

**Rossi v 140 W. JV Mgr. LLC**

2018 NY Slip Op 32312(U)

September 14, 2018

Supreme Court, New York County

Docket Number: 160467/2015

Judge: Robert R. Reed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 43

-----X  
ROBERT ROSSI,

Plaintiff,

-against-

Index No. 160467/2015

140 WEST JV MANAGER LLC, J.T. MAGEN &  
COMPANY INC. and VANQUISH CONTRACTING CORP.  
and 140 WEST STREET (NY), LLC,

Defendants.

-----X  
140 WEST JV MANAGER LLC, and  
140 WEST STREET (NY), LLC,

Third-Party Plaintiffs,

-against-

H & L ELECTRIC, INC.,

Third-Party Defendant.

-----X  
J.T. MAGEN & COMPANY INC.,

Second Third-Party Plaintiff,

-against-

H & L ELECTRIC, INC.,

Second Third-Party Defendant.

-----X  
**ROBERT R. REED, J.**

Motion sequence numbers 002, 003, and 004 are consolidated herein for purposes

of disposition.

Defendants/third-party plaintiffs 140 West JV Manager LLC and 140 West Street (NY), LLC (both, 140 West) move, pursuant to CPLR 3124 and 3126, in motion sequence number 002 for an order compelling plaintiff Robert Rossi (Rossi) to produce Health Insurance Portability and Accountability Act (HIPAA)-compliant authorizations for release of unrestricted records for pre-existing medical conditions, additional HIPAA-compliant medical authorizations, and video and photographs from his wedding, honeymoon, and vacation, or, in the alternative, precluding him from offering any evidence regarding damages at trial. Defendant Vanquish Contracting Corp. (Vanquish) in sequence number 003 and defendant/second third-party plaintiff J.T. Magen & Company Inc. (Magen) in sequence number 004 each move for an order compelling production of that discovery, as well.

In this negligence action, Rossi alleges that he sustained personal injury on November 25, 2014, when he tripped and fell on construction debris in the sub-basement elevator lobby of the building located at 140 West Street in Manhattan (premises), while in the course of his duties as an electrician apprentice for third-party defendant/second third-party defendant H & L Electric, Inc. Rossi alleges serious and permanent injuries to his left shoulder, lumbar spine, and right knee, as a result of the accident.

Following joinder of issue, Rossi moved for summary judgment on the complaint. By decision and order dated January 30, 2018, this court granted that part of the motion

for summary judgment in Rossi's favor solely as to liability on that part of the Labor Law § 241 (6) cause of action arising out of violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) asserted against 140 West Street (NY) LLC and Vanquish.

Pursuant to this court's status conference order dated August 31, 2017, defendants now move to compel Rossi to produce unrestricted medical authorizations, and wedding and vacation photographs and videos.

In opposition, Rossi contends that defendants' discovery demands are frivolous, harassment, overbroad, unduly burdensome, a clear fishing expedition, and unsupported by case law and the underlying factual record.

Evidence that is material, necessary, or relevant to the resolution of the plaintiff's claim is discoverable (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]; *see* CPLR 3101). Evidence is material, if it is sought "in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination" (*id.* at 407).

"A litigant will be deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue" (*Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]; *see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]).

However, a plaintiff waives "the physician-patient privilege only as to those conditions affirmatively placed in controversy" (*Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1<sup>st</sup> Dept 2012]).

Rossi alleges that, as a result of the accident, he sustained serious and permanent injuries to his left shoulder, lumbar spine, nervous system, and right knee and that those injuries have substantially prevented him from enjoying normal social, educational, and economic activities, and that pre-existing medical conditions were aggravated and exacerbated by the accident (*see e.g.* Verified Bill of Particulars in response to 140 West's demand ¶ 7; Second Supplemental Verified Bill of Particulars ¶ 7). Rossi alleges that he sustained internal derangement of the left shoulder with posterior and inferior labral tears with impingement requiring arthroscopic repair, internal derangement of the lumbosacral spine with left paracentral disc herniation with angular tear at L4-L5, and internal derangement of the right knee with suprapatella joint effusion and chondral debris (*see* Verified Bill of Particulars in response to 140 West's demand ¶ 7). Rossi also alleges that he underwent a lumbar laminectomy, factectomy, foraminotomy, and a diskectomy at L4-L5, resulting in post surgical scarring (*see* Second Supplemental Verified Bill of Particulars ¶ 7).

Rossi further alleges that he remains incapacitated from employment, and seeks to recover lost wages for the balance of his work life along with inflation and fringe benefits, as well as lost opportunity and profits (*see* Verified Bill of Particulars in response to Magen's demand ¶ 12 [e], [g]).

Rossi testified that there are "a lot of activities" that he could do before the accident that he can no longer do, that the "accident's had a major impact on [his life].

For one, I'm not working, I can't work. I used to workout all the time. . . I'm not the same guy . . . I'm just not the same as I was" (Rossi Jan. 12, 2017 dep tr at 191, line 9 to 192, line 25). Rossi also alleges that, since the accident, he suffers from low libido (*id.*, at 191, line 23 to 192, line 3).

With these allegations, Rossi affirmatively and directly placed the prior medical condition of his left shoulder, lumbar spine, nervous system, libido, and right knee in issue, both before and after the accident.

The nature and severity of a plaintiff's previous medical conditions are material and necessary to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life (*Vanalst v City of New York*, 276 AD2d 789, 789 [2d Dept 2000]). By seeking to recover future lost earnings, a plaintiff affirmatively places at issue his health and ability to work, and his work life expectancy, had the accident not occurred (*McLeod v Metropolitan Transp. Auth.*, 47 Misc 3d 1219[A], \*6, 2015 NY Slip Op 50705[U] [Sup Ct, NY County 2015]). Therefore, defendants are entitled to discovery to determine the extent, if any, to which Rossi's alleged injuries and damages are attributable to pre-existing conditions or to accidents other than the underlying accident or are aggravation and exacerbation of pre-existing conditions by the accident (*see McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479, 480 [1<sup>st</sup> Dept 2011]).

However, defendants are not entitled to unrestricted authorizations. The authorizations for release of Rossi's records maintained by Rossi's medical providers must

be HIPAA-compliant and limited in scope to the injuries and medical conditions listed in his bills of particulars and those about which Rossi testified at deposition, as discussed above. They must be limited in time, beginning two years prior to the accident, through the present.

Therefore, Rossi is directed to produce such limited authorizations for release of records maintained by Lenox Hill Hospital, Walgreens Pharmacy, Hamilton Medical Services, Staten Island Rehab Physical Therapy, Alluring Eyez Optical, Magnacare, Dr. Richard Funaro, Dr. Barry Gordon, Dr. Kevin Weiner, Rite Aid Corp., and Stand-Up MRI of Staten Island.

Rossi is directed to produce such limited authorizations for release of records maintained by the following doctors mentioned in records maintained by Dr. Weiner, Walgreens Pharmacy, and Lutheran Medical Center: Drs. Riley, Choueka, Chow, Hoe-Yong Lee, DeMarco, and Raymond Walsh.

With regard to the medical records maintained by Dr. Weiner, defendants may request an authorization for release of records regarding treatment 10 or more years prior to the accident, upon a showing that Rossi received medical treatment from any provider for the left shoulder during the two-year period preceding the accident.

Rossi is also directed to produce authorizations for release of relevant records maintained by his union and union pension plan.

Defendants are entitled to production of videos and photographs taken during

Rossi's wedding, honeymoon, and vacation in Costa Rica, which were taken after the accident. Post-accident photographs and videos depicting a plaintiff engaging in various social and physical activities which are part of the plaintiff's damages allegations are relevant and, therefore, discoverable (*Zegarelli v Hughes*, 3 NY3d 64, 67-68 [2004]; *Romano v Steelcase Inc.*, 30 Misc 3d 426, 434-435 [Sup Court, Suffolk County 2010]; *Sgambelluri v Recinos*, 192 Misc 2d 777, 779-781 [Sup Court, Nassau County 2002]; CPLR 3101 [i]). Therefore, Rossi is directed to produce video and photographs taken during his wedding, honeymoon, and vacation in which he appears.

Rossi is directed to comply with this court's November 10, 2016 and March 2, 2017 compliance conference orders and provide a supplemental bill of particulars outlining his claims of aggravation and exacerbation of pre-existing injuries, unless he withdraws such claims in writing.

Accordingly, it is

ORDERED that motion sequence number 002 is granted to the extent that plaintiff Robert Rossi is directed to provide the authorizations and a verified supplemental bill of particulars as described above, within 20 days after receipt of a copy of this order with notice of entry, and is otherwise denied; and it is further

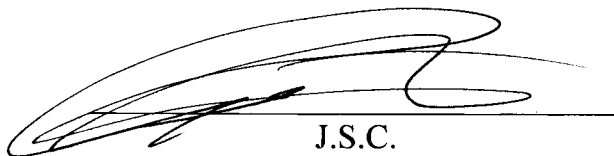
ORDERED that motion sequence number 003 is granted to the same extent; and it is further



ORDERED that motion sequence number 004 is granted to the same extent.

Dated: September 14, 2018

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A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

J.S.C.