| **Goldson v BOP MW Residential Mkt. LLC** |
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| 2020 NY Slip Op 32011(U) |
| June 15, 2020 |
| Supreme Court, Bronx County |
| Docket Number: 22410/2016E |
| Judge: Lucindo Suarez |
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FILED: BRONX COUNTY CLERK 06/19/2018 02:37 PM INDEX NO. 22410/2016E
NYSCEF DOC. NO. 46 RECEIVED NYSCEF: 06/19/2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART LPM

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RICARDO GOLDSON,

Plaintiff,

- against -

BOP MW RESIDENTIAL MARKET LLC and HUNTER ROBERTS CONSTRUCTION GROUP, LLC,

Defendants.

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DECISION AND ORDER

Index No. 22410/2016E

PRESENT: Hon. Lucindo Suarez

Upon defendants' notice of motion dated May 11, 2018 and the affirmation and exhibits submitted in support thereof; there being no opposition to the application; and due deliberation; the court finds:

Defendants move to strike plaintiff's complaint for failure to provide discovery required by the February 21, 2017 preliminary conference order and May 23, 2017 compliance conference order and discovery requested in defendants' February 26, 2018 and March 30, 2018 demands. The outstanding discovery consists of authorizations for employment, union and medical records, without which movants claim not to be able to prepare to take plaintiff's deposition. Movants have sought and received leave of the court to make this motion, which is accompanied by an appropriate affirmation of good faith.

Generally, "there shall be full disclosure [by a party] of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." CPLR 3101(a)(1). One method of obtaining disclosure is by discovery and inspection, *see* CPLR 3102(a), on notice, *see* CPLR 3102(b), by service by a party upon any other party of a notice seeking same, *see* CPLR 3120(1)(i). If the recipient of such a notice objects to any part of it, the recipient shall do so in a timely writing. *See* CPLR 3122(a)(1). Should the recipient object or not respond, the

party seeking disclosure may move pursuant to CPLR 3124. *See id.* In addition, if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." CPLR 3126. The court may also, on its own or upon motion, issue a "protective order denying, limiting, conditioning or regulating the use of any disclosure device [which] shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR 3103(a).

"The drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith." *Christian v. City of New York*, 269 A.D.2d 135, 137, 703 N.Y.S.2d 5, 7 (1st Dep't 2000). The sanction imposed should be commensurate with and proportionate to the nature and extent of the disobedience. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 N.Y.3d 877, 999 N.E.2d 156, 976 N.Y.S.2d 678 (2013); *Christian*, *supra*. To avoid the imposition of a sanction, the non-disclosing party must set forth a reasonable excuse for the failure to disclose. *See Sage Realty Corp. v. Proskauer Rose LLP*, 275 A.D.2d 11, 713 N.Y.S.2d 155 (1st Dep't 2000). Preclusion may be ordered even where the non-disclosure is neither willful nor contumacious. *See Vandashield Ltd v. Isaacson*, 146 A.D.3d 552, 46 N.Y.S.3d 18 (1st Dep't 2017).

On a motion to compel the production of discovery pursuant to CPLR 3124, the movant bears the burden of establishing a basis for the production of the discovery sought. *See Troshin v. Stella Orton Home Care Agency, Inc.*, 2018 NY Slip Op 30922(U) (Sup Ct N.Y. County May 11, 2018). Movant must "demonstrate that the ... 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." *Brito-Amezquita v. 928 Columbus Holdings LLC*, 2017 NY Slip Op 32514(U), at *4 (Sup Ct N.Y. County Nov. 24, 2017). The opposing party bears the burden of establishing the materials are immune or exempt from discovery. *See Ambac Assurance Corp. v. DLJ Mortg. Capital, Inc.*, 92 A.D.3d 451, 939 N.Y.S.2d 333 (1st Dep't 2012). If the resisting party previously asserted a privilege or immunity from disclosure, movant must establish on its motion to compel such production that the privilege or immunity does not apply. *See id.* Even if the resisting party failed to timely assert an objection to the material sought, if the court finds that the demands were palpably improper or sought privileged material, response will not be compelled. *See Lea v. N.Y.C. Transit Auth.*, 57 A.D.3d 269, 867 N.Y.S.2d 918 (1st Dep't 2008). As to demands which are not palpably improper and which do not seek privileged information, if the party resisting disclosure failed to seek a protective order or otherwise timely object to production of the discovery sought, it will not be heard to object to the demand. *See Fiore v. Bay Ridge Sanitarium, Inc.*, 48 Misc. 2d 318, 264 N.Y.S.2d 421 (Sup Ct Kings County 1965).

Where a plaintiff claims injury resulting from an accident, he waives the physician-patient privilege to the extent of the conditions affirmatively placed in controversy, *see Gumbs v. Flushing Town Ctr. III, L.P.*, 114 A.D.3d 573, 981 N.Y.S.2d 394 (1st Dep't 2014), rendering material and necessary medical records and the authorizations therefor. Plaintiff has neither moved to reargue or otherwise amend the conference orders nor objected to defendants' discovery demands, all of which seek discovery relevant to plaintiff's damages claim. Plaintiff has not opposed this motion.

Accordingly, it is

ORDERED, that defendants' motion to strike plaintiff's complaint, preclude plaintiff from offering evidence at trial or compelling plaintiff's production of discovery is granted to the

extent that within thirty (30) days after the date of this order, plaintiff shall provide defendants with authorizations for plaintiff's employment and W-2 records from 2010 to present, Local 79 records, and the records of Aetna (worker's compensation carrier), pharmacy records, ADEE Pharmacy, Walgreen Pharmacy, CVS Pharmacy, Distinguished Diagnostic Imaging, P.C., Precision Imaging of New York, St. Joseph Hospital, Throgs Neck Physical Therapy, Metroplus (Medicaid) health insurance, ThermoCare Plus, BioReference Laboratories, Multi-Specialty Pain Management, Dr. Mitchel Zeren, Concourse Chiropractic, Dr. Louis C. Rose, Saint Joseph Medical Center and all treating physicians, hospitals, osteopaths, chiropractors and other licensed medical professionals who treated plaintiff regarding his 1995 motor-vehicle accident, and that plaintiff shall appear for deposition on a date and time mutually agreeable to the parties, no later than ninety days after service of a copy of this order with written notice of its entry.

This constitutes the decision and order of the court.

Dated: June 15, 2018

Lucindo Suarez, J.S.C.