

Pandolfo v RCPI 600 Fifth Ave. Holding, LLC

2016 NY Slip Op 31612(U)

August 24, 2016

Supreme Court, New York County

Docket Number: 160045/2013

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy Bannon
Justice

PART 42

PETER C. PANDOLFO and RUTH PANDOLFO

INDEX NO. 160045/2013

- v -

MOTION DATE 5/13/2016

RCPI 600 FIFTH AVENUE HOLDING, LLC, RCPI
LANDMARK PROPERTIES, LLC, CRANE CONSTRUCTION
COMPANY, LLC, and ARTIZIA ILLINOIS, LLC

MOTION SEQ. NO. 001, 002

The following papers were read on these motions to vacate the note of issue, compel discovery, and extend the time to move for summary judgment.

Table with 2 columns: Description of motion/exhibit and No(s). Rows include Notice of Motion/ Order to Show Cause, Answering Affirmation(s), and Replying Affirmation(s).

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

In this action to recover damages for personal injuries, defendants RCPI 600 Fifth Avenue Holding, LLC, RCPI Landmark Properties, LLC, and Artizia Illinois, LLC (collectively the RCPI defendants) move (SEQ 001) to vacate the note of issue, compel further discovery from plaintiffs, and extend their time to move for summary judgment, and defendant Crane Construction Company, LLC (Crane), separately moves (SEQ 002) to vacate the note of issue, compel further discovery from plaintiffs, and for related relief. Plaintiffs oppose the motions, and the court denies them.

In a preliminary conference order dated September 25, 2014, this court directed that any dispositive motions must be made no later than 60 days after the filing of the note of issue. In a status conference order dated November 5, 2015, this court fixed November 6, 2015, as the deadline for filing the note of issue. Plaintiffs filed the note of issue on November 6, 2015. On November 23, 2015, Crane moved to vacate the note of issue, compel further medical discovery from plaintiffs or preclude them from adducing certain medical evidence at trial, and for related relief. On November 24, 2015, the RCPI defendants separately moved to vacate the note of issue, compel further medical discovery from plaintiffs or preclude them from adducing certain medical evidence at trial, and extend their time to move for summary judgment.

In support of their motion, the RCPI defendants assert that, at the time plaintiffs filed the note of issue, plaintiffs had yet to respond to outstanding demands to provide authorizations permitting them to obtain records of chiropractic treatment and physical therapy rendered to plaintiff Peter C. Pandolfo, as well as X-ray films and treatment records of physicians Stewart B. Kahn, David Matusz, Barbara Akresh, and Alfred Becker. Crane makes similar averments.

In opposition to the motions, plaintiffs demonstrated that they had provided all outstanding authorizations prior to the filing of the note of issue, save authorizations for Dr. Becker, which they provided approximately one month later. Plaintiffs submitted their responses to the demands, which showed, among other things, that, on October 30, 2015, they served authorizations permitting all defendants to obtain records of chiropractor Randy Russo, which are maintained under the auspices of his practice, Bardonia Chiropractic Office. The plaintiffs further showed that Crane nonetheless served a post-note of issue demand for a further authorization referable to Russo's records and that, notwithstanding the untimeliness of the demand, plaintiffs responded with a second authorization. Plaintiffs also established that, on September 5, 2014, and January 7, 2015, they served authorizations upon the RCPI defendants permitting them to obtain treatment records from Procore Physical Therapy, P.C. (Procore), and Gregory Stemkowsky, P.T., the practitioner at Procore who treated Pandolfo, and that Pandolfo was not treated or seen by a different physical therapy practice mentioned by his wife at her deposition.

Plaintiffs also showed that, on September 5, 2014, they served authorizations permitting the RCPI defendants to obtain the entirety of the records of Dr. Matusz, his colleague Dr. Stephen Nicholas, and his practices, NY Orthopedics and Scarsdale Orthopedics, referable to their treatment and testing of Pandolfo, which included X-ray films and radiographic records. They further showed that, on January 7, 2015, they served a second round of authorizations permitting all defendants to obtain the complete files of Dr. Matusz and NY Orthopedics, and served further authorizations on June 1, 2015, which again permitted all defendants to obtain Dr. Matusz's complete file. Plaintiffs also demonstrated that, on May 29, 2015, they served authorizations permitting all defendants to obtain records and X-ray films from Holy Name Medical Center, referable to treatment and testing provided to Pandolfo in 1987 that had been mentioned in Dr. Matusz's records. Plaintiffs further established that, on September 5, 2014, they provided an authorization permitting the RCPI defendants to obtain the full records of Dr. Akresh, even though she was not a treating physician but, rather, a physician conducting an examination on behalf of the Social Security Administration (SSA), and that they provided a similar authorization to Crane on March 21, 2014, both of which permitted the defendants to obtain the complete SSA disability records referable to Pandolfo. Plaintiffs further argue that since Dr. Kahn was not Pandolfo's treating physician, but instead his retained medical expert, for whom a proper CPLR 3101(d) statement was exchanged, they are not obligated to provide authorizations for his records.

The court may vacate a note of issue where it appears that a material fact set forth therein, *i.e.* the representation that discovery is complete, is incorrect. See 22 NYCRR 202.21(e); Rivers v Birnbaum, 102 AD3d 26 (2nd Dept 2012); Gomes v Valentine Realty LLC, 32 AD3d 699 (1st Dept 2006); Herbert v Sivaco Wire Corp., 1 AD3d 144 (1st Dept 2003). However, contrary to defendants' contentions, virtually all disputed medical discovery was completed prior to the filing of the note of issue. Moreover, although the service of authorizations permitting defendants to obtain Dr. Becker's records was concededly effected after the filing of the note of issue, the delay was minimal, and there is no showing that any failure to make disclosure was willful or contumacious. Hence, there is now no basis for striking the note of issue (see generally Eddy v White, 304 AD2d 959, 960 [3rd Dept 2003]),

compelling further discovery, or precluding plaintiffs from adducing testimony from Pandolfo's treating health-care providers. See Banach v Dedalus Found., Inc., 132 AD3d 543, 544 (1st Dept 2015). The court also rejects defendants' request to preclude licensed rehabilitation counselor Charles A. Kincaid from testifying as plaintiffs' expert, since the facts upon which he intends to rely include certain facts set forth in the treatment and diagnostic records for which plaintiffs have provided authorizations, and defendants did not expressly move for that relief in any event. See Thomas v Avalon Gardens Rehabilitation & Health Care Ctr., 73 AD3d 744, 745 (2nd Dept 2010); NYCTL 1998-1 Trust v Prol Props. Corp., 18 AD3d 525, 526-527 (2nd Dept 2005); Santiago v DaimlerChrysler Corp., 292 AD2d 226, 227 (1st Dept 2002).

The plaintiffs are not obligated to provide an authorization permitting defendants to obtain all of the materials in the possession of Dr. Kahn, since he was not Pandolfo's treating physician, but was retained as an expert for the purposes of this litigation, and those materials were prepared in anticipation thereof. Thus, plaintiffs were obligated only to serve the statement required by CPLR 3101(d), which they did here. Defendants would only be entitled to disclosure of these materials by showing substantial need for the materials and undue hardship in obtaining their substantial equivalent by other means, a showing they have not made. See Massachusetts Bay Ins. Co. v. Stamm, 228 AD2d 321, 322 (1st Dept 1996); Santariga v McCann, 161 AD2d 320, 322 (1st Dept 1990); see also Abdur-Rahman v Pollari, 107 AD3d 452, 456 (1st Dept 2013); Gama Aviation Inc. v Sandton Capital Partners, L.P., 99 A.D.3d 423, 424 (1st Dept 2012). Since Dr. Kahn was neither a treating physician nor an examining physician retained by an injured party's adversary, his reports are also immune from disclosure pursuant to 22 NYCRR 202.17(b). See Santariga v McCann, supra at 322. In addition, to the extent that materials in Dr. Kahn's possession contain attorney work product, they are not subject to disclosure. See id. at 321; CPLR 3101(c).

The RCPI defendants have not shown good cause for their request to extend their time to move for summary judgment (see Brill v City of New York, 2 NY3d 648 [2004]). The disclosure that was allegedly outstanding when the note of issue was filed related solely to Pandolfo's injuries, medical treatment, and damages, and, in light of the facts so far developed in this action, the RCPI defendants would only be able to seek summary judgment on the issue of liability. Inasmuch as all discovery in connection with the issue of liability had been completed long before the note of issue was filed, the RCPI defendants could have timely moved for summary judgment even in the absence of the disputed medical records, which, in this case, had no bearing whatsoever on the issue of liability. See Kershaw v Hospital for Special Surgery, 114 AD3d 75 (1st Dept 2013); Alexander v Gordon, 95 AD3d 1245, 1247 (2nd Dept 2012); cf. Pena v Women's Outreach Network, Inc., 35 AD3d 104, 106-107 (1st Dept 2006).

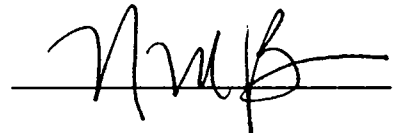
Accordingly, it is

ORDERED that the motion of defendants RCPI 600 Fifth Avenue Holding, LLC, RCPI Landmark Properties, LLC, and Artizia Illinois, to vacate the note of issue and for other relief is denied, and it is further,

ORDERED that the motion of defendant Construction Company LLC to vacate the note of issue and for other relief is denied.

This constitutes the Decision and Order of the court.

Dated: August 24, 2016

 JSC
HON. NANCY M. BANNON

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART SEQ 001
- 3. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART SEQ 002