| **McKee v Ford Motor Co.** |
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| 2018 NY Slip Op 32296(U) |
| September 13, 2018 |
| Supreme Court, New York County |
| Docket Number: 104450/08 |
| Judge: Robert R. Reed |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

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JOHN P. McKEE and RUTH McKEE,

Plaintiffs,

-against- Index No. 104450/08

FORD MOTOR COMPANY and MEADOWBROOK FORD, INC. d/b/a SYOSSET FORD,

Defendants. Motion Seq. Nos. 011 & 012

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FORD MOTOR COMPANY and MEADOWBROOK FORD, INC. d/b/a SYOSSET FORD,

Defendants/Third-Party Plaintiffs,

-against- Third-Party Index No. 590630/10

FRANCINE ROBIN GIAMBONA as Executrix of the Estate of Paul Giambona, Deceased, and "Jane Doe"/ "John Doe,"

Third-Party Defendants.

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**ROBERT R. REED, J.:**

Motion sequence numbers 011 and 012 are consolidated for disposition.

This is a strict products liability and negligence action arising out of a motor vehicle accident that occurred on October 27, 2006 in Massapequa, New York. Plaintiffs John P. McKee (McKee) and Ruth McKee (together, plaintiffs) move for an order: (1) pursuant to 22 NYCRR 202.21, granting permission to conduct additional pretrial proceedings; and (2) pursuant to CPLR 3124, compelling compliance with plaintiffs' notice of discovery and inspection dated August 11, 2017. Alternatively, plaintiffs move for an order: (1) pursuant to CPLR 3126 (1), resolving the issues for which the information was sought in plaintiffs' notice of discovery and

inspection dated August 11, 2017 in plaintiffs' favor; and/or (2) pursuant to CPLR 3126 (3), striking the answer of defendant Ford Motor Company (Ford) and setting this case down for an inquest on plaintiffs' damages (motion sequence number 011).

Defendant Ford moves, pursuant to CPLR 3124, for an order: (1) directing plaintiffs to appear for a further limited deposition concerning McKee's current health and employment status; (2) compelling plaintiffs to provide a Health Insurance Portability and Accountability Act of 1996 (HIPAA)-compliant authorization for McKee's medical records for his treatment with Dr. Michael Melgar from August 2014 through the present, and to provide *Arons* authorizations permitting Ford's counsel to interview Dr. Jeffrey Brown, Dr. John Labiak, and Dr. Michael Melgar concerning their treatment of McKee; and (3) directing plaintiffs to produce copies of McKee's tax records from 2009 through the present and inspection materials. In the alternative, Ford seeks an order, pursuant to CPLR 3126 (2): (1) precluding plaintiffs from presenting any evidence or testimony at trial in support of McKee's lost earnings and injuries alleged in the supplemental bill of particulars; and (2) precluding plaintiffs from presenting inspection materials and any testimony based on such materials as evidence at trial (motion sequence number 012).

**BACKGROUND**

Plaintiffs commenced this action on March 27, 2008 against Ford and defendant Meadowbrook Ford, Inc. d/b/a Syosset Ford (Meadowbrook Ford),[1] alleging that, on October 27, 2006, McKee was injured while driving a 2001 Ford Mustang near the intersection of Sunrise Highway and East Willow Street in Massapequa (Swergold affirmation in support, exhibit 1

[1]By stipulation of discontinuance dated April 27, 2015, plaintiffs discontinued their claims against Meadowbrook Ford (Saez affirmation in support, exhibit J).

[verified complaint, ¶ 17]). According to plaintiffs, McKee sustained permanent and disabling injuries as a result of the defective and dangerous condition of his vehicle (*id.*, ¶ 18). In the complaint, McKee seeks recovery for, among other things, severe and permanent bodily injuries and for loss of past and future lost wages (*id.*, ¶¶ 31, 47). In the bill of particulars, plaintiffs allege that the seat back, head restraint, and lap belt assembly on McKee's vehicle were defectively designed and manufactured, and that McKee suffered, among other things, central cord syndrome and other injuries to his cervical spine (Saez affirmation in support, exhibit F [verified bill of particulars, ¶¶ 1, 25]). McKee has allegedly been employed as an engineering manager at nonparty Kabar Manufacturing since 1993 (*id.*, ¶ 28]).

A police report from the day of the accident indicates that McKee's vehicle was rear-ended by another vehicle, and that the second (or "bullet") vehicle left the scene of the accident (*id.*, exhibit A).

Ford subsequently impleaded third-party defendant Paul Giambona (Giambona), the alleged owner and/or operator of the bullet vehicle, seeking contribution and indemnification (Swergold affirmation in support, exhibit 3).

Plaintiffs filed a note of issue and certificate of readiness in this action on February 24, 2015 (*id.*, exhibit 5; NY St Cts Elec Filing [NYSCEF] Doc No. 229).

Thereafter, this action was scheduled for jury selection on May 1, 2017 (Swergold affirmation in support, exhibit 6).

On March 21, 2017, Ford served on plaintiffs "DVDs evidencing testing performed on this case . . ." (*id.*, exhibit 7).

Ford moved, by order to show cause, for additional discovery. Plaintiffs cross-moved for in limine relief. However, unbeknownst to plaintiffs and Ford, Giambona died on January 24, 2016.

In a supplemental bill of particulars, which Ford asserts was served on the eve of trial, plaintiffs allege additional consequences as a result of McKee's injuries, and also assert additional allegations as to McKee's claim for lost earnings (Saez affirmation in support, exhibit T, ¶¶ 1, 3). Specifically, plaintiffs allege that McKee was denied a promotion to the position of chief engineer because of his inability to travel (*id.*, ¶ 3).

By order dated April 25, 2017, the court (Singh, J.) stayed the action pending the substitution of Giambona's estate for Giambona (Swergold affirmation in support, exhibit 8).

By decision and order dated August 4, 2017, the court denied Ford's order to show cause without prejudice to resubmission after substitution and upon a proper showing of post-note of issue relief (*id.*, exhibit 9). The court also denied plaintiffs' cross motion for in limine determinations without prejudice to resubmission before the trial judge upon his or her assignment (*id.*).

The estate of Giambona was substituted for Giambona (*id.*, exhibit 10).

On August 11, 2017, plaintiffs served a notice of discovery and inspection on Ford, which sought documents pertaining to Ford's specific crash and/or sled tests performed in connection with this litigation (*id.*, exhibit 12).

Plaintiffs now move to compel compliance with their notice of discovery and inspection dated August 11, 2017. Ford also moves to compel plaintiffs to appear for a limited deposition and to produce certain documents, in light of plaintiffs' late service of the supplemental bill of particulars.

## DISCUSSION

CPLR 3101 (a) provides that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." However, once a note of issue has been filed, disclosure is more limited.[2] 22 NYCRR 202.21 (d) provides that "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." To conduct disclosure after the filing of a note of issue, a party must demonstrate "unusual or unanticipated circumstances" that "develop[ed] subsequent to the filing of a note of issue," which require additional disclosure to prevent "substantial prejudice" (*see Madison v Sama*, 92 AD3d 607, 607 [1st Dept 2012]; *Schroeder v IESI NY Corp.*, 24 AD3d 180, 181 [1st Dept 2005]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 139-140 [2d Dept 2000]).

### A. Plaintiffs' Motion to Compel (Motion Sequence No. 011)

Plaintiffs contend that "unusual or unanticipated circumstances" have developed after the note of issue was filed. According to plaintiffs, Ford provided plaintiffs with its case specific testing two years after the note of issue was filed, and only six weeks before jury selection was scheduled to begin on May 1, 2017.

Ford counters that: (1) plaintiffs have not established "special circumstances" to obtain expert disclosure other than that required by the CPLR; and (2) plaintiffs cannot show "unusual or unanticipated circumstances" or any prejudice.

CPLR 3101 (d) (1) (i) provides that, "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in

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[2] Pursuant to 22 NYCRR 202.21 (e), a party must move to vacate the note of issue "[w]ithin 20 days after service of the note of issue and certificate of readiness." Neither side moves to vacate the note of issue here.

the subject matter on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." Under CPLR 3101 (d) (1) (iii), "[f]urther disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate." This requirement is more than just a "nominal" barrier to discovery (*see Rosario v General Motors Corp.*, 148 AD2d 108, 113 [1st Dept 1989]). Thus, "a conclusory allegation that such discovery is necessary to fully prepare for litigation is insufficient to establish" "special circumstances" (*232 Broadway Corp. v New York Prop. Ins. Underwriting Assn.*, 171 AD2d 861, 861 [2d Dept 1991]).

In *Martinez v KSM Holding* (294 AD2d 111 [1st Dept 2002]), the defendants sought disclosure of the complete files of four experts retained by the plaintiffs. The First Department held that the files were "exempt from disclosure under CPLR 3101 (d) (2), unless defendants can show that they have a 'substantial need' for the files and cannot obtain the substantial equivalent thereof by other means without 'undue hardship,' or that 'special circumstances' exist within the meaning of CPLR 3101 (d) (1) (iii) necessitating production of the files" (*id.*). The Court held that the defendants failed to make the requisite showing, noting that the substantial equivalent thereof could be obtained by means other than turning over plaintiffs' experts' files (*id.* at 112).

However, in *Matter of New York City Asbestos Litig.* (66 AD3d 600 [1st Dept 2009]), a case relied on by plaintiffs, the First Department held that the trial court properly ordered the production of certain materials associated with tests conducted by defendant's expert, who had withdrawn. There, the "plaintiff demonstrated the 'special circumstances' or 'undue hardship' necessary to support an entitlement to expert disclosure beyond the statutorily required summary

of the expert's opinions" (*id.*). The items at issue – tiles sold prior to 1986, the boxes in which they were stored, and photographs and videos thereof – could not be obtained on the open market (*id.* at 601). In addition, the withdrawal of defendant's expert did not affect the disclosure requirement, since the items were not work product prepared in anticipation of litigation (*id.*).

Here, plaintiffs have failed to demonstrate "special circumstances" sufficient to warrant expert disclosure beyond the statutorily-required expert disclosure (CPLR 3101 [d] [1] [iii]). Plaintiffs have not established that the information sought to be discovered by their notice for discovery and inspection dated August 11, 2017 cannot be discovered from other sources (*cf. Matter of New York City Asbestos Litig.*, 66 AD3d at 601; *see also Daniels v Armstrong*, 42 AD3d 558, 558 [2d Dept 2007] ["appellants failed to establish that they had a substantial need for the report in the preparation of their case and could not, without undue hardship, obtain the substantial equivalent of the report by other means"]). Indeed, plaintiffs do not claim that the information is not readily available in the marketplace (*see Rosario*, 148 AD2d at 113).

The court must next consider whether plaintiffs are entitled to discovery sanctions against Ford under CPLR 3126, as requested by plaintiffs.

CPLR 3126 provides that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . , the court may make such orders with regard to the failure or refusal as are just." It is within the trial court's discretion to determine the nature and degree of the penalty (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]). "The sanction should be commensurate with the particular disobedience it is designed to punish, and go no further than that" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013] [internal quotation marks and citation omitted]).

Although plaintiffs request penalties under CPLR 3126 (1) and (3), plaintiffs have not demonstrated that Ford willfully or contumaciously failed to disclose information which ought to have been disclosed. As discussed above, plaintiffs have failed to show any "special circumstances" warranting disclosure beyond the CPLR 3101 (d) (1) (i) expert disclosure.

Accordingly, plaintiffs' motion is denied.

**B. Ford's Motion to Compel (Motion Sequence No. 012)**

Like plaintiffs, Ford also maintains that "unusual or unanticipated circumstances" have developed after the filing of the note of issue. Specifically, Ford argues that, on the eve of trial, plaintiffs served a supplemental bill of particulars with new allegations of lost earnings and injuries. Therefore, Ford seeks a further deposition of plaintiffs, limited to McKee's health and employment status.

In light of plaintiffs' service of the supplemental bill of particulars, Ford also seeks *Arons* authorizations to interview McKee's treating physicians. Further, Ford seeks a HIPAA-compliant authorization to subpoena McKee's medical records from Dr. Michael Melgar's office for trial. Ford also requests copies of McKee's tax records from 2009 through the present, in view of plaintiffs' allegations of lost earnings in the supplemental bill of particulars and given that plaintiffs seek to recover for out-of-pocket medical expenses. In addition, Ford contends that it is entitled to an order compelling plaintiffs to produce copies of inspection materials, because plaintiffs previously agreed to provide them. In the alternative, Ford requests an order precluding plaintiffs from presenting any evidence or testimony at trial in support of their allegations in the supplemental bill of particulars.

Plaintiffs contend, in response, that Ford has failed to establish "unusual or unanticipated circumstances," because the supplemental bill of particulars does not allege a new cause of

action or injury, and only alleges the consequences of the injuries sustained by McKee. In addition, plaintiffs argue that, even if Ford had established "unusual or unanticipated circumstances," Ford is still not entitled to the discovery that it seeks.

*1. Further Deposition of Plaintiffs*

In this case, Ford has failed to demonstrate "unusual or unanticipated circumstances" with respect to McKee's injuries alleged in the supplemental bill of particulars (*see Schenk v Maloney*, 266 AD2d 199, 200 [2d Dept 1999] ["unusual or unanticipated circumstances" may be shown by new or additional injuries or dramatic change in nature and extent of existing injuries since filing of note of issue]). Plaintiffs' verified bill of particulars alleges, among other things, that McKee suffered central cord syndrome and other injuries to his cervical spine, and that these injuries have "impaired plaintiff's ability to perform his usual activities" because of his "lack of mobility" (Saez affirmation in support, exhibit F [verified bill of particulars, ¶ 25]). In plaintiffs' supplemental bill of particulars, plaintiffs allege that McKee: (1) requires the use of a cane when outside his home; (2) requires help fastening his shoes, and adjusting his collar and pants bands; (3) has lost fine motor skills in his right and left fingers; (4) requires the use of compression socks and has constant psoriasis with flare-ups under stress; (5) requires prescription medication for high blood pressure and bladder control; (6) is unable to clean himself after bowel movements; (7) is unable to drive an automobile; (8) must take extensive nightly medications for spasticity and bladder control; (9) has erectile dysfunction; and (10) can only stand for short periods of time (*id.*, exhibit R [supplemental verified bill of particulars, ¶ 1]). Additionally, plaintiffs allege that McKee's right hand often claws up, and often gets tightness and muscle spasticity (*id.*). Plaintiffs do not allege that McKee has suffered new or additional injuries after the note of issue was filed, or that the nature or extent of McKee's injuries have changed

significantly (*see e.g. Schroeder*, 24 AD3d at 181 [additional shoulder injuries alleged in supplemental bill of particulars did not constitute "unusual or unanticipated circumstances" where additional injuries were disclosed to defendants 11 months prior to the filing of the note of issue]).

Nevertheless, with respect to plaintiffs' claim for lost wages, the court finds that Ford has demonstrated "unusual or unanticipated circumstances" that require additional disclosure to prevent "substantial prejudice" (22 NYCRR 202.21 [d]). In their bill of particulars, plaintiffs allege that McKee's annual gross earnings have decreased by approximately $25,000 per year since 2006, and further allege that such loss will continue for the balance of McKee's working life, with concomitant loss of benefits and loss of salary increments (Saez affirmation in support, exhibit F [verified bill of particulars, ¶ 28]). Plaintiffs reserved their right to supplement this answer upon retention of a forensic economist (*id.*). At McKee's deposition in 2009, he testified that he lost approximately $25,000 per year in wages (*id.*, exhibit G [McKee tr at 32, 36]). In plaintiffs' supplemental bill of particulars served in 2017, plaintiffs allege that McKee was denied a promotion to the position of chief engineer, because he is unable to travel, and that the differential between McKee's annual salary and that of a chief engineer's annual salary is $61,254 (*id.*, exhibit T [supplemental verified bill of particulars, ¶ 3]). Plaintiffs intend to claim at trial that McKee's lost earnings, for the remainder of his working life, will be $710,546 without considering increments (*id.*). Given the dramatic change in the amount sought on plaintiff's lost wages claim after the note of issue was filed, and the passage of time since McKee's deposition, Ford has demonstrated the need for an additional deposition of McKee[3]

[3] While Ford requests a further deposition of Ruth McKee, Ford has not demonstrated a basis to obtain another deposition of Ruth McKee with respect to McKee's lost wages claim.

with respect to his lost wages claim (*see Singh v 244 W. 39th St. Realty, Inc.*, 65 AD3d 1325, 1325-1326 [2d Dept 2009] [plaintiff's service of a supplemental bill of particulars and expert report alleging that the cost of his future medical care would be approximately $8.9 million (more than three times what had been alleged earlier) constituted "unusual or unanticipated circumstances" warranting further deposition of plaintiff regarding future medical care]; *Karakostas v Avis Rent A Car Sys.*, 306 AD2d 381, 382 [2d Dept 2003] [defendant established "unusual or unanticipated circumstances" where plaintiff served supplemental response to discovery indicating for first time that plaintiff would call expert to testify about plaintiff's disability and lost future earnings]). McKee is directed to appear for the limited deposition within 45 days.

2. *McKee's Tax Records*

To the extent that Ford seeks McKee's tax records, Ford has failed to demonstrate a basis to obtain these tax records (*see David Leinoff, Inc. v 208 W. 29th St. Assoc.*, 243 AD2d 418, 419 [1st Dept 1997] [compelled disclosure of personal tax returns is generally disfavored; to obtain tax returns, "(t)he moving party must make a strong showing of necessity and demonstrate that the information in the returns is not available from other sources"]). Ford argues that it needs these records to defend against plaintiffs' lost wages claim. Courts have ordered disclosure of a plaintiff's personal tax returns where the plaintiff claims loss of earnings and is self-employed (*see Scholte v Agway, Inc.*, 152 AD2d 928, 929 [4th Dept 1989]), or where the plaintiff's pattern of employment makes it difficult to obtain the information from other sources (*see Maglaras v Mt. Sinai Hosp.*, 107 AD2d 605, 606 [1st Dept 1985]). However, as pointed out by plaintiffs, McKee was not self-employed, and was employed by Kabar Manufacturing prior to the date of the accident and continuing through the present (Saez affirmation in support, exhibit F [verified

bill of particulars, ¶ 28; exhibit T [supplemental verified bill of particulars, ¶ 3]). Therefore, Ford is not entitled to McKee's tax records.

*3. Arons Authorizations*

Ford has failed to demonstrate "unusual or unanticipated circumstances" with respect to its request for *Arons* authorizations to interview McKee's treating physicians ex parte (*see Arons v Jutkowitz*, 9 NY3d 393, 411 [2007] ["the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it"]; *see also Shefer v Tepper*, 73 AD3d 447, 447 [1st Dept 2010] ["the Court of Appeals expressly rejected the long-standing practice of proscribing such interviews only after the note of issue was filed, and otherwise made it clear that the preferred time for such disclosure was before the filing of a note of issue"]). Plaintiffs' supplemental bill of particulars does not allege a significant change in the nature or extent of plaintiffs' injuries (Saez affirmation in support, exhibit F [verified bill of particulars, ¶ 25]; exhibit T [supplemental verified bill of particulars, ¶ 1]). In addition, Ford states that it repeatedly requested *Arons* authorizations from December 2014 until the note of issue was filed on February 24, 2015, but did not move to vacate the note of issue. A lack of diligence in seeking discovery does not constitute "unusual or unanticipated circumstances" (*Colon v Yen Ru Jin*, 45 AD3d 359, 360 [1st Dept 2007]). Accordingly, Ford is not entitled to *Arons* authorizations at this time.

