

Jackson v New York City Tr. Auth.

2023 NY Slip Op 32940(U)

August 25, 2023

Supreme Court, New York County

Docket Number: Index No. 158016/2019

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 158016/2019

DENNIS JACKSON,

MOTION SEQ. NO. 003

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

NEW YORK CITY TRANSIT AUTHORITY, MTA BUS
COMPANY, JOHN OR JANE DOE, WAYNE MEADOWS,

Defendant.

-----X

NEW YORK CITY TRANSIT AUTHORITY, MTA BUS
COMPANY

Third-Party
Index No. 595123/2020

Third-Party Plaintiffs,

-against-

WAYNE MEADOWS, AVANT BUSINESS SERVICE
CORPORATION

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for

DISCOVERY

Upon the foregoing documents, and upon hearing oral arguments, Defendants/Third-Party Plaintiffs NEW YORK CITY TRANSIT AUTHORITY and MTA BUS COMPANY's ("TRANSIT") motion to preclude the Plaintiff from offering any evidence of injury related to the cervical spine, or alternatively, compelling Plaintiff to appear for a further independent medical examination ("IME") with Dr. Paul Kuflik, is denied in part and granted in part.

This personal injury action arises out of a December 13, 2018 incident which is alleged to have occurred on 2nd Avenue at or near its intersection with East 34th Street, in Manhattan, when the Plaintiff claims to have been a passenger in a vehicle which was struck by the Defendants' bus.

TRANSIT's prior motion seeking the same relief (Motion Seq. 2), was denied without prejudice, due to a procedural defect, by Order of this Court dated November 9, 2022 (NYSCEF Doc 121). Accordingly, this motion will be addressed on the merits.

Upon review, during the course of discovery in this matter, the Plaintiff testified at his 50-h hearing and subsequent deposition concerning his claims of neck pain and various treatment, including diagnostic imagery (NYSCEF Doc 98, 112). The Plaintiff alleged various claims as to his cervical spine in his bill of particulars (NYSCEF Doc 111). At some point following the service of the bill of particulars, the Plaintiff apparently underwent surgery to his cervical spine. Same was disclosed to this Court and the parties in February 2022. However, to date the Plaintiff has apparently not served a supplemental bill of particulars as to the cervical spine surgery.

In connection with the ongoing discovery process in this matter, the Plaintiff appeared for an IME with Dr. Kuflik on March 9, 2022. Pursuant to Dr. Kuflik's report, Eduardo Bonilla, the representative on behalf of the Plaintiff, who accompanied the Plaintiff to the IME, refused to allow Dr. Kuflik to examine the Plaintiff's cervical spine. (NYSCEF Doc 119). As per Dr. Kuflik's report, the representative also provided Dr. Kuflik from asking basic questions in connection with the examination, such as how the Plaintiff became injured. Although it appears that questions concerning the treatment to the lumbar spine were permitted, no such questions were permitted regarding the cervical spine. In his affidavit (initially submitted in opposition to the Defendants' prior motion, Motion Seq. 2) the representative acknowledged that he objected and prevented the Plaintiff from answering Dr. Kuflik's questions at the IME and disagreed with Dr. Kuflik's impression of what transpired at the IME. (NYSCEF Doc 120).

"It is well established that a plaintiff is entitled to have a representative of her choice present during the IME, provided the individual does not interfere with the IME or prevent the defendant's doctor from conducting "a meaningful examination" (*Markel v. Pure Power Boot Camp, Inc.*, 171 A.D.3d 28, 29, 96 N.Y.S.3d 187, 188 [1st Dept 2019]; quoting *Santana v. Johnson*, 154 A.D.3d 452, 452, 60 N.Y.S.3d 831, 832 [1st Dept 2017]).

Here, pursuant to the Plaintiff's bill of particulars and testimony in this matter, it is clear that claims concerning the cervical spine have been made. Thus, the Defendants are entitled to any and all medical records concerning such treatment, authorizations permitting the release of such records as well as an IME of the cervical spine. It is also clear that the Defendants duly noticed the IME of the cervical, and lumbar spine. Additionally, it is clear that the Plaintiff's representative

interfered with the IME; Dr. Kuflik was prevented from conducting a full and complete examination of the cervical spine at the March 9, 2022 IME and was prevented from asking basic questions regarding how the Plaintiff's lumbar and cervical injuries occurred.

Therefore, upon review, in light of the circumstances, TRANSIT has shown the necessity for a further IME related to the cervical spine. (*See Chaudhary v. Gold*, 83 A.D.3d 477, 478, 921 N.Y.S.2d 219 [1st Dept 2011]; *Orsos v. Hudson Transit Corp.*, 95 A.D.3d 526, 944 N.Y.S.2d 514 [1st Dept 2012]).

The Plaintiff is directed to provide any and all copies of the Plaintiff's medical records related to cervical spine treatment arising out of the subject accident to the Defendants and Third-Party Defendants by September 15, 2023 as well as HIPAA authorizations for the parties to obtain such records directly from the providers.

Plaintiff is also directed to appear for a further IME by Dr. Kuflik which is to concern the examination of the cervical spine. Dr. Kuflik is also permitted to ask relevant questions concerning the cervical spine injuries and treatment as were asked and answered regarding the lumbar spine, which is reflected in Dr. Kuflik's report (NYSCEF Doc 119). Dr. Kuflik is also permitted to ask the question related to how the injuries to the lumbar and cervical spine were sustained, which was previously prevented by the prior representative as such a basic question is relevant to the Plaintiff's medical treatment and condition and as there is no evidence that such question was asked to address aspects of liability. (*see generally Berrios v. 735 Ave. of the Americas, LLC*, 103 A.D.3d 472, 959 N.Y.S.2d 477 [1st Dept 2013]). The IME is to be held by December 31, 2023. Due to his prior obstruction, the Plaintiff is also directed not to send Mr. Bonilla as a representative to the further IME. However, the Plaintiff is still entitled to attend the IME with a different representative on his behalf and that representative shall not interfere with or prevent the cervical spine examination.

Additionally, if the Plaintiff intends to allege that the cervical spine surgery is connected to the subject accident, if not already done, the Plaintiff is directed to serve a supplemental bill of particulars by September 15, 2023 asserting same. Plaintiff is also directed to provide any and all copies of the Plaintiff's medical records related to cervical spine surgery, including pre and post operative treatment, to the Defendants and Third-Party Defendants by September 15, 2023 as well as authorizations permitting the release of such records. If the Defendants and Third-Party Defendants seek a further deposition of the Plaintiff, limited to the cervical spine surgery, they are

to advise the Plaintiff in writing by September 22, 2023 and the deposition is to be held by November 30, 2023. If the Plaintiff does not intend to allege the cervical spine surgery is connected to the subject accident, the Plaintiff is to apprise the parties in writing by September 15, 2023. If the Plaintiff fails to advise the parties as to whether the cervical spine surgery will be claimed in this matter, the Plaintiff may be precluded from introducing such evidence at the time of trial upon further application to the Court.

Although it was clearly improper to have prevented the examination of the cervical spine, at this time, this Court denies TRANSIT's request for the Plaintiff to bear the cost of the further IME. However, the Court may entertain such relief in the future if the further IME is not conducted as set forth herein.

Accordingly, it is hereby

ORDERED that the Defendants/Third-Party Plaintiffs NEW YORK CITY TRANSIT AUTHORITY and MTA BUS COMPANY's motion to preclude the Plaintiff from presenting evidence at the time of trial related to the cervical spine claims is denied; and it is further

ORDERED that the Defendants/Third-Party Plaintiffs NEW YORK CITY TRANSIT AUTHORITY and MTA BUS COMPANY's motion to compel the Plaintiff to appear for a further IME related to the cervical spine is granted to the extent as set forth above; and it is further

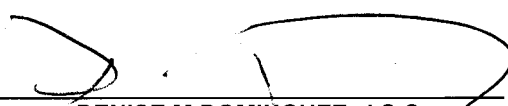
ORDERED that the Plaintiff is directed to provide the Defendants/Third Party Defendants the medical records and authorizations and advise as to whether the cervical spine surgery will be claimed in this matter, as set forth above; and it is further

ORDERED that the Defendants/Third Party Defendants are directed to advise the Plaintiff if a further deposition is requested, as outlined above; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the General Clerk's Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that such upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website)].

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

<u>8/25/2023</u> DATE	 DENISE M DOMINGUEZ, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE