Flores v Parkview Owners, Inc.
2014 NY Slip Op 31952(U)
June 2, 2014
Sup Ct, Bronx County
Docket Number: 300148/09
Judge: Laura G. Douglas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MIGUEL FLORES,

Plaintiff,

Index No. 300148/09

-against-

PARKVIEW OWNERS, INC., HUDSON RIVER PROPERTY MANAGEMENT CORP., and DF RESTORATION, INC.,

Defendants.

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DF RESTORATION, INC.,

Third-Party Plaintiff,

-against-

T.P. Index No. 84172/09

LOPEZ CONSTRUCTION SERVICES CORPORATION,

Third-Party Defendant.

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HON. LAURA DOUGLAS:

Motion by defendants Parkview Owners, Inc. and Hudson River Property Management Corp. (collectively, "Parkview"), cross-motion by third-party defendant Lopez Construction Services Corp. ("Lopez Construction"), and cross-motion by defendant/third-party plaintiff DF Restoration, Inc. ("DF Restoration"), are consolidated for purposes of Decision/Order. The motions seek to vacate the note of issue and/or compel disclosure, to extend the deadline to make a motion for summary judgment, and related relief.

The plaintiff seeks monetary damages for personal injuries allegedly sustained when a parapet wall fell upon him while he was working on a roofing renovation project on December 13, 2008. DF Restoration was the general contractor for the project. The Parkview defendants owned and managed the premises where the work was being performed. The plaintiff was employed by Lopez Construction.

Motion by Parkview

Two main points of contention are Parkview's demand for an authorization to obtain records concerning the plaintiff's account held at Bank of America and an authorization to obtain his citizenship and immigration records.

The defendants contend that they are entitled to view the bank records in assessing the

plaintiff's lost earnings claim.[1] The plaintiff testified that Lopez Construction paid his salary in both cash and check. However, there is no evidence that the plaintiff deposited the cash portion of his salary into that bank account. Rather, the plaintiff testified that he would cash his paycheck at a Bank of America branch in the Bronx (Plaintiff's EBT, p. 457-60)[2]. Since the defendants have failed to "establish a factual predicate for the disclosure of these financial records", their motion to compel this disclosure is denied (*see Chervin v. Macura*, 28 AD3d 600, 602 [2nd Dept 2006]). In addition, the plaintiff has provided access to more reliable sources from which to obtain his wage information, including payroll records from Lopez Construction and its payroll processor, W-2 forms, and pay stubs. Accordingly, that branch of Parkview's motion seeking an authorization to obtain the plaintiff's bank records from his Bank of America account is denied. However, no later than 30 days from service of a copy of this Order with notice of entry, the plaintiff shall provide the defendants with a copy of any document which he will seek to introduce at trial pertaining to his lost wages claim which has not yet been provided.

The defendants seek an authorization to obtain the plaintiff's complete records from "U.S. Citizenship and Immigration Services ... including applications and decisions regarding the grant of a work permit for Plaintiff to work in the United States".[3] The defendants contend that the plaintiff placed his immigration status at issue by asserting a "$1,513,000 to $2,311,000" lost earnings claim.[4]

The New York Court of Appeals has held that a jury is permitted to "consider **immigration status** as one factor in its determination of the damages, if any, warranted under the Labor Law"

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[1] In Plaintiff's Amended Supplemental Bill of Particulars, dated August 16, 2011, Plaintiff alleges past and future loss of earnings of approximately $1.5 to $2.3 million dollars. (Parkview's Exhibit "G").

[2]It is noted that Parkview's Post-EBT Notice for Discovery (Defendants' Exhibit "H"), Items 14 and 15, refer to p. 495 of Plaintiff's EBT (Defendants' Exhibit "C'), but that page was not included in the papers provided to the Court.

[3] *See* Parkview's "Demand for Authorizations", dated April 25, 2012.

[4] Plaintiff's "Amended and Supplemental Bill of Particulars", dated August 16, 2011, at Parkview's Exhibit "G".

[emphasis supplied] *Balbuena v. IDR Realty LLC*, 6 NY3d 338, 362 [Ct App 2006]. The Court explained that:

> "an undocumented alien plaintiff could, for example, introduce proof that he had subsequently received or was in the process of obtaining the authorization documents required by IRCA and, consequently, would likely be authorized to obtain future employment in the United States. Conversely, a defendant in a Labor Law action could, for example, allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied. In other words, a jury's analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case"

Balbuena at 362.