*4. Photographs and Other Inspection Materials*

As for Ford's request for inspection materials, Ford has also failed to demonstrate "unusual or unanticipated circumstances" (22 NYCRR 202.21 [d]). Ford asserts that plaintiffs' counsel previously provided Ford with a compact disc containing photographs and other materials taken by plaintiffs' expert Kenneth D. Brady in 2007, well before the note of issue was

filed. Although Ford claims that the compact disc is corrupted, Ford does not indicate when it became aware of this fact. In addition, in opposition to Ford's motion, plaintiffs assert that they have not named Brady as an expert. Thus, Ford is not entitled to inspection materials at this late stage.

*5. Authorization for McKee's Medical Records from Dr. Melgar*

Ford requests a HIPAA-compliant authorization for McKee's medical records from Dr. Melgar, in order to permit Ford to subpoena the records for trial. "[T]here is a distinction between pretrial discovery and the marshaling of evidence for trial by the use of a subpoena duces tecum" (*Singh v Friedson*, 36 AD3d 605, 606 [2d Dept 2007], *lv dismissed* 9 NY3d 861 [2007]; *see also Doubrovina v Griffin*, 17 Misc 3d 133[A], *1 [App Term, 2d Dept 2007] ["The fact that a case has been placed on the trial calendar does not preclude a party from seeking to obtain evidence for trial by the use of a subpoena duces tecum"]). In response to Ford's motion, plaintiffs contend that, on April 26, 2017, they furnished Ford with HIPAA-compliant authorizations as required by the CPLR (Swergold affirmation in opposition, exhibit 6). Ford argues, in reply, that, on February 15, 2017, plaintiffs' counsel provided authorizations for most of the medical providers requested by Ford, but failed to provide an updated HIPAA-compliant authorization for records from Dr. Melgar (Saez reply affirmation, exhibit I). However, Ford does not address whether plaintiffs provided the authorization on April 26, 2017, as argued by plaintiffs. Therefore, the branch of Ford's motion seeking a HIPAA-compliant authorization for McKee's medical records for his treatment with Dr. Michael Melgar is denied.

*6. Preclusion*

Finally, although Ford requests preclusion in the alternative, Ford has not demonstrated a basis for preclusion (*see De Leo v State-Whitehall Co.*, 126 AD3d 750, 752 [2d Dept 2015]

[preclusion was unwarranted where movants failed to demonstrate a "pattern of willful failure to respond to discovery demands or comply with disclosure orders"]).

In light of the above, Ford's motion is granted only to the extent of directing McKee to appear for a limited deposition as to his lost wages claim within 45 days.

**CONCLUSION**

Accordingly, it is

**ORDERED** that the motion (sequence number 011) of plaintiffs to compel, resolve the issues in plaintiffs' favor, or strike defendant Ford Motor Company's answer is denied; and it is further

**ORDERED** that the motion (sequence number 012) of defendant/third-party plaintiff Ford Motor Company to compel or preclude is granted to the extent of directing plaintiff John P. McKee to appear for a further deposition limited to his claim for lost wages, and is otherwise denied; and it is further

**ORDERED** that, within 45 days, plaintiff John P. McKee shall appear for a further deposition limited to his claim for lost wages.

Dated: September 13, 2018

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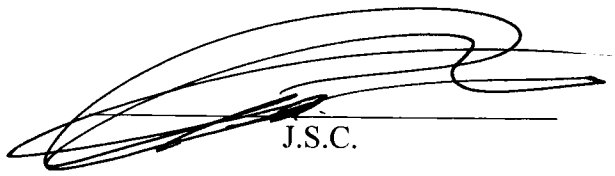

J.S.C.