

Jones v New York & Presbyt. Hosp.
2021 NY Slip Op 33026(U)
December 16, 2021
Supreme Court, Bronx County
Docket Number: Index No. 20823/2018E
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seqs. # 5, 6

DANA JONES,

Index No.: 20823/2018E

Plaintiff,

- against -

DECISION and ORDER

THE NEW YORK AND PRESBYTERIAN HOSPITAL,

Defendant.

PRESENT: Hon. Lucindo Suarez

The issues in Plaintiff’s motion are whether: (1) Defendant’s answer should be stricken; (2) whether this court should issue an order compelling Defendant’s deposition prior to the completion of Plaintiff’s deposition; and (3) whether Plaintiff is entitled to a protective order. Similarly, the issues raised in Defendant’s motion are whether: (1) the complaint should be dismissed; and (2) whether the court should compel Plaintiff to provide Defendant discovery prior to the completion of Plaintiff’s deposition.

This court holds that Plaintiff failed to establish his burden in demonstrating that Defendant’s refusal to complete Plaintiff’s deposition was willful and contumacious behavior that would warrant the drastic sanction of striking its answer. Likewise, this court holds that Defendant failed to establish its burden in demonstrating that Plaintiff’s refusal in providing authorizations and other items of discovery was willful and contumacious behavior that would warrant the drastic sanction of dismissing the complaint.

This court further holds that Plaintiff did not meet his burden in showing that Defendant’s deposition should be held before the completion of Plaintiff’s deposition as Defendant demonstrated there is a significant amount of discovery that must be exchanged prior to

conducting the damages portion of Plaintiff's deposition. Lastly, this court holds that Plaintiff is not entitled to a protective order and that Defendant established its entitlement to authorizations for medical records unrestricted by date.

Plaintiff argues that he is entitled to an order striking Defendant's answer based upon Defendant's alleged refusal to conduct Plaintiff's deposition from May 2018 (when Plaintiff's deposition was first noticed) until December 2020 when the liability portion of his deposition was completed. Since December 2020, Plaintiff claims that he has attempted to schedule the damages portions of his deposition to no avail. He alleges that Defendant has unreasonably refused to proceed with his deposition due to authorization requests that were either provided and processed, not relevant or were overbroad. Therefore, due to Defendant's refusal to proceed with discovery Plaintiff is seeking an order directing Defendant be deposed prior to the completion of Plaintiff's damages deposition or that the balance of his deposition be deemed waived.

In opposition, Defendant contends that it is entitled to a dismissal of the complaint due to Plaintiff's purported failure in providing authorizations. Defendant referred to its demand for authorizations and letter dated April 30, 2021, wherein it requested the following from Plaintiff: (1) authorizations for the Workers' Compensation Board; (2) copies of Plaintiff's W-2, 1099s, and Federal and State income taxes; (3) authorizations for union records; (4) authorizations for employment records from 2012 to present; (5) authorizations for social security disability insurance; and (6) authorizations for Department of Labor to obtain Plaintiff's unemployment records.

In addition, Defendant claims that Plaintiff failed to respond to its notice of discovery and inspection dated February 11, 2019, which sought the following: (1) provider names and

addresses concerning Plaintiff's sciatica treatment; (2) authorizations for Plaintiff's pharmacy records, insurance records, workers compensation records, no-fault file, primary care providers, and the medical provider treating Plaintiff's sciatica; (3) Arons authorizations to speak to any treating medical personnel with respect to Plaintiff's sciatica treatment; and (4) unrestricted authorizations for Bronxcare 2739-45.

Further, Defendant alleges that Plaintiff has failed to provide unrestricted authorizations for the following providers as per its demands dated July 26, 2019, and January 16, 2020: (1) BronxCare Hospital Center; (2) NYC Health + Hospitals - Lincoln; (3) NYC Health + Hospitals - Metropolitan; (4) Statcare Urgent & Walk-In Medical Care; (5) Electric Insurance Company; (6) hospitals/providers/facilities that treated Plaintiff with respect to his motor vehicle accident on May 3, 2007; (7) all non-privileged portions of the legal file maintained by any attorney Plaintiff retained with respect to his motor vehicle accident on May 3, 2007; (8) All City Health Care; (9) Walgreens Pharmacy; (10) the Kenkou Group, LLC; and (11) Mount Sinai St. Luke's Roosevelt Hospital. Defendant claims that as a result of the subject accident Plaintiff has placed at issue injuries to his cervical spine, lumbar spine, upper extremities, left lower extremity, and several psychological conditions. Therefore, Defendant seeks unrestricted authorizations based on a signed statement by Plaintiff wherein he states that he had a prior accident, which caused injuries to his lower back and related sciatica radiating to his legs.

Lastly, Defendant claims that Plaintiff failed to provide corrected authorizations for the following providers: (1) Weill Cornell; (2) Mohawk Valley Orthopedics PC; (3) MLK Health Clinic; and (4) Family Pharmacy & Surgical Supply. Defendant argues that Plaintiff's failure to provide or respond to the forgoing discovery has prohibited its ability in defending this action and from proceeding to the damages portion of Plaintiff's deposition.

In reply, Plaintiff contends that Defendant has waived all the foregoing discovery as per the parties' compliance conference order dated March 5, 2019, which contained a waiver clause. Furthermore, Plaintiff argues that Defendant's request to dismiss his complaint pursuant to CPLR §3126 is premature as it has not provided any prior discovery orders that required Plaintiff to provide discovery. Moreover, he posits that Defendant has failed to establish its burden for a dismissal of his complaint under CPLR §3126 because it failed to demonstrate any willful or contumacious behavior to warrant a sanction of a dismissal. Additionally, he argues that Defendant's request for unrestricted authorizations is without a basis as Defendant did not show a causal connection to the body parts injured in the subject accident to any pre-existing conditions. Thus, Plaintiff is seeking a protective order preventing Defendant from seeking unrestricted authorizations.

This court finds that both Plaintiff failed to sustain his burden to strike Defendant's answer and that Defendant failed to sustain its burden for a dismissal of the complaint. There was no showing of willful or contumacious behavior that would warrant such a drastic sanction particularly when considering New York State's public policy in favor of resolving disputes on the merits. *See Ellis v. Park*, 93 A.D.3d 502, 940 N.Y.S.2d 78 (1st Dep't 2012); *see also Corsini v. U-Haul Intl.*, 212 A.D.2d 288, 630 N.Y.S.2d 45 (1st Dep't 1995).

With respect to Plaintiff's request to alter the priority of depositions to allow Defendant to be deposed prior to the completion of Plaintiff's deposition that request is denied. This court finds Plaintiff failed to demonstrate that Defendant did not attempt to diligently pursue disclosure as there is a significant amount of discovery Defendant is entitled to prior to conducting the damages portion of Plaintiff's deposition. *See Serio v. Rhulen*, 29 A.D.3d 1195, 815 N.Y.S.2d 320 (3d Dep't 2006).

Lastly, this court finds that Plaintiff is not entitled to a protective order as Defendant demonstrated its entitlement to authorizations for all medical records unrestricted by date. Plaintiff averred in his bill of particulars that the injuries he allegedly sustained as a result of the subject accident aggravated or exacerbated his underlying conditions. Therefore, considering the averments contained in Plaintiff's bill of particulars, he voluntarily placed his physical condition at issue, thus, entitling Defendant to discovery to determine the extent, if any, that his claimed injuries "are attributable to accidents other than the one at issue here." *See McGlone v. Port Auth. of NY & New Jersey*, 90 A.D.3d 479, 934 N.Y.S.2d 161 (1st Dep't 2011); *see also Rega v. Avon Prods., Inc.*, 49 A.D.3d 329, 854 N.Y.S.2d 688 (1st Dep't 2008).

Accordingly, it is

ORDERED, that Plaintiff's motion (Mtn. Seq. # 5) seeking to strike Defendant's answer, *inter alia*, is denied; and it is further

ORDERED, that Defendant's motion (Mtn. Seq. # 6) seeking the dismissal of the complaint, *inter alia*, is granted in part; and it is further

ORDERED, that Defendant's application to dismiss Plaintiff's complaint is denied; and it is further

ORDERED, that Plaintiff within forty-five (45) days from the date of this decision and order shall provide the following to Defendant: (1) Copies of Plaintiff's W-2, 1099s, and Federal and State income tax returns; (2) authorizations for union records; (3) authorizations for employment records from 2012 to present; (4) authorizations for social security disability insurance; (5) authorizations for Department of Labor to obtain Plaintiff's unemployment records; (6) provider names and addresses concerning Plaintiff's sciatica treatment; (7) HIPAA authorizations for Plaintiff's pharmacy records, insurance records, workers compensation

records, no-fault file, primary care provider, and medical providers treating Plaintiff's sciatica; (8) Arons authorizations to speak to any treating medical personal with respect to Plaintiff's sciatica treatment; (9) unrestricted authorizations for Bronxcare 2739-45 as to time and body parts; (10) unrestricted authorization for BronxCare Hospital Center; (11) unrestricted authorizations for NYC Health + Hospitals - Lincoln; (12) unrestricted authorizations for NYC Health + Hospitals - Metropolitan; (13) unrestricted authorizations for Statcare Urgent & Walk-In Medical Care; (14) unrestricted authorizations for Electric Insurance Company; (15) authorizations for hospitals/providers/facilities that treated Plaintiff with respect to his motor vehicle accident on May 3, 2007; (16) authorizations for all non-privileged portions of the legal file maintained by any attorney Plaintiff retained with respect to his motor vehicle accident on May 3, 2007; (17) unrestricted authorizations for All City Health Care; (18) unrestricted authorizations for Walgreens Pharmacy; (19) unrestricted authorizations for the Kenkou Group, LLC; (20) unrestricted authorizations for Mount Sinai St. Luke's Roosevelt Hospital; (21) corrected authorizations for Weill Cornell; (22) unrestricted authorizations for Mohawk Valley Orthopedics PC; (23) unrestricted authorizations for MLK Health Clinic; and (24) unrestricted authorizations for Family Pharmacy & Surgical Supply; and it is further

ORDERED, that the continuation of Plaintiff's deposition with respect to damages shall be conducted on or before April 8, 2022; and it is further

ORDERED, that Defendant's deposition shall be conducted on or before April 22, 2022; and it is further

ORDERED, that Defendant shall designate a physician to conduct Plaintiff's independent medical examination within thirty (30) days from the completion of Plaintiff's deposition; and it is further

ORDERED, that the Plaintiff's independent medical examination shall be held within sixty (60) days from the completion of Plaintiff's deposition.

This constitutes the decision and order of the court.

Dated: December 16, 2021

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

Lucindo Suarez, J.S.C.

LUCINDO SUAREZ, J.S.C.