

Einbinder v Restoration Hardware, Inc.

2020 NY Slip Op 32843(U)

August 25, 2020

Supreme Court, New York County

Docket Number: 155819/2016

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

SUSAN J. EINBINDER and JEFFREY S.
EINBINDER,

Index No. 155819/2016

Plaintiffs

- against -

RESTORATION HARDWARE, INC., TANGER
PROPERTIES LIMITED PARTNERSHIP, TANGER
FACTORY OUTLET CENTERS, INC., and HOGAN
RIVERHEAD, LLC,

Defendants

TANGER PROPERTIES LIMITED PARTNERSHIP,
TANGER FACTORY OUTLET CENTERS, INC., and
HOGAN RIVERHEAD, LLC,

Third Party Plaintiffs

- against -

TITAN GLOBAL, LLC, and LOYAL BUSINESS
SERVICES, INC.,

Third Party Defendants

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. PRIOR PROCEEDINGS

On October 10, 2019, the parties stipulated and the court ordered that third party defendant Titan Global, LLC, was to serve any subpoena for the deposition of nonparty Scott Marwin M.D., plaintiff Susan Einbinder's treating physician, by December 20, 2019, and that the note of issue was to be filed by January

3, 2020. On December 19, 2020, the parties stipulated and the court ordered that the parties conduct any deposition of Dr. Marwin by February 19, 2020, and that plaintiffs reserved their rights to move to quash the subpoena for his deposition or for a protective order against the deposition. As Dr. Marwin's deposition was the only outstanding disclosure and did not bear on liability, the parties stipulated and the court ordered further that the note of issue would be filed forthwith.

On December 19, 2019, Titan Global served Dr. Marwin with a subpoena for his deposition to be conducted January 20, 2020. On December 20, 2019, plaintiffs filed a note of issue. On December 27, 2019, Dr. Marwin's employer, NYU Langone Orthopedic Associates, informed Titan Global that Dr. Marwin would not comply with the subpoena and requested an authorization for disclosure of health information from his patient, Susan Einbinder. Titan Global does not demonstrate whether it served an authorization with the subpoena, but plaintiffs previously provided Titan Global every authorization it requested, including an authorization for Dr. Marwin to discuss Susan Einbinder's health information with Titan Global's attorneys. *Aff. in Opp'n of Lisa Arden Exs. B-C. See Arons v. Jutkowitz*, 9 N.Y.3d 393, 415-16 (2007); *Caminiti v. Extell W. 57th St. LLC*, 139 A.D.3d 482, 483-84 (1st Dep't 2016).

Rather than provide NYU Langone Orthopedic Associates the authorization from plaintiffs if Titan Global had not already done so or, if it had done so, moving to compel Dr. Marwin's

deposition pursuant to the subpoena, on January 8, 2020, Titan Global requested a further authorization from plaintiffs: "a HIPAA compliant authorization with section 9(b) initialed to allow testimony." Attorney Aff. of Wayne L. Gladstone Ex. I. The authorization NYU Langone Orthopedics Associates enclosed with its correspondence declining to comply with the subpoena absent its requested authorization, however, does not include a "section 9(b)." See id. Ex. H, at 4-5. Since plaintiffs had provided all authorizations requested before the note of issue, all disclosure except Dr. Marwin's deposition was completed, and plaintiffs had reserved their rights, to which Titan Global stipulated, to move to quash the subpoena for his deposition or for a protective order against the deposition, plaintiffs declined to provide any further authorization. Titan Global now moves to compel plaintiffs to provide a further authorization and to extend Titan Global's time to depose Dr. Marwin. C.P.L.R. §§ 2004, 3124.

II. THE RELIEF NOW SOUGHT

Titan Global does not explain why the authorization that Titan Global requested and that plaintiffs provided August 14, 2019, permitting Dr. Marwin to discuss with its attorneys his testing and treatment of Susan Einbinder's left hip and foot was inadequate. Arden Aff. in Opp'n Ex. C. That authorization allows Dr. Marwin to disclose all the information that "a HIPAA compliant authorization with section 9(b) initialed," Gladstone Attorney Aff. Ex. I, allows: "to discuss my [the patient's]

health information" with Titan Global's attorney. Arden Aff. in Opp'n Ex. D. If anything, the HIPAA compliant authorization with section 9(b) initialed is more restrictive, as it contemplates that the discussion of health information will be "with my [the patient's] attorney or a governmental agency," not the attorney for the patient's adversary in litigation. Id.

Nor does Titan Global explain why, if plaintiffs' authorization was somehow inadequate, Titan Global, knowing that it sought Dr. Marwin's deposition months before the note of issue was filed, did not request a further authorization from plaintiffs before the note of issue was filed. Therefore Titan Global fails to show any "unusual or unanticipated circumstances" after the note of issue was filed requiring plaintiffs to provide a further authorization. 22 N.Y.C.R.R. § 202.21(d); Arons v. Jutkowitz, 9 N.Y.3d at 411; Palmiero v. 417 E. 9th St. Assoc., LLC, 167 A.D.3d 472, 472 (1st Dep't 2018); Prevost v. One City Block LLC, 155 A.D.3d 531, 537 (1st Dep't 2017); Allen v. Hiraldo, 144 A.D.3d 434, 435 (1st Dep't 2016).

If NYU Langone Orthopedic Associates' noncompliance with the subpoena to Dr. Marwin was unanticipated, Titan Global's remedy was to move to enforce the subpoena so as to complete the deposition before the deadline February 19, 2020. Titan Global certainly had ample time to do so between December 27, 2019, when notified of the intended noncompliance, and February 19, 2020. If Titan Global did forward the authorization plaintiffs had provided to Dr. Marwin, neither Titan Global nor NYU Langone

Orthopedics Associates has justified the latter's noncompliance with the subpoena. A motion to enforce the subpoena also would have given plaintiffs the opportunity to cross-move, as was their right, to quash the subpoena or for a protective order. As long as Titan Global chose not to enforce the subpoena, however, plaintiffs had no reason to move to quash it or for a protective order. At this point, Titan Global has waived Dr. Marwin's deposition that was to have been conducted by February 19, 2020. Alvarez v. Feola, 140 A.D.3d 596, 597 (1st Dep't 2016); Perez De Sanchez v. Trevz Trucking, 124 A.D.3d 527, 528 (1st Dep't 2015); Stolowski v. 234 E. 178th St. LLC, 104 A.D.3d 569, 570 (1st Dep't 2013); Sereda v. Sounds of Cuba, Inc., 95 A.D.3d 651, 652 (1st Dep't 2012).

To succeed with a motion to compel Dr. Marwin's deposition, moreover, Titan Global would be required to show that it seeks testimony unrelated to Susan Einbinder's diagnosis and treatment and that the only means to discover the information sought is through Dr. Marwin's deposition. Matter of 91 St. Crane Collapse Litig., 159 A.D.3d 511, 512 (1st Dep't 2018); Tuzzolino v. Consolidated Edison Co. of N.Y., 135 A.D.3d 447, 448 (1st Dep't 2016); Carson v. Hutch Metro Ctr., LLC, 110 A.D.3d 468, 469 (1st Dep't 2013). Titan Global fails to show that it meets these requirements as well. It does not dispute that plaintiffs provided an authorization allowing Titan Global's attorneys to obtain Dr. Marwin's medical records regarding his testing and treatment of Susan Einbinder's injuries and to discuss those

subjects with Dr. Marwin. Besides Titan Global's attorneys discussing those subjects with him, Titan Global's own experts may analyze the records and any discussion with Dr. Marwin.

Tuzzolino v. Consolidated Edison Co. of N.Y., 135 A.D.3d at 448.

Finally, Titan Global also had time between December 27, 2019, and January 9, 2020, 20 days after the note of issue was filed, to move to vacate the note of issue if disclosure remained outstanding. 22 N.Y.C.R.R. § 202.21(e). Now Titan Global's remaining remedy is to use the authorization plaintiff provided to interview Dr. Marwin.

III. CONCLUSION

For all these reasons, Titan Global fails to demonstrate unusual or unanticipated circumstances warranting further disclosure after the note of issue, or any excuse for failing to enforce the subpoena to Dr. Marwin, or any grounds to extend Titan Global's time to do so. C.P.L.R. § 2004; Anderson & Anderson LLP-Guangzhou v. North Am. Foreign Trading Corp., 165 A.D.3d 511, 512 (1st Dep't 2018); Alissa E. v. Michael M., 154 A.D.3d 526, 527 (1st Dep't 2017); BBCN Bank v. 12th Ave. Rest. Group, Inc., 144 A.D.3d 494, 495 (1st Dep't 2016); Carmody v. 208-210 E. 31st Realty, LLC, 135 A.D.3d 491, 491 (1st Dep't 2016). Therefore the court denies the motion by third party defendant Titan Global, LLC, to compel plaintiffs to provide a further authorization for health information and to extend the

time to depose Scott Marvin M.D. C.P.L.R. §§ 2004, 3124; 22
N.Y.C.R.R. § 202.21(d).

DATED: August 25, 2020

Lucy Billings

LUCY BILLINGS, J.S.C.

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