Tashman v Tejeda
2018 NY Slip Op 34139(U)
November 19, 2018
Supreme Court, Westchester County
Docket Number: Index No. 63830/2017
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

----------x

JOSEPH TASHMAN,

Plaintiff,

-against-

DECISION and ORDER
Index No. 63830/2017
Motion Date: Nov. 19, 2018
Seq. No. 2

JUAN TEJEDA,

Defendant.

----------x

LEFKOWITZ, J.

The following papers were read on defendant's motion for an order: 1) pursuant to CPLR 3126 dismissing plaintiff's complaint; or in the alternative, 2) pursuant to CPLR 3126 precluding plaintiff from giving or offering any evidence or testimony in support of his claims; or in the alternative, 3) pursuant to CPLR 3124 compelling plaintiff to provide all outstanding discovery on a date certain; and 4) for such other, further and different relief as this court may deem just, proper and equitable.

Order to Show Cause; Affirmation in Support; Exhibits A-O;
Affirmation of Good Faith; Memorandum of Law in Support
Affirmation in Opposition; Exhibits A-C
NYSCEF File

Upon the foregoing papers and the proceedings held on November 19, 2018, this motion is determined as follows:

Plaintiff commenced this personal injury action by the filing of a summons and verified complaint on September 12, 2017. Issue was joined by the service of defendant's verified answer dated December 8, 2017. Plaintiff alleges that on February 11, 2017 he slipped and fell on the sidewalk owned/maintained by the defendant. The so-ordered (Lefkowitz, J.) Preliminary Conference Stipulation entered on March 16, 2018, provided, inter alia, that plaintiff was to provide authorizations for medical records by April 15, 2018.

On or about December 8, 2017 defendant served a demand for a bill of particulars and combined demands. On or about January 23, 2018 plaintiff served responses to defendant's demands, including authorizations for Motion Sports Medicine ("Motion Sports"), St. John's

Riverside Hospital ("St. Johns"), Daniel Ruiz, CPO ("Ruiz") and 3T Open Imaging of Westchester ("3T"). The authorizations for Motion Sports and Ruiz were limited to medical records related to the February 11, 2017 incident. The authorization for St. John's was "solely limited to the emergency room records of 2/14/13." The authorization for 3T was limited "solely to the MRI of the thoracic spine taken on 2/16/17 and 8/14/ 2017."

On or about February 8, 2018 plaintiff served a verified bill of particulars wherein he alleged injuries, inter alia, severe superior endplate fracture of the T10 of the thoracic spine with loss of height of 10%-15%; central left-sided disc herniation at T11-T12 causing compression upon the thecal sac and left sided neural foraminal narrowing of the thoracic spine; mid thoracic dextrocurvature; bulging discs from T9-T12, resulting in flattening of the dural sac; lower back and neck pain; difficulty with movement activities including sitting, standing, walking and stairs; aggravation, exacerbation and/or re-activation of existing injuries and conditions, and possible activation of latent degenerative conditions causing them to be symptomatic. Plaintiff alleged that these injuries, "their residuals, and sequelae are permanent, chronic and progressive in nature and will tend to worsen over the lifetime of the plaintiff necessitating future surgery, physical therapy, pharmacotherapy and treatment" and over time there would be "further psychological and somatic overlay with resultant disabilities." Plaintiff also alleges "[i]impairment of recreational, family, avocational, and social activities." Additionally, plaintiff stated that he has been "periodically confined from the date of the occurrence to the present date to his home due to severe pain/limited mobile ability."

By letter dated May 2, 2018, defendant objected to the authorizations provided by plaintiff on the grounds that they were improperly limited in time and scope. Defendant demanded that plaintiff provide authorizations for five years prior to plaintiff's accident through the present, unlimited in scope, in order that defendant may "properly gauge your client's damages and loss of enjoyment of life." Plaintiff's counsel replied by letter dated June 5, 2018, stating, inter alia, that its office had fully complied with the Preliminary Conference Order.

By letter dated June 18, 2018, defendant's counsel reiterated his rejection of the previously provided authorizations on the grounds that they were improperly limited as to time and scope. Defendant's counsel demanded authorizations for two years prior to plaintiff's accident through present in order to properly determine plaintiff's claims for "damages and loss of enjoyment of life." Defendant states that when he did not receive a response to that letter, defense counsel served a notice for discovery and inspection dated July 11, 2018 ("discovery demands").

Plaintiff was directed to serve responses to the discovery demands on or before July 31, 2018.[1] By letter dated August 21, 2018, defendant's counsel sought responses to the discovery demands. Plaintiff served responses, dated August 21, 2018, to defendant's discovery demands. The responses objected to all but one demand which sought addresses for two witnesses.

[1] Compliance Conference Referee Report & Order (Lefkowitz, J.) entered July 12, 2018.

The parties appeared for a compliance conference on August 22, 2018. The Order from that conference directed, inter alia, for defendant to serve sufficiently detailed and particularized supplemental demands by September 7, 2018, for plaintiff to serve responses to the supplemental demands by September 28, 2018, and for plaintiff to serve new, unrestricted, authorizations for plaintiff's doctors, physical therapy and films from the date of the accident to present. Defendant served supplemental discovery demands dated August 28, 2018. Plaintiff served responses, dated August 28, 2018 to the supplemental demands. Included with plaintiff's responses were authorizations for Motion, Ruiz, and 3T, unlimited in scope from the date of the accident to present. On or about September 17, 2018 plaintiff served responses to the discovery demands, including unlimited authorizations for St. John's, Dr. Chong Oh, and Dr. Jozef Debiec for medical records from the date of the accident to present. Additionally, plaintiff objected to demands 6-17 on the grounds that they were irrelevant, immaterial, overly broad and too remote in time. Plaintiff also objected to demands 22-25 for lack of foundation of the claimed pre-existing back/neck condition and its relation to this instant matter.

Defendant argues that plaintiff placed his medical condition at issue by pleading various hardships which amount to a claim for loss of enjoyment of life. With respect to the authorizations concerning plaintiff's medical treatment for the injuries he alleges herein, defendant states that plaintiff has failed to provide authorizations for two years prior to the date of the accident. Defendant contends that plaintiff's medical records prior to the date of the accident are necessary to assess plaintiff's claims for damages and loss of enjoyment of life. Additionally, defendant states that the discovery demands seek information concerning certain pre-existing back and neck conditions which defendant asserts are the result of four prior motor vehicle accidents, occurring between 1993 and 2017. Defendant argues that this information is relevant in that the injuries sustained by plaintiff in those accidents involve injuries to the back and neck which plaintiff claims to have injured as a result of the accident which is the subject of this action.

Plaintiff opposes the motion contending that he has complied with each of defendant's discovery demands "to the extent they are appropriate." Plaintiff initially argues that defendant's demands for information concerning the 1993 and May 25, 2001 occurrences are too remote in time. Additionally, plaintiff contends that defendant has offered no proof of a pre-existing back/neck condition from the medical records produced. Plaintiff states that since plaintiff has not yet appeared for deposition there is no testimonial evidence to support defendant's claims that these injuries exist. Plaintiff states that should plaintiff's deposition testimony reveal any relevancy regarding a prior alleged injury and the currently claimed injuries, then plaintiff will provide all appropriate prior records.

Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be 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. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21

NY2d 403, 406 [1968] [internal quotation marks omitted]; *see Matter of Kapon v Koch*, 23 NY NY3d 32 [2014]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading a court must determine that the party's failure to disclose is wilful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Wilful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; *see also Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Insofar as plaintiff has provided some responses to defendant's discovery demands, the court is not inclined to dismiss plaintiff's complaint at this juncture. Presently, to the extent that plaintiff, in his complaint and verified bill of particulars, has made broad allegations of physical injury he has affirmatively placed his entire medical condition in controversy (*DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d 1092 [2d Dept 2010]). Defendant is entitled to review records showing the nature and severity of plaintiff's prior medical conditions which may impact upon the amount of damages, if any, which are recoverable as a result of plaintiff's claims of loss of enjoyment of life (*O'Brien v Village of Babylon*, 153 AD3d 547 [2d Dept 2017]). Additionally, plaintiff's allegations that the present incident and the injuries allegedly suffered therefrom exacerbated pre-existing injuries and conditions establish relevancy between plaintiff's pre-existing conditions and the injuries claimed here (*Id.*). Moreover, it is noted that plaintiff does not deny the existence of prior accidents. Accordingly, defendant is entitled to authorizations for the release of medical records concerning treatment for any back or neck injuries caused as a result of prior accidents. The court also finds that the authorizations provided by plaintiff for the injuries alleged in the present action should predate the date of the accident complained of herein by two years. However, defendant has not established that he is entitled, at this time, to discovery of any of the legal files or no fault files associated with any prior accidents, or discovery of plaintiff's income tax returns.

All other arguments raised and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In light of the foregoing it is hereby:

ORDERED that defendant's motion is granted to the extent that on or before November 30, 2018 plaintiff shall furnish duly executed, HIPAA compliant, authorizations for the release of medical records concerning treatment for any back and/or neck injuries sustained by plaintiff as a result of any prior accidents, from 1993 to present; and it is further

ORDERED that concerning the authorizations previously provided, plaintiff shall furnish revised authorizations for the release of medical records for treatment plaintiff received for injuries alleged in his complaint and verified bill of particulars from two years prior to the date of the accident to present; and it is further

ORDERED that in the event that plaintiff fails to provide these authorizations as specified above, defendant shall upload to the NYSCEF website, no later than December 14, 2018, a detailed affidavit/affirmation of noncompliance and a proposed order precluding plaintiff from offering testimony, by affidavit or otherwise, or evidence at trial or in support of a motion, upon notice to plaintiff; and it is further

ORDERED that defendant's motion is otherwise denied; and it is further,

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on December 19, 2018 at 9:30 a.m.; and it is further;

ORDERED that defendant shall serve a copy of this Decision & Order, with notice of entry, upon plaintiff within five days of entry.

The foregoing constitutes the Decision & Order of this court.

Dated: White Plains, New York
November 19, 2018

HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Service Upon All Counsel Via NYSCEF

cc: Compliance Part Clerk