

S.O. v City of New York
2018 NY Slip Op 32992(U)
November 26, 2018
Supreme Court, New York County
Docket Number: 155683/2015
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 34

S.O., Infant by Mother and Natural Guardian
STEPHANIE TORRES, and STEPHANIE TORRES,
Individually,

Plaintiffs,

Index No.: 155683/2015
Motion Sequence No.: 004

- against -

DECISION/ORDER

THE CITY OF NEW YORK, NEW YORK CITY
BOARD OF EDUCATION, NEW YORK CITY
DEPARTMENT OF EDUCATION, CITY OF NEW
YORK OFFICE OF PUPIL TRANSPORTATION and
HOYT TRANSPORTATION,

Defendants.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In this personal injury action, infant plaintiff S.O., seeks to recover damages against defendants for injuries she allegedly sustained during the school day on October 28, 2014. Among other things, plaintiff alleges that she sustained a fractured hip, between the time the infant plaintiff got on the bus and throughout the school day and/or on her way back home while in custody of a para-professional employed by the defendants.

Currently, defendants move for an order precluding plaintiffs from offering evidence at the time of trial; or in the alternative, for an order compelling discovery on the ground that plaintiffs failed to provide authorizations releasing the records of the health insurance carrier(s) for the infant plaintiff in the year prior to the date of the accident and the year after, pursuant to defendants' discovery demand dated May 18, 2018. Plaintiffs objected to defendants' demand as being overly broad, burdensome, and not calculated to lead to admissible evidence. Defendants contend that plaintiffs have willfully and unjustifiably failed to provide defendants with the requested

discovery. Defendants note that as a result of a global developmental delay, infant plaintiff is non-verbal. In support of their motion, defendants rely on the depositions of two non-parties, Robert Paras and Cherry George. According to the movants' papers, Robert Paras was the driver of the school bus in which plaintiff was a passenger on the date of the alleged incident and Cherry George was the matron on the school bus on said date. Paras testified that in early September, Stephanie Torres, infant plaintiff's mother informed him that infant plaintiff was scheduled to have hip surgery prior to the alleged incident date of October 28, 2014. George testified that she overheard this conversation and that Torres stated that infant plaintiff needed to undergo hip surgery but could not because of an issue that had arisen with her insurance coverage. Defendants argue that the insurance records requested are a legitimate subject of inquiry and may uncover evidence of infant plaintiff's prior existing conditions that are vital to the defense of this case.

In opposition, plaintiffs argue that this inquiry is based on hearsay statements made by Paras and George and characterizes it as a "fishing expedition." Notably, plaintiffs' counsel points out that they previously provided unrestricted authorizations to obtain infant plaintiff's pediatric, orthopedic, neurology, and/or home health care records. Plaintiffs assert that none of these records yielded any notation regarding a prior hip injury or planned hip surgery. It is plaintiffs' contention that they have responded to all of defendants' outstanding demands and they are not entitled to authorizations to obtain records from the health insurance carriers.

In reply, defendants emphasize the uniqueness of this situation in terms of infant plaintiff's inability to communicate on any meaningful level. Defendants contend that the only method to explore this allegation of a prior hip surgery is a review of records of the insurance carrier for the year preceding the incident and the year afterwards.

CPLR § 3126 provides penalties that can be implemented against parties for “refusing to obey an order for disclosure or willfully fail[ing] to disclose information which the court finds ought to have been disclosed...” To impose the drastic remedy of preclusion, the court must determine that the offending party’s failure to comply with discovery demands was willful, deliberate, and contumacious (CPLR § 3126 [2]). The court can infer willfulness from repeated failures to comply with court orders or discovery demands without a reasonable basis (*see LaSalle Talman Bank, FSB v Weisblum & Felice*, 99 AD3d 543 [1st Dept 2012]). A party seeking to compel disclosure may move to compel compliance or a response (CPLR § 3124). CPLR § 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” and this language is “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” (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]) *quoting Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]).

The branch of defendants’ motions seeking preclusion pursuant to CPLR § 3126 is denied in its entirety because defendants have failed to show that plaintiffs engaged in pattern of willful and contumacious conduct that rises to the level sufficient to warrant the severe sanctions sought to be imposed (*see Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]).

In addition, the Court denies defendants’ motion to compel authorizations to obtain records from the health insurance carriers. Depositions are a method of discovery. While it is clear that non-party depositions have been taken, the record is silent as to whether or not plaintiff Stephanie Torres has been deposed. Certainly, infant plaintiff’s mother is capable of answering questions regarding her daughter’s medical background including whether or not infant plaintiff was scheduled to have hip surgery prior to October 28, 2014. The Court recognizes the limitations

placed upon defendants' investigation in this matter, however, it is reluctant to compel plaintiffs to provide the requested authorizations without further clarification as to the status of plaintiff Stephanie Torres' deposition. Without this information, there can be no meaningful discussion as to whether defendants' request is tantamount to going on fishing expedition. Based on the record before this Court, defendants have not provided sufficient details for this Court to make any determination as to defendants' motion to compel disclosure.

Accordingly, it is

ORDERED that the branch of defendants' motion seeking preclusion pursuant to CPLR § 3126 is denied in its entirety; and it is further

ORDERED that the branch of the motion seeking an order compelling plaintiff to provide authorizations to obtain records from infant plaintiff's health insurance carriers is denied without prejudice.

Dated:

11/26/2018

ENTER:



CARMEN VICTORIA ST. GEORGE J.S.C.
HON. CARMEN VICTORIA ST. GEORGE
J.S.C.