

Hernandez v Cablevision Sys. N.Y. City Corp.

2018 NY Slip Op 34009(U)

October 10, 2018

Supreme Court, Bronx County

Docket Number: 23055/2015E

Judge: Doris M. Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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GUADALUPE HERNANDEZ,

Plaintiff,

Index No. 23055/2015E

v.

DECISION AND ORDER

CABLEVISION SYSTEMS NEW YORK CITY
CORPORATION and ERIC GORDON,

Defendants.

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GONZALEZ, D.:

Upon: i) the Order to Show Cause, by David Rosenthal, Esq., attorney for defendants, for an Order: 1) compelling plaintiff to provide the defendants with unrestricted HIPAA-compliant authorizations for the release of both plaintiff's prior and current medical providers, social worker, Social Security Disability benefits and collateral sources; 2) compelling plaintiff to provide fresh unrestricted HIPAA-compliant trial subpoenas following plaintiff's September 12, 2017 surgery; 3) staying the trial of this matter to allow defendants time to obtain the necessary and pertinent medical records to rebut the expert opinions of plaintiff's life-care planner, Dr. Ali Guy and/or economist Alan M. Leiken, PhD, and Debra S. Dwyer, PhD, who plaintiff intends to produce for testimony at trial; or, in the alternative, 4) precluding plaintiff from introducing at trial the expert testimonies of Dr. Ali Guy, Alan M. Leiken, PhD, and Debra S. Dwyer, PhD, due to plaintiff's refusal to provide the aforementioned disclosure; and 5) for such other and further relief as this Court shall deems just and proper; ii) the Affirmation in Opposition, dated September 20, 2018, by Alison R. Keenan, Esq., attorney for the plaintiff; and iii) the stipulation entered into by and between the parties, agreeing to provide the defendants with authorizations for the plaintiff's social

security disability records and Medicare records for five years prior to the accident within ten (10) days, and adjourn the trial of this matter to November 5, 2018.

PROCEDURAL HISTORY

The action was commenced by the filing of a Summons and Verified Complaint on June 4, 2015. Issue was joined by service of the defendants' Answer, on or about August 17, 2015.

The plaintiff served a bill of particulars, on or about October 21, 2015. A preliminary conference was held on January 22, 2016, and an order was issued directing the examinations before trial of all parties be held by March 22, 2016. An examination before trial of the plaintiff was conducted on June 28, 2016.

A note of issue and certificate of readiness was filed on July 29, 2016. The defendants moved to vacate the note of issue, on or about August 12, 2016, since discovery was not complete. By stipulation, dated September 27, 2016, so ordered by Justice Laura Douglas, the parties agreed the note of issue and certificate of readiness would not be stricken and the plaintiff would appear for independent medical examinations within 60 days.

On October 16, 2017, the plaintiff served a supplemental bill of particulars alleging the plaintiff underwent cervical surgery by Dr. Jason Gallina on September 12, 2017. A further examination before trial of the plaintiff was conducted on December 22, 2017.

On May 29, 2018, the plaintiff served an expert witness disclosure for Dr. Ali Guy. Thereafter, on June 18, 2018, plaintiff served an expert witness disclosure for Alan M. Leiken, PhD, and Debra S. Dwyer, PhD, and a supplemental bill of particulars alleging additional special damages.

On July 27, 2018, the defendants served a demand for authorizations for the plaintiff's pre-accident medical records, the plaintiff's social security disability and Medicare records. The

plaintiff served a response to defendants' demand on August 8, 2018, providing authorizations for her post-accident medical records. The defendants now move to compel the plaintiff to provide unrestricted HIPAA authorizations for her pre-accident medical records, or, alternatively, to preclude the plaintiff's experts.

Multiple conferences have been held in the Special Trial Part. The trial of this matter is scheduled for November 5, 2018.

FACTUAL BACKGROUND

This action is for personal injuries allegedly sustained as a result of an automobile accident that occurred on September 11, 2014, on East 219th Street, at or near its intersection with Carpenter Avenue, in the County of Bronx, City and State of New York. It is alleged that a vehicle operated by defendant Eric Gordon and owned by defendant Cablevision came in contact with the plaintiff pedestrian.

On June 28, 2016, the plaintiff testified at an examination before trial that she had pre-existing diabetes and asthma and takes medication for these illnesses. She testified she receives social security disability benefits due to her diabetes and asthma.

The defendants request authorizations for the plaintiff's pre-accident medical records. The defendants contend that there are unusual or unanticipated circumstances necessitating the disclosure of the plaintiff's pre-accident medical history based on the plaintiff's testimony at an examination before trial, the expert witness disclosure and the supplemental bill of particulars, dated June 18, 2018.

The plaintiff opposes the motion arguing that the defendants are not entitled to plaintiff's pre-accident medical records since there are no unusual or unanticipated circumstances allowing such disclosure post-note of issue and on the eve of trial. The plaintiff contends that defendants

made no effort to seek the pre-accident medical records until the eve of trial despite being aware of her pre-existing medical condition.

DISCUSSION OF LAW

The law is well settled, as per 22 NYCRR 202.21 (d), the Court may authorize additional discovery “[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness” that would otherwise cause “substantial prejudice” (*Audiovox Corp.* at 140; *Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 168 AD2d 376 [1st Dept 1990]).

The defendants have failed to establish that there are any “unusual or unanticipated circumstances” warranting their entitlement to authorizations for the plaintiff’s medical records pre-dating the accident in question. The defendants argue the plaintiff’s pre-accident medical records are necessary since the plaintiff testified at an examination before trial that she receives social security disability benefits for asthma and diabetes. She also testified she had diabetes and asthma prior to the accident. In addition, the plaintiff alleges a loss of enjoyment of life due to the accident in her bill of particulars, dated October 21, 2015. The defendants, however, did not seek authorizations for the plaintiff’s pre-accident medical records until the eve of trial, two-years post-note of issue, despite her claims and pre-existing medical conditions. Thus, the defendants have failed to establish that there are “unusual or unanticipated circumstances” warranting disclosure.

The defendants contend that the plaintiff’s pre-accident medical records are necessary because the plaintiff’s supplemental bill of particulars, dated June 18, 2018, alleges new claims for depression, stress and psychological difficulties, and the plaintiff’s claim has affected special damages. The plaintiff’s bill of particulars, however, dated October 21, 2015, clearly alleges depression, stress, anxiety and other psychological difficulties as a result of the plaintiff’s accident.

The bill of particulars alleges continuing special damages and a need for future surgery and medical care.

The plaintiff's supplemental bill of particulars, dated October 16, 2017, did in fact allege depression, anxiety, stress and other psychological trauma. In addition, the October 16, 2017 supplemental bill of particulars alleges the plaintiff underwent cervical surgery by Dr. Jason Gallina on September 12, 2017, and that future surgery and hospitalization may be needed. The plaintiff's supplemental bill of particulars, dated June 18, 2018, outlines the plaintiff's increased future special damages consistent with all bill of particulars previously served. Thus, the defendants have failed to show that the plaintiff's June 18, 2018 supplemental bill of particulars alleges any new claims not previously plead.

The defendants waited almost two years post-note of issue to demand authorizations for the plaintiff's pre-accident medical records. Based on the record and all prior pleadings, there are no unusual or unanticipated circumstances warranting disclosure of the plaintiff's medical records pre-dating the accident in question.

The defendants seek to preclude the plaintiff's experts from testifying based on the plaintiff's failure to provide unrestricted authorizations. The plaintiff's expert witness disclosure, dated May 29, 2018, discloses Dr. Ali Guy, a physiatrist, as an expert that intends to testify about the plaintiff's injuries and future medical treatment based on his examination of the plaintiff and a review of the plaintiff's medical records. The plaintiff's expert witness disclosure, dated June 18, 2018, discloses Dr. Alan Leiken and Dr. Debra Dwyer, economists, as experts that intend to testify about the cost of the plaintiff's future health care based on their review of the plaintiff's medical records and their expertise.

It is well settled that a preclusion of expert evidence on the ground of failure to give timely disclosure, as called for in CPLR 3101 (d) (1) (i), is generally unwarranted without a showing that the noncompliance was willful or prejudicial to the party seeking preclusion by the lateness of the exchange (*Nathel v Nathel*, 55 AD3d 434, 866 NYS2d 153 [2008]).

The movant must show that the recent disclosure of experts Dr. Guy, Dr. Leiken and Dr. Dwyer, was willful, deliberate and contumacious. Based on the record, the defendants have failed to establish that the plaintiff's actions were willful and deliberate. The plaintiff served her expert witness disclosures immediately after retaining her experts. In addition, the experts intend to testify on injuries and damages previously alleged in the plaintiff's bill of particulars, dated October 21, 2015, and the cost of plaintiff's future medical treatment related to the injuries sustained in the accident. Furthermore, the plaintiff and defendants agreed to adjourn the trial to November 5, 2018.

ACCORDINGLY, based on the record before the Court, a review of the Court file, the applicable law, and due deliberation; it is hereby

ORDERED, that the motion to compel the plaintiff to provide authorizations for pre-accident medical records is DENIED; and it is further

ORDERED, the motion to preclude the plaintiff's experts from testifying is DENIED.

This constitutes the Decision and Order of the Court.

Dated: October 10, 2018
Bronx, New York

ENTER:



HON. DORIS M. GONZALEZ, J.S.C.