

Marks v 79th St. Tenants Corp.
2018 NY Slip Op 31431(U)
June 26, 2018
Supreme Court, New York County
Docket Number: 153486/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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SONDRA MARKS

Plaintiff

Index No. 153486/2015

v

DECISION AND ORDER

79th STREET TENANTS CORP. and NEW 56-79
I.G. ASSOCIATES, L.P.

Defendant.

MOT SEQ 001, 002

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NANCY M. BANNON, J.:

I. INTRODUCTION

This is a personal injury action wherein the plaintiff alleges that she was injured when she tripped and fell on uneven pavement on the public sidewalk adjacent to the defendants' premises. The defendant 79th Street Tenants Corp. (79th Street) now moves (SEQ 001) (1) pursuant to CPLR 3126 to dismiss the complaint in its entirety for the plaintiff's failure to provide outstanding authorizations in response to its discovery demands, or, in the alternative, (2) pursuant to CPLR 3124 to compel the plaintiff to provide the outstanding authorizations. The plaintiff cross-moves (SEQ 001) for a protective order (1) pursuant to CPLR 3103(b) with regard to the "production of any and all documents, files, notes, memorandum, internal communications, e-mails, photos, charts, invoices, [and] retention requests" pertaining to this matter and the independent

medical examinations (IMEs) conducted, and (2) pursuant to CPLR 2304 to quash 79th Street's subpoena seeking the production of IME WatchDog Advocate April Quijano-Elepano for a deposition.

II. DISCUSSION

A. Defendant 79th Street's Motion (MOT SEQ 001)

Defendant 79th Street states that it served demands for HIPAA compliant authorizations on November 6, 2017, and that it served a separate demand on November 28, 2017, for a HIPAA compliant authorization to speak with Northwell Health, in order to depose two EMTs who responded to the subject incident. 79th Street sent a good faith letter to the plaintiff on January 18, 2018, addressing the foregoing discovery, but alleges that the plaintiff has not responded to its demands. The outstanding demands have not been the subject of a court order. By letter dated April 16, 2018, more than two months after the filing of the instant motion, and five months after the demands were served, the plaintiff finally produced the outstanding authorizations. The plaintiff's belated compliance renders the alternative relief that 79th Street seeks pursuant to CPLR 3124 moot.

As to 79th Street's motion to dismiss the complaint, CPLR 3126 authorizes the court to sanction a party who "refuses to

obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" and that "a failure to comply with discovery, particularly after a court order has been issued, may constitute the "dilatory and obstructive, and thus contumacious, conduct warranting the striking of [a pleading]." Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488, 489 (1st Dept. 1998); see CDR Creances S.A. v Cohen, 104 AD3d 17 (1st Dept. 2012); Reidel v Ryder TRS, Inc., 13 AD3d 170 (1st Dept. 2004). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable excuse. See LaSalle Talman Bank, F.S.B. v Weisblum & Felice, 99 AD3d 543 (1st Dept. 2012); Perez v City of New York, 95 AD3d 675 (1st Dept. 2012); Figiel v Met Food, 48 AD3d 330 (1st Dept. 2008); Ciao Europa, Inc. v Silver Autumn Hotel Corp., Ltd., 270 AD2d 2 (1st Dept. 2000).

The plaintiff provides no reason for her five-month delay in providing the requested authorizations. Nonetheless, as no court order had been issued on this matter, and there has not been alleged a pattern of failures to comply with discovery demands on the part of the plaintiff, the court declines to grant 79th Street's motion for sanctions at this juncture. However, the plaintiff is cautioned that further failure to comply with discovery demands may subject her to sanctions pursuant to CPLR 3126, including the dismissal of the complaint.

B. Plaintiff's Cross-Motion (MOT SEQ 001)

On February 1, 2018, after the filing of their motion, defendant 79th Street served a Notice for Discovery and Inspection (D&I) seeking "[c]opies of all correspondence, bills, invoices, notes, reports, audio recording and photographs relating to any and all observations made by 'April Quijano-Elepano' of 'IME Watchdog' during the plaintiff's physical examination with Dr. Jerry A. Lubliner on November 28, 2017." By subpoena dated February 2, 2018, served upon both the plaintiff and IME Watchdog, Inc., 79th Street sought to compel the appearance of April Quijano-Elepano for a deposition and to produce all IME WatchDog materials pertaining to this matter and the IMEs conducted. By letter dated March 27, 2018, the plaintiff rejected the subpoena, and now cross-moves for a protective order and to quash the subpoena, on the grounds that (1) 79th Street improperly seeks privileged materials protected under CPLR 3101(c) and (d)(2), (2) 79th Street failed to state special circumstances justifying their demands, and (3) 79th Street has improperly noticed the non-party deposition in New York County, a county in which Quijano-Elepano allegedly neither resides nor is employed.

As to the first ground, neither the attorney work product privilege pursuant to CPLR 3101(c) nor qualified immunity pursuant to CPLR 3102(d)(2) is applicable to the materials sought

by 79th Street. The plaintiff's arguments (1) that "all" notes, logs, memorandums and reports prepared by Quijano-Elepano are protected attorney work product and "*absolutely immune* from disclosure" because the plaintiff retained IME WatchDog Inc. "for the sole purpose to assist with the prosecutions of Plaintiff's legal representation" and (2) that those materials are protected from discovery because they constitute "material prepared for litigation" are unconvincing. IME WatchDog does not offer expert or investigatory services based on a plaintiff's underlying claim. See, e.g., Hudson Ins. Co. v Oppenheim, 72 AD3d 489 (1st Dept. 2010); Salzer v Farm Family Life Ins. Co., 280 AD2d 844 (3rd Dept. 2001); Sullivan v Smith, 198 AD2d 749 (3rd Dept. 1993). Rather, it offers eyewitness testimony of independent medical examinations conducted as part of discovery in the instant action. Furthermore, the First Department has held that IME WatchDog observers such as Quijano-Elepano may properly be deposed as nonparty witnesses prior to trial. Santana v Johnson, 154 AD3d 452 (1st Dept. 2017). Under these circumstances, the court finds that the discovery sought by 79th Street, including the deposition of Quijano-Elepano that 79th Street seeks to conduct, is not subject to protection.

As to the second ground, contrary to the non-parties' contention, a showing of "special circumstances" is not required before a party may obtain discovery from a nonparty by means of a

subpoena. Nor must a party seeking disclosure from a nonparty establish that the evidence sought cannot be obtained from sources other than the nonparty. CPLR 3101(a)(4) provides that, with respect to nonparties, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . upon notice stating the circumstances or reasons such disclosure is sought or required." As the Court of Appeals has stated,

the 'material and necessary' standard adopted by the First and Fourth Departments is the appropriate one and is in keeping with this state's policy of liberal discovery. The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.

Matter of Kapon v Koch, 23 NY3d 32, 37, 38 (2014) (citation and some internal quotation marks omitted).

79th Street establishes that it seeks to depose Quijano-Elepano regarding her eyewitness observations, the methods and manner she used in obtaining and transcribing her reports and/or

recordings, and whether she interfered with the exam in any way, in order to avoid surprise at trial. Moreover, as stated above, the First Department has sanctioned the pretrial deposition of IME WatchDog observers. Santana v Johnson, supra. The plaintiff fails to make any showing that the requested deposition is "utterly irrelevant."

As to the third ground, the plaintiff states, but provides no evidence, that Quijano-Elepano neither resides nor is employed in New York County. Nonetheless, in its opposition to the plaintiff's cross-motion, 79th Street attaches an additional subpoena dated March 29, 2018, noticing the deposition in Queens County, in which IME WatchDog's Fresh Meadows office is allegedly located. The plaintiff's third ground for quashing the subpoena is thus rendered moot.

C. Plaintiff's Subsequent Motion (MOT SEQ 002)

By separate motion scheduled for oral argument on October 24, 2018 (SEQ 002), the plaintiff moves for the same relief for which she cross-moves under motion sequence 001. As the cross-motion (SEQ 001) has been decided, the plaintiff's motion (SEQ 002) is rendered academic.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendant 79th Street Tenants Corp.'s motion to dismiss the complaint (SEQ 001) is denied; and it is further,

ORDERED that the plaintiff's cross-motion for a protective order and to quash a subpoena compelling the appearance of April Quijano-Elepano and seeking the production of all WatchDog materials pertaining to this matter and the independent medical examinations conducted (SEQ 001) is denied; and it is further,

ORDERED that the plaintiff's motion filed under SEQ 002 and seeking the same relief as its cross-motion filed under SEQ 001 is denied as academic (SEQ 002).

This constitutes the Decision and Order of the court.

Dated: June 26, 2018

ENTER: _____


J.S.C.