

Arney v Burgler

2018 NY Slip Op 30777(U)

January 15, 2018

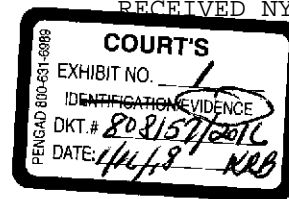
Supreme Court, Erie County

Docket Number: 808157/2016

Judge: Mark Montour

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State of New York

Supreme Court: County of Erie

Mary Arney and

Curtis Arney

Plaintiffs

v.

Decision on Trial Motions

Index No. 808157/2016

Katherine Coster Burgler and

Christopher Burgler

Defendants

Appearances:

Richard Binko, Esq. for plaintiffs

2427 William Street

Cheektowaga, NY 14206

Matthew Pflazer, Esq. for Defendants

Hagelin Spener, LLC

135 Delaware Avenue

Buffalo, NY 14202

Arney v. Burgler

Mark A. Montour, JSC

The plaintiff has moved for an Order to strike the trial testimony of the defendant's expert Sherry Withiam Leitch, M.D. The basis for the request is the experts' failure to deliver documents in contempt of a judicial subpoena. The plaintiff's attorney contends without the documents an effective examination of the witnesses' bias could not be explored. The defendant moved for an Order granting a directed verdict respecting the plaintiff's "90/180 day" serious injury claim under Insurance Law 5102 (d). The parties agreed to submission without oral argument and the court has considered the following documents:

- Notice of Motion dated January 10, 2018
- Affidavit of attorney Richard Binko in support of the motion
- Judicial subpoena dated December 14, 2017
- Attorney subpoena dated December 27, 2017
- Letter between attorneys memorializing a compromise to redact names from records of claimants examined by the expert witness
- Letter from expert witness providing certain documents and setting forth objections to providing other subpoenaed documents
- Transcript of expert witness taken January 10, 2018
- Notice of Cross-Motion dated January 14, 2018
- Affidavit of attorney Matthew Pflazer in opposition to the motion and in support of the cross-motion
- Affidavit of attorney Richard Binko in opposition to the defendant's cross-motion

- Reply affirmation of attorney Richard Binko in support of motion to strike the trial testimony of the Defendant's medical expert

The subpoena required the defendant's expert witness to provide various documentation, including, any and all records, reports, testing related to the independent medical examination of the plaintiff as well as the payment for the exam and report. The subpoena also directed the witness to provide payment information from the defense attorneys for prior examinations involving different parties, 1099 records for IME's for a 10-year period, income tax records and copies of all medical reports from 2007 to the present authored by the expert witness for IME's, compulsory medical reviews, defense medical reviews or other exams prepared by the witness in instances where no physician patient relationship existed.

In contravention of the subpoena the witness failed to provide certain records from Buffalo Psychiatric Center and Internal Med ID although the doctor certified that the records were provided pursuant to the subpoena. The expert indicated that these documents were reviewed in preparing the report and formulating her opinions. Furthermore, the witness did not bring office notes, including hand written notes, related to the examination of the plaintiff or any correspondence directed to defense attorneys requesting various documents that were not provided to her prior to the examination.

Moreover, the witness did not provide any records of payment for this examination. Nor did the witness provide any 1099 records from the defense attorney or any insurance companies for conducting independent medical examinations. Additionally, the witness did not provide any of the requested tax returns or the copies of other reports authored by the witness with the patient names redacted.

During cross examination the witness contended that it would be too burdensome to provide much of the subpoenaed information, that her tax returns and income were “private”, that “presidents don’t bring [tax returns] in”, and her malpractice carrier prohibited her from releasing reports of other examinations.

The defendant contends that in the event the expert witness disobeyed the requirements of the subpoena then the applicable remedies are set forth in CPLR 2308(a) and preclusion of the expert’s testimony is not an available remedy. The defendant further avers that the service provisions of CPLR 3120 (2) were not followed, therefore, the subpoena is deficient on its face. The court agrees with the defendant that the judicial subpoena dated December 14, 2017 was never properly served upon the expert witness and is consequently deficient.

The proper procedure to challenge a subpoena dated December 27, 2017 is to seek to quash the subpoena pursuant to CPLR 2304. Both the expert witness or the defense attorney could have brought a motion to quash setting forth that the requested information was too burdensome or the time frame for supplying the documents was too limited. The burden of establishing that the requested documents and records are utterly irrelevant is on the person being subpoenaed (see *Gertz v. Richards*, 233 AD2d 366). Neither the expert witness or the defense attorney availed themselves of this opportunity. Rather than choosing this option the medical expert arbitrarily elected to evade the responsibility required pursuant to the judicial subpoena. There is no evidence that the witness sought out to retain an attorney to seek to quash the subpoena. The witness expressed familiarity with this option as she did testify that in a prior action an attorney did appear on her behalf to make a motion to quash the subpoena in that matter

The Appellate Division recently held that a party was entitled to certain financial information to assist in preparing questions for cross examination of a witness concerning any bias or interest. (see *Porcha v. Binette*, 155 AD3d 1676 [4th Dept 2017]). In *Porcha*, the plaintiff served a subpoena duces tecum seeking the production of “all billing and payment records related to examinations performed by [the expert witness] on behalf of all insurance companies and attorneys for the prior five years” (Id at 1677). Unlike here, in *Porcha*, both the nonparties and the defendant moved to quash the subpoena at the lower court and the Appellate Division affirmed the decision to deny the motion. Likewise, the Fourth Department earlier in *Dominicci v. Ford*, 119 AD3d 1360 [2014] affirmed the decision of a lower court to deny a motion to quash a subpoena brought by an insurance company on the ground that it was the plaintiffs intent to use the subpoenaed financial records to impeach the examining physician’s general credibility. The court in *Dominicci*, citing *Salm v. Moses* (133 NY3d 816, 818 [2009]) stated, it is “proper to allow cross-examination of a physician regarding the fact that the defendant’s insurance company retained him to examine the plaintiff in order to show bias or interest on the part of the witness. Such questions concerning the bias, motive or interest of a witness is relevant and should be “freely permitted and answered” (see *Burke v. County of Erie*, 110 AD3d 1461, 1462 [2013]).

The defendants cross-motion seeks a directed verdict on the ground that the plaintiff did not establish a serious injury under the 90/180 day category in as much as the plaintiff (1) was only out of work for 76 days out for the first 90 days after the accident, (2) plaintiff testified that she was able to perform a great deal of her customary daily activities, (3) plaintiff admitted during the first month she was able to shower herself, dress herself, drive a car, attend social functions, cook, clean and do laundry, (4) plaintiff testified that her biggest difficulty was blow

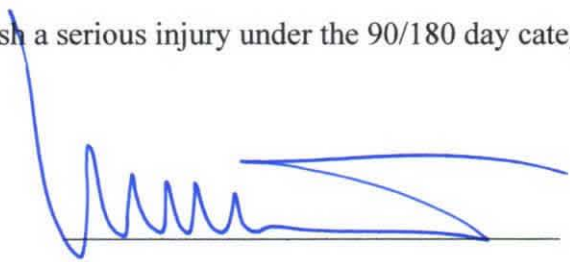
drying her hair, clipping her toenails, having to rest more often while working and being unable to lift certain items at work.

Based upon the foregoing the court finds that the witnesses acts were contemptuous and actually did defeat, impair, impede and prejudice the plaintiff's ability to cross exam the expert witnesses bias or interests (see Judiciary Law sec 770). As a result, the court strikes the testimony of the expert witness in its entirety.

Furthermore, the court grants the defendants cross-motion for a directed verdict on the ground that the plaintiff failed to establish a serious injury under the 90/180 day category.

Dated January 15, 2018

Granted:



Hon. Mark A. Montour