Taylor v Enterprise FM Trust
2021 NY Slip Op 32616(U)
December 8, 2021
Supreme Court, New York County
Docket Number: Index No. 156990/2016
Judge: Lisa Headley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY **PART** 22

Justice

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DEQUAN TAYLOR,

Plaintiff,

- v -

ENTERPRISE FM TRUST, TRUE WORLD FOODS NEW YORK LLC,DOUGLAS NUNEZ-LUZON

Defendant.

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INDEX NO. 156990/2016

MOTION DATE 08/31/2021

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

Plaintiff, Dequan Taylor, brought this underlying action to recover damages sustained as a result of a motor vehicle accident. Defendants, True World Foods New York LLC (True World) and Douglas Nunez-Luzon (Nunez-Luzon) (collectively, defendants), move pursuant to *22 NYCRR §202.21(d)*, for an order vacating the Note of Issue and certificate of trial readiness filed on February 24, 2020, and striking the action from the trial calendar. Defendants further move, pursuant to *CPLR §§ 3121(a), 3124 and 3106(b)*, for an order compelling plaintiff to provide HIPAA-compliant authorizations allowing defendants to obtain and utilize medical records and other evidence for trial, or, in the alternative precluding plaintiff from offering testimony and/or evidence of these damages at the time of trial. Defendants also move, pursuant to *CPLR §§3124 and 3126*, to compel plaintiff to appear for a further deposition with respect to the claims of bodily injury to the same body parts claimed herein, that were discovered in an updated ISO Claim Search.

Plaintiff cross-moves for an order, pursuant to *CPLR §3130(c)*, suppressing documents received in response to a subpoena dated June 22, 2020, and all other subpoenas served in violation of the CPLR, and seeks to compel defendants to comply with *CPLR §3120,* and any other applicable CPLR provision for any and all subpoenas issued. For the reasons set forth below, defendants' motion and plaintiff's cross motion are both denied.

I. Procedural History

Plaintiff commenced this action by filing a summons and complaint on August 19, 2016. In the complaint, plaintiff alleges that he sustained injuries on December 4, 2015 after being involved in a motor vehicle accident that occurred on 9th Avenue, near the intersection of West 39th Street, in New York, New York. As a result of the accident, plaintiff alleges that he injured his neck and back and was required to undergo surgery on August 16, 2016. Plaintiff claims that

he sustained serious injuries, as defined under *Insurance Law § 5102(d)*. At the time of the accident, defendant Nunez-Luzon, an employee of True World, was operating the motor vehicle, which was owned by co-defendant Enterprise and leased to co-defendant True World.

On June 20, 2017, co-defendant Enterprise was dismissed from the action. (*See, NYSCEF Doc. No. 20)*. Plaintiff's examination before trial took place on July 6, 2017. In pertinent part, plaintiff testified that, after the accident occurred, he was taken to the hospital and complained of neck and back pain. Plaintiff started physical therapy for his neck and lower back pain and subsequently had surgery. After the surgery, he continued to receive epidural injections to his neck and back. Plaintiff testified that he did not have any other accidents involving injuries to his neck or his back both prior to, and after, the subject accident.

On February 24, 2020, plaintiff and defendants certified that discovery was complete, and plaintiff filed his note of issue on February 25, 2020. On June 22, 2020, defendants issued a subpoena to "ISO Claim Search Casualty System," seeking all ISO claim search records pertaining to the plaintiff. ISO Claim Services, Inc., advised defendants that, although it objected to the subpoena on the grounds of lack of jurisdiction because its offices are located in New Jersey, it would still produce the requested records. On July 8, 2020, defendants received the claim search records, "which revealed that plaintiff had made numerous bodily injury claims to similar body parts before and after the subject accident." (*See, NYSCEF Doc. No. 117; Calabrese affirmation in support, ¶ 10*).

On July 30, 2020, defendants served a supplemental demand for authorizations for "duly executed/unrestricted HIPAA compliant authorizations to obtain records," in connection with the various motor vehicle accidents occurring between 2008 and 2019. (*See, NYSCEF Doc. No. 128 at 2*). On August 3, 2020, plaintiff objected to the supplemental demand, stating, in relevant part, that "[t]here are no 'special circumstances' that would entitle defendants to the untimely discovery." (*See, NYSCEF Doc. No. 129 at 1*).

On September 25, 2020 defendants filed an Order to show cause requesting the identical relief as in the instant motion. On September 29, 2020, this court declined to sign the order the show cause, without prejudice to renew upon the filing of a motion. The order stated that "[t]he movant failed to articulate any reason to circumvent regular motion practice." NYSCEF Doc. No. 115.

In light of the above, defendants now move to vacate the note of issue and compel plaintiff to provide HIPAA-compliant authorizations to allow defendants to obtain medical records to be used for trial. According to defendants, unusual or unanticipated circumstances occurred subsequent to filing the note of issue as plaintiff is 31 years old, and has filed six unrelated motor vehicle accident bodily injury claims over an 11-year period. Plaintiff testified that he had not been involved in any accidents before or after the instant accident. However, "an updated ISO search has revealed multiple prior and subsequent injuries to the same parts of plaintiff's body as he claims were injured in the instant lawsuit." (*See, Calabrese affirmation in support, ¶ 3*). For instance, the ISO search reported that in 2008, plaintiff was riding a bike when he was hit by a motor vehicle. The medical records indicated that plaintiff made complaints of pain to his neck and back. Plaintiff also required lumbar surgery after being involved in a motor vehicle accident that took place on October 18, 2018. Defendants argue that they are entitled to review all records related to plaintiff's multiple motor vehicle accident bodily injury claims related to his head, cervical and lumbar spine made between July 19, 2008 and August 2, 2019 as the injuries suffered are to identical body parts as claimed in this case, and are highly relevant to the causal relationship

and plaintiff's claims of permanency related to the subject accident. As a result, defendants argue that they would be prejudiced without being entitled to conduct additional discovery.

Defendants argue that they are entitled to all relevant records related to the six unrelated motor vehicle accident bodily injury claims occurring on July 19, 2008, September 22, 2011, December 2, 2017, May 4, 2018, October 18, 2018 and August 2, 2019. After defendants receive these records, they seek to compel plaintiff to appear for a further deposition and physical examination.

II. **Plaintiff's Opposition and Cross Motion**

Plaintiff opposes defendants' motion to vacate the note of issue on the grounds that it is untimely. Plaintiff states that the parties have appeared at the discovery part twenty-one times prior to stipulating that discovery was complete. Plaintiff was then directed to file his note of issue, and filed the note of issue on February 25, 2020. Plaintiff argues that as this motion was made more than 20 days after the note of issue was filed, it should be denied as untimely.

Plaintiff also argues that defendants are unable to show that unusual or unanticipated circumstances developed subsequent to filing the note of issue, which would allow for additional discovery. Plaintiff contends that defendants signed a stipulation certifying that discovery was complete, and then defendants waited three years after discovery commenced, and four months after the note of issue was filed, to conduct an ISO search. According to plaintiff, "one cannot claim special circumstances created by one's own inactivity and failure to conduct discovery." (*See, NYSCEF Doc. No. 134, Barron affirmation, ¶ 13*).

In support of the cross motion, plaintiff argues that, as defendants allegedly violated several provisions of the CPLR when serving the subpoena on ISO Claim Services, the search results should be suppressed pursuant to *CPLR §3103 (c)*. Specifically, plaintiff claims that defendants failed to serve him with a copy of the subpoena pursuant to *CPLR §3120(3)* and *CPLR §2303(a)*, and that they also failed to provide him with "official" notice of the complete items produced in response. Plaintiff contends that, had he been timely served, he would have been successful in quashing the subpoena prior to the production of documents. In addition, defendants allegedly improperly used a New York subpoena to produce documents in New Jersey. Plaintiff also believes that defendants improperly used the subpoena as a "discovery device and fishing expedition months after filing of note of issue." (*See, NYSCEF Doc. No. 141, Barron affirmation, ¶ 11*).

Further plaintiff argues defendants were made aware of at least one of these accidents prior to filing the note of issue. Specifically, on January 2, 2020, defendants served plaintiff with a second supplemental demand for authorizations, including HIPAA-compliant medical authorizations. (*See, NYSCEF Doc. No. 138*). On January 9, 2020, plaintiff provided a HIPAA-compliant authorization for release of the requested medical records, and these medical records reference the medical care and treatment plaintiff received in connection with a subsequent accident that occurred on October 18, 2018. On February 24, 2020, Defendants entered into a stipulation certifying that all discovery was complete.

In opposition to plaintiff's cross-motion, defendants argue that plaintiff's denial of any prior or subsequent accidents or injuries at his deposition, and the defense's subsequent discovery that he filed at least six other personal injury claims, is the "unusual and/or unanticipated circumstance" requiring further discovery. Further, defendants argue that the newly discovered evidence of the 31-year old plaintiff filing at least six unrelated motor vehicle accidents, with bodily injury claims to similar body parts as in this case, within an 11-year timespan is unusual or an unanticipated circumstance. In addition, defendants contend that they would be substantially

prejudiced if they are not allowed the opportunity to review the highly relevant records and depose plaintiff of the injuries that were only revealed by an updated ISO claim search that plaintiff has sustained many subsequent injuries to the same parts of his body as alleged in the subject accident. (*See, NYSCEF Doc. No. 143, Calabrese reply affirmation, ¶ 3*).

Defendants further argue that, although they subpoenaed ISO Claim Search, a subpoena was not necessary because the documents are not privileged. Defendants argue that "[a]ny person, including plaintiff, can request a printout of any person's insurance claim history that is compiled by ISO by paying a fee directly to ISO. However, our office subpoenaed ISO Claim Search because we were able to obtain records more quickly than going through the more traditional means." (*Id.*, ¶ 12).

III. DISCUSSION

Procedurally, a party may seek post-note discovery in two ways. *See, 22 NYCRR §202.21 (e)*. First, a party may move to vacate the note of issue within 20 days of its service upon "showing in what respects the case is not ready for trial." *Id*. Second, a party may move by motion, as here and argue that although "the motion is not timely, the party seeking relief must meet the more difficult standard of *22 NYCRR §202.21(d)*, which requires the movant to demonstrate unusual or **unanticipated circumstances and substantial prejudice**." *Reardon v. Macy's, Inc.*, 191 A.D.3d 712, 714 (2d Dep't 2021). (Emphasis added).

Here, this court finds that defendants' motion to vacate the note of issue is untimely and, as set forth below, they failed to meet their burden to demonstrate unusual or anticipated circumstances which would warrant vacating the note of issue. It is well settled that "[a] lack of diligence in seeking discovery does not constitute" "unusual or unanticipated circumstances warranting vacatur of the note of issue." *Colon v. Yen Ru Jin,* 45 A.D.3d 359, 359-360 (1st Dep't 2007). Defendants assert that, "an updated ISO search has revealed multiple prior and subsequent injuries to the same parts of plaintiff's body as he claims were injured in the instant lawsuit." (*See, NYSCEF Doc. No. 117, Calabrese affirmation in support, ¶ 3*). Plaintiff's accident took place in 2015 and he was deposed in 2017. On February 24, 2020, both parties stipulated that discovery was complete and then plaintiff filed a note of issue on February 25, 2020. Defendants provide no explanation for why they waited three years after plaintiff was deposed, and four months after they stipulated that all discovery was complete, to subpoena ISO Claim Search Casualty System for the records.

Defendants are seeking to compel plaintiff to provide multiple HIPAA-compliant authorizations in order to subpoena the records for trial. Defendants claim that "plaintiff's denial of any prior or subsequent accidents or injuries at his deposition and the defense's subsequent discovery that he filed at least six other personal injury claims, is the unusual and/or unanticipated circumstance requiring further discovery," and that "[i]t was only revealed by an updated ISO claim search that plaintiff has sustained many subsequent injuries to the same parts of his body." However, these statements are misleading. The updated records indicate that, although plaintiff may have sustained similar injuries to the ones sustained in the subject accident, four out of the six accidents took place after plaintiff was deposed in 2017.

Furthermore, the record indicates that defendants were aware of at least two of the accidents prior to the ISO Claim search, and yet defendants did not request additional HIPAA authorizations or testimony. Specifically, in response to defendants' request on January 2, 2020, plaintiff provided HIPAA compliant medical authorizations, and defendants received medical records indicating that plaintiff was involved in another motor vehicle accident on October 18, 2018, and underwent lumbar surgery. Further, defendants provide no explanation for why they

stipulated that all discovery was complete and moved for summary judgment, even after receiving plaintiff's supplemental response. "Rather, the record is clear that any outstanding discovery is due to defendant's own inaction." *Jenkins v. Riverbay Corp.*, 187 A.D.3d 543, 543 (1st Dep't 2020). As such, the part of defendants' motion seeking to compel plaintiff to provide multiple HIPAA-compliant authorizations is denied. *See, e.g. Nikqi v. Dedona Contr. Corp.*, 117 A.D.3d 620, 620 (1st Dep't 2014) ["The court also properly concluded that defendants failed to demonstrate that any special or unusual circumstances existed for seeking medical authorizations, after the filing of the note of issue. Defendants were aware of plaintiff's alleged injuries and had ample time to request the authorizations but failed to do so"].

This court finds that defendants failed to demonstrate that any unusual or anticipated circumstances developed, after the note of issue was filed, for seeking additional deposition testimony and an updated medical examination. After defendants received the ISO claim search records, defendants moved for summary judgment dismissing the complaint on the grounds that plaintiff's claimed injuries do not satisfy the serious injury threshold under *Insurance Law § 5102 (d)*. Defendants' retained expert examined plaintiff and reviewed various medical records, including the medical records related to the 2008 accident. Defendants' expert issued a report dated November 20, 2017, and issued addendum reports dated February 2, 2019 and July 30, 2020. As plaintiff has not submitted a supplemental bill of particulars indicating any change in the nature of his injuries, defendants have also failed to demonstrate an entitlement to further deposition or physical examination. *See e.g. Nikqi v. Dedona Contr. Corp.,* 117 A.D.3d at 620 ["defendants failed to show that a post-note of issue IME was warranted where plaintiff did not claim any new or additional injuries"]. Accordingly, the part of defendants' motion seeking to compel plaintiff to provide updated deposition testimony, and to submit to further medical examination, is denied.

In sum, defendants' requested relief is denied in its entirety. The court "need not address the second prong of the standard under *22 NYCRR § 202.21 (d)*, i.e., substantial prejudice to the movant, because the defendant has not established the first prong--that 'unusual or unanticipated circumstances' developed subsequent to the filing of the note of issue." *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 140 (2d Dep't 2000).

IV. Plaintiff's Cross Motion

Plaintiff's cross motion seeks to suppress any documents received in connection with the ISO Claim Search performed on June 22, 2020. Among other reasons for suppression, plaintiff argues that defendants improperly used a subpoena to obtain these records, and that they failed to serve a copy on plaintiff or notify him of items produced in response. Plaintiff argues that "defendants improperly obtained the ISO search due to their failure to comply with *CPLR §§3120 (3)* and *2303(a)*," and that defendants' conduct prevented plaintiff from moving to quash the subpoena. Plaintiff contend that he "would have been successful in quashing the subpoena prior to the production of documents, had he been timely served[.]" (*See, Barron affirmation, ¶ 12*).

CPLR §2303(a) and *CPLR §3120(c)* provide, in relevant part, that parties issuing subpoenas on parties or nonparties in a civil judicial proceeding must serve a copy of the subpoena on all parties. Pursuant to *CPLR §3103(c)*, "[i]f any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed." Here, defendants served a subpoena on non-party ISO Claim Search Casualty System in order to obtain ISO claim search records. Service of subpoenas on non-parties without also notifying the parties involved in the litigation is a violation of *CPLR §§2303(a)* and *3120(c)*. Nonetheless, for the reasons set forth below, plaintiff's cross-motion to suppress these records, is denied.

Here, plaintiff has not alleged that this material is privileged. *Matter of Kochovos,* 140 A.D.2d 180, 181 (1st Dep't 1988). ISO Claim Search is a database of property/casualty claims and can be accessed by the person seeking information about his/her claims. Here, none of the material obtained was privileged, and there is no showing that counsel would not have been entitled to obtain the documents at issue in the normal course of discovery, properly conducted. *Id.* As such, and for the same reasons, plaintiff's cross-motion is denied in its entirety.

Accordingly, it is

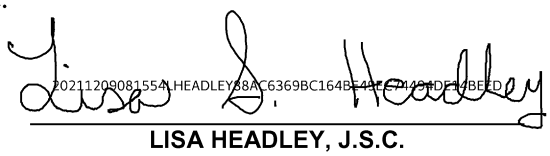
ORDERED that defendants True World Foods New York LLC and Douglas Nunez-Luzon's motion is denied in its entirety; and it is further

ORDERED that plaintiff Dequan Taylor's cross-motion is denied in its entirety; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



12/8/2021
DATE

LISA HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE