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EA 12/22/14 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED, JUSTICE OF SUPREME COURT (Justice) PART 2

Byron Gonzalez and Martha Natalie

-v-

Newport East, Inc. and Starbucks Corporation

INDEX NO. 113985/11

MOTION DATE

MOTION SEQ. NO. 01

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
DEC 22 2014
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
DEC 22 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

FOR THE FOLLOWING REASON(S):

Dated: 12/16/14
DEC 16 2014

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

BYRON GONZALEZ and MARTHA NATALIE,

Plaintiffs,

-against-

NEWPORT EAST, INC. and STARBUCKS CORPORATION,

Defendants.

DECISION & ORDER
Index No. 113985/2011
Motion Sequence 001

KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE, AFFIRMATIONAND EXHIBITS.....	...1-2 (Ex.A)....
AFFIRMATION IN OPPOSITION AND EXHIBITS.....	...3.(Exs. A-E).
REPLY AFFIRMATION.....	....5.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Plaintiff Byron Gonzalez ("plaintiff") alleges that he slipped and fell on the premises of defendant Starbucks Corporation ("Starbucks"), which Starbucks rented from defendant Newport East, Inc. ("Newport"). Plaintiff Martha Natalie was plaintiff's spouse at all relevant times. Plaintiff claims, *inter alia*, that, as a result of the alleged incident, he has sustained serious cognitive delays and depression. Defendants seek the deposition of plaintiff's treating therapist, Carlos Campette, LCSW, and, in an attempt to conduct the same, have served a nonparty subpoena upon him.

Plaintiff moves for a protective order to quash the subpoena, and seeks sanctions and motion

costs against defendants. He argues that nonparty testimony is improper where the discovery is available from other sources and that, therefore, since plaintiff has already provided authorizations for all medical and counseling records, the deposition is not necessary.

Defendants respond that, pursuant to a recent Court of Appeals case, they have the right to depose Mr. Campette unless plaintiff shows that the deposition is utterly irrelevant or futile. Only if plaintiff makes this showing do they have to establish the necessity and usefulness of the deposition. *See Kapon v. Koch*, 23 NY3d 32 (2014). Moreover, they assert that the deposition is necessary because some of Mr. Campette's handwritten notes are hard to read and since he may have a better recollection of plaintiff's memory issues than plaintiff. They acknowledge that they can interview Mr. Campette *ex parte* but argue that this does not vitiate their right to the deposition. They also argue that sanctions are not warranted here, where they simply sought the deposition of an individual whom they have the right to depose by utilizing the proper discovery methods.

In reply, plaintiff states that defendant's arguments are specious. He distinguishes *Kapon* on the facts and asserts that it does not apply herein. In support of this argument, he relies on *Ramsey v. New York Univ. Hosp. Center*, 14 AD3d 349 (1st Dept 2005), in which the First Department affirmed a trial court's order quashing a deposition of the plaintiff's treating psychiatrist.

This Court grants the motion to the extent of quashing the subpoena and denies it to the extent that it seeks motion costs and sanctions. Contrary to defendants' assertions, *Kapon* does not eliminate their burden of showing that the information they seek is relevant. "Although the nonparty bears the initial burden of proof on a motion to quash, section 3101(a)(4)'s notice requirement nonetheless obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, 'the circumstances or reasons such disclosure is sought or required.' The subpoenaing party must include that information in the notice in the first instance (*see* Sponsors

Mem, Bill Jacket, L 1984, ch 294) lest it be subject to a challenge for facial insufficiency' (*see De Stafino v. MT Health Club*, 220 AD3d 331, 331[1995]." *Kapon*, *supra,* at 39. That is, the party must show that the discovery is material and necessary, but does not have to make any further showing. *See Ferolito v. Arizona Beverages USA, LLC*, 119 AD3d 642 (2nd Dept 2014). In the instant matter, the subpoena merely states that the witness has knowledge of the underlying incident. This is not specific enough to show that the deposition is necessary. Nor does it provide the subpoenaed individual with enough information regarding why he or she is to be questioned.

As defendants correctly maintain, *Ramsey*, upon which plaintiff relies, is not binding. In finding that a protective order was proper because the defendant in that case could find that the information sought was available elsewhere, *Ramsey* relied on the standard rejected by *Kapon*. Still applicable, however, is another principle upon which plaintiff relies, that "it is not the norm to seek the deposition of a treating physician, and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment." *Ramsey*, *supra* at 350; *see also Carson v Hutch Metro Center, LLC*, 110 AD3d 468, 469 (1st Dept 2013)(deposition denied, in part, because testimony at issue was not "unrelated to diagnosis and treatment). As stated above, defendants acknowledge that they can simply discuss the notes with the doctor on an ex parte basis in order to clarify what the notes say. Since defendants indicate that the deposition is only necessary because they cannot read some of the treatment notes, it is unclear why they are not pursuing this much simpler alternative first.

Plaintiff also seeks sanctions including motion costs and this Court denies that request. Defendants had every right to pursue this avenue of relief, especially in an area of law where the parameters are still being clarified for both the courts and the litigants. Thus, they did not engage in sanctionable conduct. *See Carson v. Hutch Metro Center, LLC*, *supra* at 469.

In light of the foregoing, it is hereby:

ORDERED that the motion is granted to the extent of quashing the subpoena; and it is further,

ORDERED that the motion is otherwise denied; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: December 16, 2014 ENTER:

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT