Desimone v Canecchia
2020 NY Slip Op 33531(U)
September 28, 2020
Supreme Court, Richmond County
Docket Number: 150407/2019
Judge: Thomas P. Aliotta

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART TR-2

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ANNA DESIMONE and JOSEPH DESIMONE

Plaintiffs,

-against -

JAMES V. CANECCHIA, ROBERT SIMONESON, NEW YORK CIT TRANSIT AUTHORITY, ACCESS-A-RIDE, STARCRUISER TRANS-PORTATION, INC., and EDMOND ROLLERSON,

Defendants.

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Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Motion Seq. No. 005

Index No: 150407/2019

Action #1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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DENISE CASSANO,

Plaintiff,

-against-

JAMES VINCENT CANECCHIA, ROBERT SIMONSON, EDMOND A. ROLLERSON, STARCRUISER TRANSPORTATIONS, INC., NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSIT AUTHORITY,

Defendants.

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Index No: 150472/2019

Action #2

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "4" were fully submitted on the day of 5th day of August 2020.

	Papers Numbered
Plaintiffs' Notice of Motion to Vacate Prior Order (Affidavit in Support with Supporting Exhibits) (Dated: May 4, 2020)	1, 2

Upon the foregoing papers, plaintiffs' motion to vacate "Part VI" of this Court's November 20, 2019 Compliance Conference Order requiring plaintiffs "to serve authorizations for *Anna DeSimone v. Royal 6M Richmond Supreme 11745/2004*, including non-privileged portion of legal file for plaintiff attorney Chelli & Bush and defendant attorney Cheven, Keely, along with authorizations for related medical records therein within 30 days" is granted.

This matter arises out of a three-vehicle accident occurring on October 4, 2018, on Richmond Avenue in Staten Island. At the time of the accident, the elderly plaintiffs (both over the age of 90) were rear seat passengers in an Access-A-Ride vehicle that was transporting them to ophthalmology appointments.

Consistent with this Court's instruction in a January 9, 2020 So-Ordered Stipulation, plaintiffs now move to vacate "Part VI" of the November 20, 2019 Compliance Conference Order (*see* NYSCEF Doc. Nos. 59 and 55 respectively). In support, plaintiffs maintain that the material sought by defendant Canecchia relative to plaintiffs' legal file from a 15-year old accident is "vague, unduly broad, irrelevant, and...protected by attorney-client and work product privilege" (*see* May 4, 2020 Affirmation in Support, para 8), and was opportunely inserted in the handwritten Compliance Conference Order by defense counsel, whose adversary at the conference was per diem counsel. Defendant opposes the motion arguing, *inter alia*, that

plaintiffs were not "blindsided" by Part VI of the Compliance Conference Order, since the order was "submitted on consent" of both parties (*see* May 4, 2020 Affirmation in Opposition, para. 5). It is undisputed that defendant did not demand the subject discovery through conventional methods (*i.e.*, service of a notice for disclosure to obtain plaintiffs' legal file from the purported 2004 accident).

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 phrase "material and necessary" should be interpreted liberally, and the test is one of "usefulness and reason" (*Accent Collections, Inc. v. Capelli Enters., Inc.*, 84 AD3d 1283 [2d Dept. 2011] [*citing Kooper v. Kooper,* 74 AD3d 6, 10 [2d Dept. 2010]). The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and **reducing delay** and prolixity" (*Allen v. Cromwell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; emphasis supplied]). However, "a party is not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Mercy Med. Ctr.,* 83 AD3d 998, 998 [2d Dept 2011]), nor is a party required to respond to discovery demands that are "palpably improper." A demand is palpably improper if it seeks information which is irrelevant or confidential, is overbroad and unduly burdensome (*Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531 [2d Dept. 2007]), or fails to specify with reasonable particularity many of the documents demanded (*see Kiernan v. Booth Mem. Med. Ctr.,* 175 AD3d 1396 [2d Dept. 2019]; *Kayantas v. Restaurant Depot, LLC*, 173 AD3d 718 [2d Dept. 2019]). While the work of an attorney in preparation for trial of an action may be immune from discovery, discovery of some items may be proper upon a

showing that relevant and non-privileged facts are essential to the preparation of a proponent's case (*see Markel v. Pure Power Boot Camp., Inc.*, 171 AD3d 28 [1st Dept. 2019]).

A "So-Ordered Stipulation," is substantively different from a *sua sponte* or pre-calendar/compliance conference order of the Court (see *Tangalin v. MTA Long Island Bus,* 91 A.D.3d 766 [2d Dept, 2012] and *Pagan v. Penthouse Manufacturing Co., Inc.,* 121 A.D.2d 374 [2d. Dept., 1986]). Unlike a stipulation which is a binding contract entered into after the proverbial "meeting of the minds", a pre-calendar order does not require or contemplate the consent or agreement of the parties. Since such an order is not appealable as of right as it does not decide or resolve a motion made on notice, the procedural remedy is a motion seeking vacatur (*Tanglin v. MTA Long Island Bus,* 92 AD2d 766).

Here, there is no indication that relevant and non-privileged facts from plaintiffs' 2004 legal file are essential to the defense of this case. Plaintiffs' liability for the accident is not an issue, as they were passengers in a vehicle for hire when the accident occurred. As for damages, plaintiffs produced relevant authorizations and testified at length as to their prior injuries and/or surgeries. The inclusion of Part VI in the November 20, 2019 Compliance Conference Order is effectively the same as this Court granting defendant's motion to compel plaintiffs' compliance with discovery that has not been demanded, which would be improper (*see Canales v. State of N.Y.*, 51 Misc.3d 648 [Ct Cl 2015]). Consistent with the instruction that "where the discovery demands are overbroad, the appropriate remedy is to vacate the entire demand rather than to prune it" (*Pascual v. Rustic Woods Homeonwers Assn., Inc.*, 173 AD3d 757, 758 [2d Dept. 2019]), this Court vacates and severs Part IV from the November 20, 2019 Compliance Conference Order.

The Court also vacates and severs Part IV from the Order as defense counsel's reliance upon plaintiff's alleged acquiescence to furnish information in compliance with Part VI of the Order is misplaced and without merit. The November 20, 2019 Compliance Conference Order--as opposed to the January 9, 2020 So-Ordered Stipulation--was not submitted upon the consent of the parties (*Tangalin v. MTA Long Island Bus,* and *Pagan v. Penthouse Manufacturing Co., Inc., supra*). The Order is not signed by the parties indicating their consent to be bound by its terms (*Tanglin v. MTA Long Island Bus,* 92 AD2d 766).

Finally, it is noted that plaintiffs' depositions were concluded on December 6, 2019, during which time no questions were posed regarding a 2004 accident, injuries, or legal proceeding.

Accordingly, it is

ORDERED that plaintiffs' motion to vacate the Compliance Conference Order dated November 20, 2019 is granted in its entirety and Parts IV and VI of said Order are hereby vacated and severed.

This constitutes the decision and order of the Court.

Dated: September 26 , 2020

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.