

Lambert v Westhab, Inc.
2019 NY Slip Op 34236(U)
January 28, 2019
Supreme Court, Westchester County
Docket Number: 56441/2017
Judge: Joan B. Lefkowitz
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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
VIVIANNE LAMBERT as Parent and Natural
Guardian of F.F., an Infant,

Plaintiff,

DECISION & ORDER

-against-

Index No.:56441/2017
Motion Date: Jan. 28, 2019
Motion Seq. No. 2

WESTHAB, INC., ANTHONY BOYD, and 40 EAST
4TH STREET, LLC,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by defendant Westhab, Inc. (“Westhab”) for an order pursuant to CPLR 3124, CPLR 3113 (B), CPLR 3104 and 22 NYCRR §130-1.1 compelling plaintiff to appear and give testimony at a further deposition in regard to matters on which she was previously deposed, but directed by counsel not to answer, concerning any family history of autism and other related injuries claimed by her minor son allegedly due to lead poisoning, and for such other and further relief as this Court may deem just and proper.

Order to Show Cause - Affirmation in Support - Exhibits A-H
Affirmation in Opposition by Plaintiff- Exhibits 1-2¹

Upon the foregoing papers and the proceedings held on January 28, 2019, this motion is decided as follows:

Plaintiff commenced this action on behalf of her infant son, F.F., by the filing of a summons and verified complaint on April 28, 2017. In this action plaintiff alleges various injuries were sustained by F.F. allegedly as a result of F.F.’s ingestion of lead based paint in the premises where F.F. resided which were owned and/ or operated by defendants. Issue was joined by the service of Westhab’s answer dated July 17, 2017 and by defendant Anthony Boyd (“Boyd”) pursuant to an answer filed on July 25, 2018.²

¹ Insofar as the Order to Show Cause specifically prohibited the filing of reply papers Westhab’s Reply Affirmation was not considered in the determination of this motion.

² Pursuant to a so-ordered stipulation entered on December 24, 2018, plaintiff filed a supplemental summons and amended verified complaint naming 40 East 4th Street LLC as an additional

In plaintiff's response to Westhab's demand for a bill of particulars, plaintiff alleged that F.F. has suffered the following injuries:

Plumbism, lead poisoning and its sequelae; anemia; elevated blood lead levels; increased lead burden in blood and infant's body, causing developmental delays and brain damage; cognitive deficits and learning difficulties; loss of IQ.; behavioral irregularities; anti-social behavior patterns; developmental delays resulting in inability to fully interact and play with others; Difficulties in concentration, unfocused and shortened attention span, attention deficits; necessity for extensive medical monitoring; learning difficulties and impairment in ability to carry out responsibilities; inability to participate in usual childhood activities; language deficits and delay; necessity for multiple and painful blood tests; physical and mental pain, suffering, and anguish; embarrassment and humiliation; increased lead in bony formations; elevated bone lead level; sleep disorders; visual disturbances; hyperactivity; lack of concentration; memory loss; infant plaintiff has also suffered subclinical joint and connective tissue disease, disease of the immune system, kidney disease, hypertension and visual and auditory system processing deficits.

At plaintiff's deposition her counsel instructed her not to answer questions concerning, inter alia, whether there was any family history of autism.³ Westhab brings this motion seeking to compel a further deposition of plaintiff and to compel her to answer questions concerning the existence of family history of autism and related injuries.

Westhab argues that many of the injuries which F.F. has alleged are consistent with a diagnosis of autism and that F.F.'s symptoms are the result of autism and not elevated blood levels of lead. Westhab contends that autism has a strong genetic component which necessitates discovery of a family history of autism. In support of its motion Westhab has included three articles from various scientific journals establishing what Westhab contends is the hereditary nature of autism. Westhab also includes reports of medical and educational evaluations of F.F.⁴ Westhab relies on the case of *Adams v Rizzo*, 13

defendant. It is unclear if this defendant has been served. No appearance has been filed to NYSCEF on behalf of this defendant.

³ Plaintiff's counsel instructed plaintiff not to answer questions concerning a family history of learning disabilities, speech deficits, autism, psychiatric problems, ADD, ADHD, PPD, and depression.

⁴ These documents were provided to the court in camera and include an evaluation by a pediatric neurologist, and a Committee on Preschool Special Education ("CPSE") evaluation and a Psychological

Misc.3d 1235(A) [Sup Ct, Onadaga County 2006]). In *Adams* the plaintiff, the infant plaintiff's mother, Susan Adams ("Adams"), sought damages for a variety of neurological, cognitive function, developmental and psychological injuries allegedly suffered as a result of lead paint. At Adams's deposition her counsel refused to let her answer questions concerning her own educational background and learning disabilities. The Adams court found that defendants had established that these areas were material and relevant to plaintiff's claims, that no privilege exists which would prohibit disclosure of the mother's education information.

In opposition plaintiff argues that plaintiff, who is suing only in her representative capacity on behalf of F.F. is a nonparty and that defendants are not entitled to her medical information which is privileged and has not been placed into controversy. Plaintiff argues that she has not waived her rights in this regard beyond the time of her prenatal care, pregnancy with F.F. and his birth. Plaintiff also argues that in contrast to *Adams*, Westhab has failed to establish the relevance of the information sought by an affidavit of a medical expert. Plaintiff argues that Westhab is not a medical or genetic expert and has failed to properly authenticate the articles submitted in support of the motion. Plaintiff further argues that with respect to the non-medical information Westhab has failed to demonstrate how the information concerning plaintiff mother's education and special education records are material or necessary to the instant action. Plaintiff argues that the fact that F.F. was diagnosed with autism, or any other disabilities, prior to his lead poisoning diagnosis does not entitle Westhab to discovery of the medical or educational history of F.F.'s nonparty family members.

"CPLR 3101(a) is to be liberally construed '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 Publ. Co.*, 21 NY2d 403, 406 [1968]). However, "unlimited disclosure is not required and supervision of disclosure is generally left to the trial court's broad discretion" (*Palermo Mason Constr. v Aark Holding Corp.* 300 AD2d 460, 461 [2d Dept 2002]) (internal citations omitted). The essential test is one based on "usefulness and reason" (*Andon v 302-304 Mott St. Assoc.*, 94 NY 2d 740, 746 [2000]) (internal citations omitted). In *Andon* the plaintiff mother sought damages resulting from alleged lead paint injuries to her infant son. The *Andon* court held that the plaintiff mother could not be compelled to submit to an IQ examination in order to determine whether the infant son's learning disabilities and developmental delays were genetic despite defendant's submission of a medical expert which opined that maternal IQ would be extremely relevant in assessing a child's potential cognitive development. In its determination the *Andon* court emphasized that in these cases "discovery determinations are discretionary; each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (*Andon v 302-304 Mott St. Assoc.*, 94 NY 2d at 747).

In the aftermath of *Andon* the First Department decided *Mendez v. Equities by Marcy*, (24 AD3d 138 [1st Dept 2005]). In *Mendez* the First Department upheld the decision of the trial court which refused to compel the mother to answer questions at her deposition concerning her personal medical history and that of other family members. In so holding, the Appellate Division emphasized that the defendants had failed to offer any "expert evidence establishing a particularized need for

Assessment, both performed by the Westchester County Department of Health.

inquiry into such matters not placed at issue by the complaint” (*Mendez v. Equities by Marcy*, 24 AD3d at 138).

Here, plaintiff is suing only in her representative capacity. She has not placed her medical condition in controversy and has not waived her privilege with respect to her medical history. Accordingly, Westhab is not entitled to question plaintiff about her medical history (*Yetman v St. Charles Hosp.*, 112 AD2d 297 [2d Dept 1985]). Moreover, insofar as it is uncontroverted that F.F. has been diagnosed with autism Westhab has failed to establish the relevancy of the hereditary nature of autism. Nor has Westhab established the relevancy, by affidavit of an expert or otherwise, concerning plaintiff’s history of learning disabilities, speech deficits, psychiatric problems, ADD, ADHD, PPD, and depression (*Andon v 302-304 Mott St. Assoc.*, 94 NY 2d 740 [2000]; *Mendez v. Equities by Marcy*, 24 AD3d 138 [1st Dept 2005]; see 66 Am Jur 2d Trials §47 [Note: online version]). *Adams* is not controlling authority nor is this court bound by that decision. Additionally, *Adams* is distinguishable from this case. The determination by the *Adams* court relied upon the submission of “competent expert opinion, supported by authoritative treatises and studies ... which demonstrate a sufficient scientific basis for the defendants to pursue the areas of deposition questioning at issue” (*Adams v Rizzo*, 13 Misc 3d 1235(A) [Sup Ct 2006]). Moreover, the *Adams* decision specifically qualifies that the court’s determination was specific to the circumstances “*in this case*” (*id.*)(emphasis in original).

By reason of the foregoing, it is

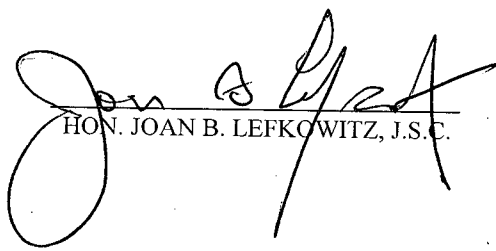
ORDERED that Westhab’s motion is denied in its entirety; and it is further

ORDERED that counsel are directed to appear in the Compliance Part, Courtroom 800, for a conference on February 19, 2019 at 9:30 A.M.; and it is further

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

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 28 2019


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

NYSCEF DOC. NO. 57

RECEIVED NYSCEF: 01/29/2019

To all counsel via NYSCEF

To:

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CC: Compliance Part Clerk