

Cole v 376 W. Broadway LLC
2019 NY Slip Op 30442(U)
February 22, 2019
Supreme Court, New York County
Docket Number: 155019/2017
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT R. REED PART 43

Justice

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SONIA COLE,

Plaintiff,

- v -

376 WEST BROADWAY LLC, 376 WEST BROADWAY
ENTERPRISES, INC., DOWNTOWN RESTAURANT
COMPANY, LLC, CIPRIANI GROUP, INC., CIPRIANI USA,
INC.

Defendant.

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INDEX NO. 155019/2017

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISCOVERY

Upon the foregoing documents, it is granted in part and denied in part.

In this personal injury action, defendants move to dismiss the complaint, pursuant to CPLR 3126, for failing to comply with two court conference discovery orders, or, in the alternative, to compel plaintiff to respond to all outstanding discovery demands, pursuant to CPLR 3124. In opposition, plaintiff argues that she has provided responses to all discovery demands, making the herein motion moot.

Defendants served Post Deposition Demand for Discovery and Inspection, dated May 22, 2018, which included the following 14 demands:

- 1) Names and contact information for the 4 individuals at the restaurant on the night of the accident, including but not limited to May Shriver, Julia Aryed, Diane and Christopher Cole;
- 2) Name and contact information for man in the white jacket and jeans that assisted plaintiff after the fall;
- 3) All digital copies of the photographs taken by Christopher Cole after the accident, including the metadata;
- 4) True and accurate copies of all text messages between plaintiff and her friend Julia about her injury and Dr. Glashow;
- 5) An authorization for records from the doctor plaintiff was referred to by Lenox Hill emergency room;

- 6) Authorization for nursing agency that provided a nurse for plaintiff after the incident;
- 7) Authorization or name, address and contact information for housekeeper utilized after the incident;
- 8) Authorization for Dr. Fagon;
- 9) Authorization for doctor who provided a third opinion in May or June of 2017;
- 10) Authorization for "nerve doctor" on Park Avenue and 68th Street;
- 11) Authorizations for all prior and subsequent medical treatment for plaintiff's neck and back injuries;
- 12) True and accurate copies of all receipts and evidence of out of pocket expenses claimed as a result of this incident;
- 13) Contract [sic] information for Heidi Kons;
- 14) Name and contact information for any witnesses to plaintiff's physical condition after the accident.

Plaintiff's counsel responded to this demand on October 3, 2018. During the November 8, 2018 status conference, defendants' counsel raised specific objections to plaintiff's responses to demands numbered 4, 6, 11, 13 and 14. Those responses are re-stated below:

4. Plaintiff objects to this request as being overly broad and invasive of plaintiff's privacy to the extent that it calls for "all text messages between plaintiff and her friend Julia."
6. Plaintiff did not use a nursing agency to hire home care nurses.
11. Plaintiff objects to this demand as being overly broad and unduly vague. Notwithstanding said objection, plaintiff never treated for her neck or back prior to this accident and plaintiff's treatment for her neck and back are contained within the records for which authorizations have already been provided, including Dr. Chapman and Chiropractor Fagan.
13. Plaintiff does not have an address for Heidi Kons.
14. The witnesses with information relative to plaintiff's physical condition following the accident are her treating physicians, for whom authorizations have been provided, and her son, who's name and address is provided herein.ve been provided, and her son, who's name and address is provided herein.

See Response to Post Deposition Demand for Discovery & Inspection (Affirmation in Opposition, Exhibit A).

DISCUSSION

CPLR 3101 (a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist in sharpening the issue for trial" (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258). A disclosure

request is “palpably improper” if it is not relevant to the case at issue, is of a confidential and private nature, is overbroad, or is overly burdensome to produce (*Zimmer v Cathedral Sch. of St. Mary & St. Paul*, 204 AD2d 538, 539; *Spancrete Ne., Inc. v Elite Assocs., Inc.*, 148 AD2d 694, 696; *Muller v Sorensen*, 138 AD2d 683, 684). Further, “[w]here discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it” (*Berkowitz v 29 Woodmere Blvd. Owners', Inc.*, 135 AD3d 798, 799 [internal citations omitted]). Notices for discovery and inspection are overly broad where they fail to specify the documents sought with “reasonable particularity” (see CPLR 3120 [2]; *Degliuomini v Degliuomini*, 308 AD2d 501; *Finn v Town of Southampton*, 266 AD2d 429; *Fascaldi v Fascaldi*, 209 AD2d 578; *Fallon v CBS Inc.*, 124AD2d 697). The burden of serving a proper discovery demand rests with counsel, and it is not for the courts to correct a palpably bad one (see *Bell v Cobble Hill Health Center, Inc.*, 22 AD 3d 620). An attorney's affidavit made without personal knowledge lacks probative value (see, e.g., *PPG Industries Inc. v. A.G.P. Systems Inc.*, 235 A.D.2d 979).

Plaintiff argues that demand 4 is “overly broad... to the extent that it calls for all text messages between plaintiff and her friend Julia.” However, a proper read of the demand does not call for all text messages. The demand is limited to “all text messages between plaintiff and her friend Julia *about her injury and Dr. Glashow.*” Defendant has specified with some particularity the documents sought. Accordingly, plaintiff must provide a supplemental response to demand 4.

Demands 6 and 13 request information that could only be within the plaintiff's personal knowledge. The attorney's affirmation is insufficient. Accordingly, Ms. Cole, or someone with personal knowledge, must provide a supplemental response to demands 6 and 13.

Plaintiff argues that demand 11, seeking “authorizations for all prior and subsequent medical treatment for plaintiff's neck and back injuries” is overly broad and unduly vague. The objection continues to state that “plaintiff never treated for her neck or back prior to this accident and plaintiff's treatment for her neck and back are contained within the records for which authorizations have already been provided.” At best, this is

a contradictory response. Accordingly, plaintiff must provide a supplemental response to demand 11.

CONCLUSION AND ORDER

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent plaintiff must comply with all outstanding discovery orders, no later than March 25, 2019; and it is further

ORDERED that plaintiff must provide a supplemental response to demand number 4; and it is further

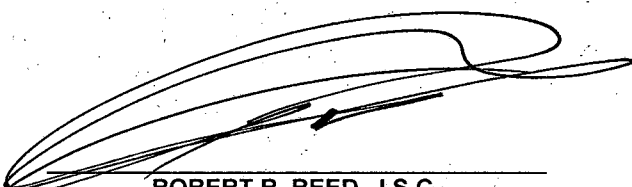
ORDERED that Ms. Sonia Cole, or someone with personal knowledge, must provide supplemental responses to defendants' May 22, 2018 Post Deposition Demand for Discovery and Inspection for demands numbered 6, 11 and 13, no later than March 25, 2019; and it is further

ORDERED that defendants' motion to dismiss the complaint is denied; and it is further

ORDERED that the parties appear for a status conference in Part 43, Room 412, at 60 Centre Street, New York, NY 10013, on April 18, 2019 at 11:00 a.m.

2/22/19

DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE