STATE OF NEW YORK – NASSAU COUNTY
P R E S E N T: HON. NORMAN JANOWITZ,

Justice.

SHELBY BRELIG,

Plaintiff,

-against-

Trial/ IAS Part 21
Index No.: 10398-11
Motion Seq. # : 001-004
Submit Date: May 8, 2013

TARGET CORPORATION, BESAM S INC a/k/a and d/b/a BESAM ETRANCE SOLUTIONS and ASSAY ABLOY SALES AND MARKETING GROUP, INC.,

DECISION AND ORDER

Defendants.

The following papers having been read on the instant motions:

Motion Sequences 001 and 002:

Notice of Motion, Affirmation & Exhibits.....1
Notice of Cross Motion, Affirmation & Exhibits.....2
Affirmation in Further Support and in Opposition to Cross- Motion and Exhibits.....3
Reply Affirmation 4

Motion Sequences 003 and 004:

Notice of Motion, Affirmation & Exhibits.....1
Notice of Cross Motion, Affirmation & Exhibits.....2
Affirmation in Opposition and Exhibits.....3
Reply Affirmation to Motion to Strike and In Opposition to Cross-Motion.....4
Reply Affirmation to Opposition to Cross-Motion.....5

Motion Sequence 001 & 002

Motion by defendant Target Corporation (Target) pursuant to CPLR 3126 to (1) dismiss the complaint or, in the alternative, to compel plaintiff to provide certain outstanding discovery; (2) to strike the answer interposed by defendant Besam US Inc., a/k/a and d/b/a Besam Entrance Solutions (Besam) or, in the alternative, to compel defendant Besam to provide outstanding

discovery and (3) to direct plaintiff and defendant Besam to reimburse Target for the cost of the motion, is **DENIED**.

Cross motion pursuant to CPLR 3126 by defendant Besam to compel defendant Target to provide outstanding discovery requested pursuant to Notice for Discovery and Inspection dated June 27, 2012 is granted. Defendant Target is hereby directed to serve a response within 20 days of service of a copy of this order on said defendant.

Motion Sequence 003 & 004

Motion pursuant to 22 NYCRR 202.21(e) by defendant Target to vacate the note of issue and certificate of readiness filed by plaintiff, and to strike the action from the trial calendar, and, pursuant to CPLR 2004 and CPLR 3212(a), extend defendant Target's time to move for summary judgment until 120 days following completion of discovery is denied.

Cross motion by plaintiff pursuant to CPLR 3124 to compel defendant Target to produce a copy of the medical report prepared by Andre Montazem, M.D., who examined plaintiff on January 16, 2013, is denied as moot inasmuch as the report has been produced.

BACKGROUND

In this action plaintiff seeks to recover for injuries she sustained on December 23, 2010 as she exited Target store #T1264 located at 3850 Hempstead Turnpike, Levittown, New York, when the automatic door suddenly slammed into her face causing her to be precipitated to the ground.

Dissatisfied with certain of their adversaries' responses to various discovery demands, or lack thereof, the respective parties seek to compel answers to outstanding discovery or, in the alternative, to impose a penalty as prescribed by CPLR 3126.

ANALYSIS

CPLR 3101(a) provides for full disclosure of all matter material and necessary in the prosecution or defense of an action. The material and necessary requirement directed in CPLR 3101(a) is to be liberally construed to require disclosure where the material sought will assist in trial preparation by sharpening the issues and reducing delay (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Wadolowski v Cohen*, 99 AD3d 793, 794 [2d Dept 2012]). It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence, or is reasonably calculated to lead to the discovery of information bearing on the claims. Unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010]; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]).

Where a party wilfully refuses to obey a discovery order, CPLR 3126 provides for the imposition of penalties. Such penalties may include striking the recalcitrant party's pleadings.

The nature and degree of the penalty to be imposed for failure to comply with a disclosure order is a matter generally left to the discretion of the court (*Polsky v Tuckman*, 85 AD3d 750 [2d Dept 2011]). To invoke the drastic remedy of striking a pleading, the court must determine that a party's failure to comply with a disclosure order was the result of willful, deliberate and continuous conduct or its equivalent (*Bernardis v Town of Islip*, 95 AD3d 1050 [2d Dept 2012]; *Commisso v Orsham*, 85 AD3d 845 [2d Dept 2012], *lv to appeal dismissed in part, denied in part* 18 NY3d 876 [2012], *rearg denied* 19 NY3d 846 [2012]).

At issue on this discovery motion is the failure of plaintiff to provide:

an authorization to obtain plaintiff's medical records from Premiere Clinic;

an authorization to obtain plaintiff's records regarding her Cheer Team from Premier Gym;

copies of receipts evidencing any claimed out-of-pocket expenses;

copies of the documents that plaintiff referred to at her recent deposition which she viewed to obtain her grade point average from the University of Connecticut;

a copy of plaintiff's high school yearbook; and

a photograph of plaintiff prior to the accident at Target

(Defendant Target's Motion to Compel: Exhibit "O").

Defendant Target seeks to compel defendant Besam to provide a further response to items 6 - 9 of defendant Target's notice for discovery and inspection dated July 12, 2012, and items 3 - 6; 9, 10; and 12 - 14 of the demand dated January 26, 2012 pursuant to the so ordered stipulation of the Hon. Jeffrey A. Goodstein dated January 24, 2013. (Defendant Target's Motion to Compel: Exhibit "N")

It appears from the submissions before the court that plaintiff has provided authorization permitting defendant Target to obtain a copy of her high school yearbook and has provided photographs of herself pre and post-accident. Inasmuch as plaintiff has provided authorization for defendant Target to obtain her educational records, including transcripts, from the University of Connecticut, the fact that plaintiff has not provided the specific document she reviewed online regarding her grade point average prior to her deposition, is inconsequential.

Here, defendant Target has failed to establish that plaintiff's or defendant's Besam's conduct, or lack of cooperation, *vis-a-vis* discovery was willful, deliberate and contemptuous

such that the striking of their respective pleadings is warranted.

Plaintiff is, however, directed to provide authorization(s) compliant with Health Insurance Portability and Accountability Act of 1996 (42 USC § 1302d *et seq.*), permitting defendant Target to conduct an *ex parte* interview of plaintiff's treating non-party physicians in accordance with *Arons v Jutkowitz*, 9 NY3d 393 [2007]. As noted by the Court of Appeals in *Arons*, there is no general prohibition against defense counsel conducting an *ex parte* interview with a non-party physician who treated plaintiff. As reiterated in that decision.

> "the treating physicians remain entirely free to decide whether or not to cooperate with defense counsel. HIPAA compliant authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use of disclosure of protected health information may take place" (*Arons v Jutkowitz, supra* at p. 416).

Notwithstanding assertions to the contrary by plaintiff's counsel, counsel is not entitled to be present at the interview conducted of plaintiff's treating physicians by defendant Target's counsel, or to know what questions said attorney intends to ask of plaintiff's treating physicians.

With respect to defendant Besam, defendant Target argues that said defendant has failed to comply with the January 24, 2013 so ordered stipulation of the Hon. Jeffrey A. Goodstein in that it has not provided complete responses to items 7, 8, 11 and 15 of said defendant's July 12, 2012 demand and item 1 of its January 26, 2012 demand.

"While the mere use of such terms as "all," "all other" and "any and all" will not necessarily or automatically render an otherwise proper request for specified documents improper (*Agricultural & Indus. Corp. v Chemical Bank*, 94 AD2d 671, 672 [1st Dept 1983]), items 7, 8, 11 and 15 of the July 12, 2012 notice, and item number 1 of the January 27, 2012 notice, are

overbroad and lacking in requisite specificity.[1] As such, they are hereby stricken.

While CPLR 3101(a) is to be liberally interpreted in favor of disclosure, the discovery sought must be relevant to the issues at bar with the test employed being usefulness and reason (*Ural v Encompass Ins. Co. of America*, 97 AD3d 562, 566 [2d Dept 2012]). Here, review of defendant Besam's responses indictes that with respect to all proper demands, said defendant is in compliance.

Although defendant Target objected to the two items contained in defendant Besam's notice for discovery and inspection dated January 24, 2013 as vague, overbroad and irrelevant and, therefore, not likely to lead to discoverable information, the objection is untenable in that

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[1]The items at issue are as follows:

July 12, 2012 Notice for Discovery and Inspection:

> Copies of any and all of Besam's records regarding its national accounts;
>
> Copies of any and all of Besam's records regarding its national account with Target;
>
> Any and all documents and/or records showing Besam's procedures for expedited service;
>
> A copy of any and all written training materials regarding safety, ordering parts, servicing doors and repairing doors; and

January 27, 2012 Notice for Discovery and Inspection:

> All materials in the possession of co-defendants' counsel and/or representatives, or anyone under co-defendants' control, including any documents, manuals, handbooks, guides, video tapes, policies, practices operating procedures, or any other materials, containing information including, but not limited to the rules and procedures regarding maintenance work performed on automatic doors.

both items are specific, narrowly targeted and relevant to the issues at hand.[2] Defendant Target is, therefore, directed to provide the requested information.

Having reviewed the papers submitted, the court finds that defendant Target has offered no cogent basis to strike the note of issue herein and extend its time to move for summary judgment. Under *Arons*, a post note of issue physician interview is expressly permitted (*Arons v Jutkowitz, supra* at p. 410) without the need to strike an already filed note of issue. All outstanding "necessary and relevant" discovery has been provided.

DATED: June 25, 2013
Mineola, NY

ENTER:

HON. NORMAN JANOWITZ
J.S.C.

[2] Copies of any service orders for service by Besam at the Levittown Target store for the period of November, 2010 thru January, 2011.

A copy of the e-mail correspondence generated by Mr. Lally upon the completion of the work performed by Steve Hanna on December 13, 2010 as testified by Mr. Lally wherein he issued an e-mail to Target concerning Mr. Hanna's advising that the doors should remain closed until they could be repaired and that they could not have been repaired that night because parts needed to be ordered.