

Del Grosso v Jimmy Jazz Staten Is., LLC
2019 NY Slip Op 33401(U)
November 18, 2019
Supreme Court, New York County
Docket Number: 152912/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH

PART IAS MOTION 32

Justice

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INDEX NO. 152912/2016

VINCENT DEL GROSSO,

Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 003

- v -

JIMMY JAZZ STATEN ISLAND, LLC, GENERAL GROWTH
PROPERTIES, INC., GENERAL GROWTH SERVICES,
INC.,

DECISION + ORDER ON
MOTION

Defendant.

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GGP STATEN ISLAND MALL, LLC isha GENERAL GROWTH
PROPERTIES, INC. and GENERAL GROWTH SERVICES,
INC.,

Third-Party
Index No. 595978/2017

Plaintiffs,

-against-

ALL-RITE CONSTRUCTION COMPANY, INC., K&R
ELECTRIC COMPANY, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80,
81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 110, 111, 112, 113, 114, 115

were read on this motion to/for DISCOVERY

The motion by third-party defendant K&R Electric Company, Inc. ("K&R") to compel is granted. The cross-motion by plaintiff for a protective order precluding defendants from seeking discovery related to potential substance abuse, authorizations permitting the release of certain information and from seeking authorizations for purportedly unrelated medical treatment is denied.

Background

This Labor Law action relates to the construction of a Jimmy Jazz store located on Staten Island. Defendant GGP Staten Island Mall, LLC (“GGP”) owns the property and defendant Jimmy Jazz Staten Island, LLC (“Jimmy Jazz”) was the tenant where the construction work was being performed. Third-party defendant All-Rite Construction Company, Inc. (“All-Rite”) was the general contractor for the project and plaintiff worked for K&R, which was hired to do electrical work on the site.

Plaintiff claims that he was injured when he moved a 12-foot ladder and an object resting on top of the ladder fell and hit him in the head. Plaintiff contends he has suffered a traumatic brain injury and has issues with cognitive function stemming from the accident.

K&R seeks certain discovery from defendant Jimmy Jazz and from plaintiff, including authorizations relating to potential substance abuse treatment and mental health issues. Plaintiff cross-moves for a protective order regarding K&R’s request for authorizations relating to plaintiff’s mental health records. Plaintiff contends that K&R is not entitled to receive any records concerning plaintiff’s drug or alcohol status without a compelling need. Plaintiff argues that he need not check box 9(a) on the authorizations and that K&R’s requests are merely a fishing expedition. Plaintiff complains that K&R did not provide an affidavit from a medical professional demonstrating the need for its requested authorizations.

In opposition to the cross-motion, K&R explains that it is not seeking information related to a potential HIV status but is seeking information about plaintiff’s purported substance abuse. K&R emphasizes that plaintiff contends he is suffering from a brain injury that has hindered his cognitive abilities. K&R insists that it is entitled to know about plaintiff’s cognitive abilities before the accident and that includes any mental health issues.

Discussion

As an initial matter, the branch of K&R's motion against Jimmy Jazz is granted as Jimmy Jazz did not submit opposition.

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, regardless of the burden of proof." "The words material and necessary, are . . . 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" (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968] [internal quotations omitted]).

"Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition" (*Forman v Henkin*, 134 AD3d 529, 530, 22 NYS3d 178 [1st Dept 2015] [internal quotations and citation omitted]). Additionally, "discovery determinations rest within the sound discretion of the trial court" (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 745, 731 NE2d 589 [2000] [citations omitted]).

Plaintiff primarily relies upon *Nesbitt v Advanced Serv. Solutions* (173 AD2d 1056, 100 NYS3d 877 [2d Dept 2019]) for the proposition that K&R cannot obtain the requested information without an affidavit from an expert. However, plaintiff's reading of *Nesbitt* is simply too broad and the Second Department noted that the defendants had "failed to make any effort to link any such information to plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life" (*id.* at 1057). The Court declines to read *Nesbitt* to require a defendant to submit an expert's affidavit every time sensitive information is sought from an allegedly-injured plaintiff.

Here, there is a clear link between the information sought by K&R concerning mental health/substance abuse records and the injuries that plaintiff claims he continues to suffer. Put another way, K&R is entitled to know what plaintiff's mental health condition and cognitive abilities were before the accident so that they can be compared with his current status. Obviously, K&R cannot be held liable for plaintiff's cognitive issues to the extent that they arise from conditions originating from before the accident.

While the Court recognizes that the information sought by K&R is personal and sensitive, the fact is that plaintiff brought a lawsuit alleging that he suffers permanent cognitive restrictions. Based on that allegation, the Court cannot conclude that K&R's request is a fishing expedition. Instead, it appears to be a highly relevant request for information that can shed light on the extent of plaintiff's purported damages. It would be wholly unfair for a plaintiff to claim that he suffered a serious brain injury and not allow K&R to assess what his cognitive function was prior to the accident. Whether plaintiff experienced substance abuse challenges or mental health issues and whether he took medication to address those conditions is pertinent to his claims in this case. This information is material and necessary for K&R's defense of this action.

Accordingly, it is hereby

ORDERED that the motion by K&R Electric Company, Inc. is granted in all respects; and the cross-motion by plaintiff is denied in its entirety; and it is further

ORDERED that plaintiff must submit the requested authorizations on or before December 19, 2019.

Next Conference: February 25, 2020 at @2:15 p.m.

11/18/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE