Brown v Pacheco
2018 NY Slip Op 33010(U)
October 24, 2018
Supreme Court, Bronx County
Docket Number: 300405/2017
Judge: John R. Higgit
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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ASHLEY A. BROWN,

Plaintiff,

- against -

SAMANTHA PACHECO,

Defendant.

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DECISION AND ORDER

Index No. 300405/2017

John R. Higgitt, J.

Upon defendant's August 24, 2018 notice of motion and the affirmation and exhibits submitted in support thereof; there being no opposition to the application; and due deliberation; defendant's motion to strike plaintiff's complaint for plaintiff's failure to respond to defendant's May 16, 2018 discovery demands is granted in part.

Defendant asserts that a response to her May 16, 2018 discovery demands remains incomplete. The demands sought authorizations to obtain the records of, among other things, plaintiff's employer and the medical providers for and no-fault files from September 17, 2014 and May 27, 2000 accidents.

Plaintiff responded on June 13, 2018. Plaintiff stated that an authorization for plaintiff's employer was not applicable. Plaintiff further stated that she could not provide an authorization for the acupuncture facility without a complete address for the facility, and stated that she could not provide authorizations for the prior accidents because she could not recall information regarding the prior accidents. She stated that authorizations would be provided upon defendant providing names and addresses of providers.

On July 31, 2018, defendant requested an authorization for plaintiff's school, and provided the address for the acupuncture facility and the results of an Insurance Service Office (ISO) claims search for the two prior accidents. The ISO search results included the name and address of a provider for the 2014 accident, in which plaintiff injured her neck and back, but did not identify any providers for the 2000 accident, in which plaintiff injured her right shoulder, hand and knee. The search results also

contained the claim numbers relating to the two accidents.

On August 16, 2018, plaintiff objected to providing an employment authorization because she was not claiming lost wages. Plaintiff again did not provide an authorization for the identified medical provider for the 2014 accident because she could not recall additional information regarding the claim. Plaintiff again did not provide authorizations for the 2000 accident because she could not recall information regarding the accident.

Any motion relating to disclosure must include "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion" (22 NYCRR § 202.7[a][2]). The good faith requirement applies by its terms to any discovery-related application, not just applications to strike pleadings or for particular sanctions for failure to disclose, and the regulation states that the motion cannot be filed without it. Such affirmation must provide a substantive description of the efforts undertaken to confer and avoid motion practice *(see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470 [1st Dept 2013]). Failure to do so is, standing alone, sufficient ground to deny the motion (*see Perez De Sanchez v Trevz Trucking LLC*, 124 AD3d 527 [1st Dept 2015]).

"Good faith" contemplates communication *between* parties (*see Fulton v Allstate Ins. Co.*, 14 AD3d 380 [1st Dept 2005]), not communication *at* a party. Good faith entails "constructive dialogue" (*Nikpour v City of New York*, 179 Misc 2d 928, 930 [Sup Ct, N.Y. County 1999]), and "diligent effort" (*Baez v Sugrue*, 300 AD2d 519, 521 [2d Dept 2002]). The motion discloses no circumstances warranting disregard of this requirement (*cf. Lu Huang v Di Yuan Karaoke*, 28 Misc 3d 920 [Sup Ct, Queens County 2010]). The affirmation submitted here discloses no efforts undertaken by defendant to comply with the good faith requirement. Attendance at a mandatory, court-ordered conference is not a good-faith effort of the kind envisioned by the regulation (*see Arma v East Islip Union Free School Dist.*, 2016 NY Slip Op 31823[U] [Sup Ct, Suffolk County 2016]). The service of a discovery demand is not a good faith effort to avoid motion practice because it does not constitute a "conferral" with opposing

counsel (*see Kelly v N.Y.C. Transit Auth.*, 162 AD3d 424 [1st Dept 2018]).

Nevertheless, defendant's motion, when viewed as a whole (*see Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442 [1st Dept 2017]; *Loeb v Assara* N.Y. I L.P., 118 AD3d 457 [1st Dept 2014]), discloses that defendant re-served the demands upon receiving no response and, upon receipt of plaintiff's partial response, submitted additional information to assist plaintiff in formulating a more complete response. The court finds sufficient demonstration of defendant's efforts to avoid motion practice.

With respect to the employment authorization, defendant argues that the disclosure is relevant not to plaintiff's lost wages, if any, but to whether plaintiff's attendance was affected by the accident. Given that plaintiff claims "serious injury" under the category of a 90/180-day injury, defendant has demonstrated that the discovery sought is material and necessary (*see Brito-Amezquita v 928 Columbus Holdings LLC*, 2017 NY Slip Op 32514[U], at *4 [Sup Ct, N.Y. County 2017]) and plaintiff has failed to establish that the material is immune or exempt from discovery (*see Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451 [1st Dept 2012]).

As to the medical providers for the prior accident, plaintiff cannot disclose what she cannot recall (*see Angielczyk v N.Y. Cent. Mut. Ins. Co.*, 2013 NY Slip Op 34194[U] [Sup Ct, Erie County 2013]). Plaintiff, however, does not deny that the information sought was material and necessary to the issue of the treatment of her injuries (*see* CPLR 3101), has not objected to defendant's demand (*see* CPLR 3122[a][1]), and has indicated that she will not comply with the demand. Accordingly, plaintiff shall provide authorizations to obtain the no-fault files for the prior accidents and the records of Warren M. Ward, D.C., the medical provider named in relation to the 2014 accident.

The court retains broad discretion in supervising discovery (*see Crooke v Bonofacio*, 147 AD3d 510 [1st Dept 2017]), and any CPLR 3126 sanction imposed should be commensurate with and proportionate to the nature and extent of the disobedience (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013]; *Christian v City of New York*, 269 AD2d 135, 137 [1st

Dept 2000]). In light of the circumstances here, the court declines to impose any CPLR 3126 sanction at this juncture on the assumption that plaintiff will comply in good faith with this order.

To the extent defendant requests an order compelling plaintiff to provide an authorization for the non-privileged portion of the legal file of the attorney who represented plaintiff in relation to the 2014 accident, moving to compel a party's compliance with discovery that has not been demanded is improper (*see Canales v State of N.Y.*, 51 Misc 3d 648 [Ct Cl 2015]).

Accordingly, it is

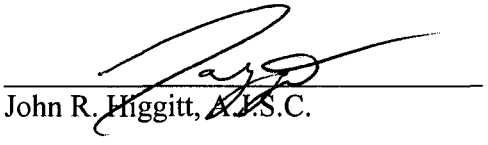
ORDERED, that defendant's motion to strike plaintiff's complaint for failure to respond to defendant's May 16, 2018 discovery demands is granted to the extent that within 30 days after service of a copy of this order with written notice of its entry, plaintiff shall provide to defendant authorizations to permit defendant to obtain the records of Children's Aid College Prep Charter School (limited to attendance records) and Warren M. Ward, D.C. and the no-fault files for State Farm claim numbers 11556R550 and 55S237677; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that the parties shall appear before the undersigned in Part 14, courtroom 709, at 9:30 a.m. on January 4, 2019 for a compliance conference.

This constitutes the decision and order of the court.

Dated: October 24, 2018



John R. Higgitt, A.J.S.C.