"Plaintiff put his immigration status at issue when he sought damages for future lost earnings..., defendants are clearly entitled to present evidence to a jury concerning the amount of plaintiff's future lost earnings. In calculating the amount ..., a jury may consider the likelihood that plaintiff will remain in this country. Therefore, plaintiff's immigration status is a relevant fact for a jury to consider." *Barahona v. Trustees of Columbia Univ. in City of New York*, 11 Misc.3d 1035, 1036-38 [Sup Ct, Kings County 2006]. In *Barahona*, the Court held that the plaintiff should provide defendants with the requested authorizations and records pertaining to his immigration status.

In another recent case, the Court held that "plaintiff's lost earnings and lost future earning capacity, which are claimed here, may vary significantly depending on whether the earnings are based on earnings figures for jobs in the United States, or in other parts of the world where plaintiff might have worked." Therefore, the Court held that "plaintiff shall (1) provide an executed copy of Form G-639 from the Department of Homeland Security, U.S. Citizenship and Immigration Services, to allow defendants to obtain plaintiff's immigration records, and (2) produce copies of plaintiff's immigration visas and passport(s) to defendants" *Wilkowski v. New York City Tr. Auth.*, 2011 N.Y. Slip. Op. 31339(U) [Sup Ct, NY County 2003].

Similarly, in a case here in Bronx County, the Supreme Court held that a "plaintiff's immigration condition is relevant in the sense that the jury may consider the economic realties that exist if plaintiff is ultimately not permitted to remain in the United States. The jury may consider the effect on plaintiff's wage earning ability and required medical care costs in the event he is required to return to his homeland" *Maliqi v. 17 E. 89th St. Tenants, Inc.*, 25 Misc.3d 182, 188-189 [Sup Ct, Bronx County 2009]. In another recent case, upon analyzing the "differing treatment by courts as to the scope of disclosure with respect to a plaintiff's immigration status", the Court held that it was sufficient for plaintiff to provide "defendants with a copy of his Permanent Resident Card, as well as disclosure of his driver's license and union card", since "[t]hat **disclosure reveals Plaintiff's permanent resident status**, and Defendants fail to make any showing that there is further need of disclosure as to Plaintiff's immigration status. More specifically, Defendants fail to show how their demand for authorizations for homeland security records, and Plaintiff's passport are "material and necessary" in defense of Plaintiff's claims or is reasonably calculated to lead to relevant evidence" [emphasis supplied] *Reynoso v. Bovis Lend Lease, Lmb, Inc.*, 39 Misc 3d 1224(A) [Sup Ct, Kings County 2013].

In the case at bar, the relevant facts include that the plaintiff was born in Mexico in 1984, and came to the United States in 1992. The plaintiff is not a U.S. citizen; he holds a Mexican passport. He married a U.S. citizen on September 4, 2010 (Plaintiff's EBT, dated April 26, May 3, and July 6, 2011, p. 8-10, 439, 445).

Although the plaintiff did not have his Permanent Resident Card (a/k/a his "green card") at the time of his deposition in 2011, he subsequently was granted permanent resident status and acquired his "green card". In response to the motion, the plaintiff provided defendants, for the first

time, a copy of his current Permanent Resident Card (which expires June 23, 2014); Welcome Notice (dated June 25, 2012); and social security card dated December 6, 2011 (*see* Plaintiff's Exhibits "J", "I", and "K"). It is noted that the plaintiff redacted some information from these documents submitted to the Court, including his USCIS number.

Since the plaintiff admitted at his deposition that he had bought a fake social security card on the street, which he then presented to his employer, the defendants question the authenticity of the documents presented. They request an authorization to obtain a copy of the pertinent records directly from their source. Accordingly, the defendants' motion is granted to the extent that, no later than 30 days following service of a copy of this Order with notice of entry, the plaintiff shall provide the defendants with an authorization to obtain, directly from the Department of Homeland Security U.S. Citizenship and Immigration Services, a copy of the document that reflects Plaintiff's current immigration status – namely, Plaintiff's Permanent Resident Card (as well as any updated card issued after the present card expires in June 2014). In addition, the plaintiff shall provide the defendants with a sworn affidavit stating his current immigration status.[5]

The Court notes that the only document identified as being dispositive on the issue of the plaintiff's immigration status is his Permanent Resident Card. A permanent resident may live and work in the United States permanently. Thus, the defendants have not shown that they are entitled to a copy of the remainder of the plaintiff's file – which presumably may merely contain such ancillary documents as

the plaintiff's application to obtain the green card.

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[5] (This affidavit is necessary since the "green card" was issued to the plaintiff subsequent to his deposition, and plaintiff's counsel did not present such an affidavit in response to the instant motion).

The branch of the motion seeking authorizations to obtain the plaintiff's medical records from Gwonuk Lim, DPT, WSPT, Michael Del Grosso, DPT, WSPT, Eduardo Cardona, PT, and Soft Touch Orthotics, LLC,[6] is granted. The plaintiff shall provide the defendants with these authorizations no later than 30 days following service of a copy of this Order with notice of entry. The Court notes that the plaintiff did not object to the defendants obtaining records from those providers, but objected only that these authorizations were already provided. As far as the individual therapists Lim, Del Grosso, and Cardona, the plaintiff surmises that their records were contained within the records of WSPT (an aquatic physical therapy facility). However, no proof regarding WSPT's record-keeping practices was submitted. In addition, the defendants note that the individual therapists billed for their services separately, not under WSPT's name. Under these circumstances, the defendants are entitled to the authorizations to ascertain whether any separate records exist.

With respect to Soft Touch Orthotics, although plaintiff's counsel contends that the plaintiff's last contact with this facility was in October 2011, no affidavit from plaintiff himself was submitted on this point. Since the authorization that the plaintiff previously provided limited disclosure to records up until May 2012, the defendants are entitled to a fresh authorization to ascertain whether subsequent records exist. The branch of the motion which seeks authorizations for the plaintiff's medical treatment, if any, for a November 2, 2006 motor vehicle accident, is granted only to the extent that, if the plaintiff's Nationwide Insurance (no-fault) claim records indicate that he received medical treatment, then the plaintiff shall provide the pertinent medical authorizations within 30 days

[6] *See* Parkview's Demand for Authorizations dated January 7, 2013.

of a further demand for same.[7]

The branch of the motion which seeks to compel DF Restoration to respond to the defendants' Post-EBT Notice for Discovery and Inspection dated January 4, 2013 (regarding documents requested pursuant to the deposition of Mr. McMahon, including minutes of progress meetings, and the roof work schedule), and Notice for Discovery and Inspection dated February 24, 2011 (including certain correspondence between DF Restoration and certain insurance carriers and brokers regarding this incident, as well as certificates of incorporation for DF Restoration and others), is granted. DF Restoration does not object to providing the documentation requested, but vaguely states that the records were previously provided, "or addressed", in its numerous discovery responses. Yet, it failed to provide a copy of its response or any specifics about when it was furnished. Similarly, Lopez Construction seeks to compel DF Restoration to provide a response to its Post-Deposition Demand for Discovery and Inspection dated December 24, 2012, which also requests documents flowing from the deposition of Mr. McMahon, including minutes of progress meetings, and the roof work schedule. Accordingly, no later than 30 days following service of a copy of this order with notice of entry, DF Restoration shall respond to the aforesaid documents.

The branch of the motion pertaining to Lopez Construction's response to the defendants' Post-EBT Notices for Discovery & Inspection dated November 26, 2012 (including a copy of the job file and progress photos) and March 26, 2013 (regarding documents requested pursuant to the deposition of Adalberto Lopez, including contact information for its former foreman Oscar Alvarez),

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[7] Plaintiff's counsel denies that the plaintiff received treatment, but provided the Nationwide authorization so that the defendants could verify that information through the no-fault record. However, at the time of the making of the instant motion, the defendants had just received the corrected authorization, and so had not yet processed it.

is denied as moot. This issue appears resolved, since a response was provided within Lopez Construction's Affirmation in Partial Opposition submitted herein, including an affidavit from its principal, Adalberto Lopez, dated May 10, 2013 addressing the outstanding issues.

Cross-Motion by Lopez Construction

Lopez Construction moves to compel Parkview to produce certain documents in response to Lopez Construction's "Post-Deposition Demand" dated March 9, 2012, pertaining to the deposition of Fran Kempler, one of Parkview's building manager. The most-contested item is # 5, which requests a complete copy of the "Mueser Rutledge Consulting Engineers report pertaining to examination of the wall on behalf of defendants Hudson and Parkview following the subject incident". In support of its request, Lopez Construction contends that the subject parapet wall fell onto the plaintiff because of the "improper pre-existing design and construction of the parapet wall" which "was improperly braced in that it lacked stabilization rods, and no witness has had any factual knowledge as to the reasons why the wall fell, **and, as the wall does not currently exist in the form that it did on the date of the accident**, a copy of the Mueser Rutlege Consulting Engineers engineering report is critical to the central [liability] issue in the main action as to the reason that the wall fell." [emphasis supplied] (*see* Affirmation of Judy Brown, counsel to Lopez Construction, dated May 3, 2013, p. 9).

In response, Parkview contends that the Mueser report is not discoverable, since it is "material prepared in anticipation of litigation", as well as a record of "post-accident remedial measures". In support, Parkview merely cites to that portion of the deposition of Ms. Kempler wherein she states that Mueser was retained by their corporate counsel (Kempler EBT, p. 263-64). No details are provided with respect to the substance of the report.

The Court of Appeals has stated that

> "the CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney's work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101 [d] [2])."

Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 NY2d 371, 376-377 [Ct App 1991].

With regard to the applicable standard, pertaining to disclosure of materials prepared for litigation, CPLR § 3101(d)2 specifically provides as follows:

> "Materials. Subject to the provisions of paragraph one of this subdivision, **materials** otherwise discoverable under subdivision (a) of this section and **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, surety, indemnitor, insurer 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" [emphasis supplied].

"[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed, and its application must be consistent with the purposes underlying the immunity... [A]n investigative report does not become privileged merely because it was sent to an attorney. Nor is such a report privileged merely because an investigation was conducted by an attorney" *Spectrum Sys. Int'l Corp. v. Chem. Bank,* 78 N.Y.2d at 377, 379. In addition, "if litigation is only one of the motives of a report, the report is not immune from discovery", and defendants failed to sustain their burden, where their brief statement, alleging that the documents "were made in contemplation of litigation[,] is conclusory and does not establish privilege." *Mavrikis v. Brooklyn Union Gas Co.*, 196 AD2d 689, 690 [1st Dept. 1993].

In the case at bar, although the defendants vaguely allege that the engineer was retained by its attorneys, they do not describe the substance of the report, or present it for *in camera* inspection. A conclusory allegation by counsel, without any evidentiary support, that the subject report constitutes material prepared in anticipation of litigation is insufficient to meet the defendants' burden (*see Martino v. Kalbacher*, 225 AD2d 862 [3rd Dept 1996]).

If the defendants manage to satisfy their burden to establish that the subject document constitutes material prepared for litigation, then the party seeking disclosure must meet its consequent burden, set forth in CPLR 3101[d][2], to show that it has substantial need of the materials and is unable to obtain the equivalent (*see Corcoran v. Peat, Marwick, Mitchell & Co.*, 151 AD2d 443 [1st Dept 1989]). Here, Lopez Construction suggests that the Mueser engineers were in a position to inspect the condition subject parapet wall as it was when the accident occurred, and that the wall does not exist in that form today. However, this is difficult to verify without reviewing the report.

With respect to the claim that the subject engineering report is shielded from discovery as a post-accident remedial measure, it is well-established that such items need not be disclosed unless they fall within an exception to the general rule (*see Cook v. HMC Times Sq. Hotel, LLC*, 112 AD3d 485 [1st Dept 2013] and *Stolowski v. 234 E. 178th St. LLC*, 89 AD3d 549 [1st Dept 2011]). The Court of Appeals has held that reviewing document immunity claims is a fact-specific process (*see Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 NY2d 371 [Ct App 1991]). In Spectrum, the Court remitted the matter back to the Supreme Court for an *in camera* inspection of the subject document, since the record before it left it with an inadequate basis for making a determination. Similarly, in another case, the Court directed that the defendants "supply that court with the material at issue ...

for *in camera* review to allow a more informed determination of whether these reports were prepared for the express purpose of litigation or whether they were reports which normally result from the regular internal operation of the business" *Mavrikis v. Brooklyn Union Gas Co.*, 196 AD2d 689 [1st Dept 1993].

Accordingly, Parkview is directed to provide the subject Mueser report, directly to the undersigned, for an *in camera* inspection, within 20 days following service of a copy of this Order with notice of entry, so that the Court may make a more informed determination as to whether the document, or portions thereof, may be protected from disclosure upon the grounds alleged. Together therewith, counsel shall provide a signed Memorandum of Law, setting forth the legal standards to be applied, which shall be served upon all counsel. Opposing counsel may submit, and serve, a signed responsive Memorandum of Law, within ten (10) days thereafter.

As far as the other seven items that Lopez Construction seeks pursuant to its "Post-Deposition Demand" dated March 9, 2012, it is not clear why Parkview objects to their production, since they employ general commonplace language.[8] Accordingly, the defendants shall provide a copy of four of those items, summarized as follows: Item 3 (project file for roof replacement, etc.), Item 4 (architect's meetings minutes, etc.), Item 6 (progress meetings minutes, etc.), and Item 8 (payment requisitions for roof replacement, etc.), no later than 30 days following service of a copy of this Order with notice of entry.[9]

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[8] *See* Parkview's "Response to Post Deposition Demand" dated March 21, 2012, annexed as Exhibit "B" to Parkview's "Affirmation in Opposition and Reply" dated June 21, 2013

[9] If Parkview can make a good faith contention that portions of these documents are not discoverable, then the defendants may redact only those portions, but include the full documents as part of the *in camera* inspection herein, and explain the legal basis for their position in their aforesaid Memorandum of Law

As far as the three remaining items summarized as follows: Item 1 (meetings of Board Meetings, etc.), Item 2 (Annual Shareholder's Meetings, etc.), and Item 7 (monthly agenda reports, etc.), Lopez Construction's request is denied, since it did not sufficiently explain how these documents would be material and necessary to the dispute herein.[10]

The branch of Lopez Construction's motion compelling DF Restoration to respond to its "Demand for Discovery and Inspection" dated December 1, 2011, by providing the contract between them that was in effect on the date of the incident, is denied as moot. The subject contract was marked for identification and discussed at Lopez Construction's deposition on October 16, 2012, and was attached to DF Restoration's Reply Affirmation as Exhibit "A".

The branch of Lopez Construction's motion to compel DF Restoration to respond to its "Demand for a Third-Party Bill of Particulars" dated May 11, 2011 is granted. A response shall be served no later than 30 days following service of a copy of this Order with notice of entry.[11]

That branch of Lopez Construction's motion seeking to reserve its right to conduct an examination of the plaintiff by a specialist in RSD (complex regional pain syndrome/reflex sympathetic dystrophy) is granted, on consent of the plaintiff. If Lopez Construction desires such an examination, it shall notice, in writing, such examination to take place no later than 60 days following service of a copy of this Order with notice of entry.

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[10] In the event that Lopez Construction maintains, in good faith, that these documents are discoverable, then it may explain the legal basis for this position in the aforesaid Memorandum of Law

[11] DF Restoration may supplement its response within 20 days after the deposition of Lopez Construction's former employee, (its job foreman and plaintiff's supervisor), Oscar Alvarez – who is alleged to have firsthand knowledge regarding the happening of the accident

Cross-Motion by DF Restoration

The branch of the cross-motion by DF Restoration to compel Lopez Construction to provide contact information for the aforementioned Oscar Alvarez is denied as moot, since Lopez Construction provided the information in its "Affirmation in Partial Opposition" dated May 21, 2013. Since it appears that Alvarez's testimony is material and relevant to issues of liability and damages, the parties may notice him for a deposition pursuant to the applicable rules under Article 23 of the CPLR.

Note of Issue is Vacated

The branches of the respective motions seeking to vacate the note of issue are granted. The Clerk shall forthwith strike this action from the trial calendar. The outstanding discovery shall be completed pursuant to the terms of this Order, and the plaintiff shall file a new note of issue no later than September 30, 2014.

The branches of the motions seeking to extend the deadline to make summary judgment motions is granted, without opposition, to the extent that said deadline is extended to no later than 60 days following the filing of the new note of issue (*see* CPLR 3212 [a]).

All parties shall appear for a discovery Compliance Conference on **September 16, 2014**, at 9:30 a.m. in Part 11, Room 711, bringing with them a copy of this Order. At that time, this Court may make such further Order as it deems just and proper, including whether this matter may be restored to its original place on the trial calendar.

This constitutes the decision and order of this Court.

Dated: June 2, 2014

HON. LAURA G. DOUGLAS, J.S.C.