

Pizzola v Tutor Perini Corp.

2023 NY Slip Op 33268(U)

September 20, 2023

Supreme Court, New York County

Docket Number: Index No. 152407/2021

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. 152407/2021

ANTHONY PIZZOLA,

MOTION SEQ. NO. 001

Plaintiff,

- v -

TUTOR PERINI CORPORATION, MTA CAPITAL
CONSTRUCTION COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK CITY
TRANSIT AUTHORITY, METRO-NORTH COMMUTER RAIL
ROAD, LONG ISLAND RAIL ROAD

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

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

Upon the foregoing documents, and after conferencing this matter with the Court, the Defendants' motion to vacate the note of issue, to compel discovery from the Plaintiff and to preclude the Plaintiff from offering evidence at the time of trial is denied without prejudice in part and granted in part.

This personal injury action arises out of an August 13, 2020 incident in which it is alleged that the Plaintiff, ANTHONY PIZZOLA, sustained injury in the course of his employment at a construction site in Grand Central Terminal in Manhattan.

As per the February 21, 2023 Status Conference Order (NYSCEF Doc. 18), a further Status Conference Order was to be submitted as per Part 21 Rules on May 22, 2023 and the note of issue was to be filed on June 1, 2023. The Compliance Conference was not submitted on May 22, 2023 and the Plaintiff instead filed the note of issue on May 26, 2023 (NYSCEF Doc. 24). The Defendants timely moved to vacate the note of issue, alleging that discovery remained outstanding, primarily concerning multiple authorizations permitting the Defendants to obtain the Plaintiff's various medical, insurance and employment records.

Pursuant to 22 NYCRR 202.21(e), the note of issue may be vacated when the certificate of readiness is erroneous and asserts that discovery is complete when it is not. (*See Ortiz v Arias*, 285 A.D.2d 390, 727 N.Y.S.2d 879 [1st Dept 2001]). However, courts also have discretion to allow post-note of issue discovery without vacating the note of issue where neither party would be prejudiced, and where it is clear that post-note of discovery may be necessary. (*see Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442, 49 N.Y.S.3d 624 [1st Dept 2017]; *Dominguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 168 A.D.2d 376, 562 N.Y.S.2d 694 [1st Dept 1990]).

Here, the Defendants have not shown that they will be substantially prejudiced if limited post-note of discovery is permitted to continue while the case remains on the trial calendar. No trial date has yet to be set in this matter, nor does there appear to be a pending pre-trial conference currently scheduled. Thus, the parties would not be prejudiced if this matter were to remain on the trial calendar while the limited additional discovery related to the Plaintiff's injuries and damages is completed. Therefore, that branch of the motion which seeks to vacate the note of issue is denied without prejudice.

With respect to that branch of the motion which seeks to preclude the Plaintiff from offering evidence at the time of trial, the Defendants have not shown any basis by which to preclude the Plaintiff as it appears from both the Plaintiff's opposition, and upon conferencing these issues with the Court, that the Plaintiff has previously provided various records and authorizations and is making efforts to provide the requested additional authorizations.

With respect to that branch of the motion which seeks to compel additional discovery from the Plaintiff, the Defendants have not demonstrated that all of the items requested are material and necessary in its defense of this matter. (*see Hunlock v. New York City Transit Auth.*, 194 A.D.3d 522, 523, 148 N.Y.S.3d 104 [1st Dept 2021]). Moreover, the First Department has consistently found that broad discovery requests related to prior injuries and/or prior general medical condition are generally improper. (*See James v. 1620 Westchester Ave. LLC*, 147 A.D.3d 575, 48 N.Y.S.3d 51 [1st Dept 2017]; *Abrew v. Triple C Properties, LLC*, 178 A.D.3d 526, 111 N.Y.S.3d 843 [1st Dept 2019]).

Therefore, that branch of the motion which seeks an unrestricted authorization for the Plaintiff's complete Medicare records for Policy #109548252A and #CF89258Y is denied. As is the Defendants' demand for any unrestricted authorization permitting the release of the Plaintiff's

entire medical insurance records as same is premised on the hope of identifying potential prior relevant medical providers without sufficient support. If not already provided, or if a fresh authorization is needed in light of the Defendants' recent change of address, the Plaintiff is directed to provide an authorization permitting the Plaintiff's Medicare records for Policy #109548252A and #CF89258Y as referenced in Plaintiff's February 17, 2023 discovery response (NYSCEF Doc. 42).

As to that branch of the motion for authorizations from One Call Medical and a Dr. Aberese, the Defendants have not shown at this time how records from One Call Medical and a Dr. Aberese are material and necessary. Although these providers may be referenced in some of the various medical records already obtained by the Defendants, the Plaintiff has repeatedly advised that these providers were not known, and requested additional information be provided to help identify the provider. (NYSCEF Doc. 42). As no evidence has been presented that the Plaintiff treated with these providers at any time, let alone as a result of the subject accident, that branch of the motion seeking to compel such authorizations is denied. However, as the Plaintiff has also demonstrated a willingness to provide such authorizations if additional information can be provided, such as the location of the provider, the Defendants are directed to provide Plaintiff with same so that an authorization can be prepared.

As for prior accidents and injuries, the Plaintiff disclosed a prior cervical and lumbar spine injury having occurred on February 7, 2012, as referenced in the Plaintiff's Bill of Particulars (NYSCEF Doc. 32). Given the injuries alleged in this matter, it is clear those alleged as a result of the February 7, 2012 accident are necessary to the Defendants' defense in this action. (*see Villanueva v. J.T. Magen & Co. Inc.*, 216 A.D.3d 604, 190 N.Y.S.3d 320 [1st Dept 2023]; *Brito v. Gomez*, 33 N.Y.3d 1126, 131 N.E.3d 904 [2019]). The Plaintiff is directed to provide authorizations for any and all providers where the Plaintiff treated related to this prior cervical and lumbar spine injury, including for any physical therapy and diagnostic imagery by October 13, 2023. The Plaintiff is to advise the Defendants in writing if no provider, other than Putnam Hospital, is recalled by Plaintiff. Although the Defendants reference an Allstate No Fault claim related to the February 7, 2012 accident, no policy number, claim number or other information is provided and it is unclear to this Court how Allstate was identified. The Defendants are directed to provide the Plaintiff with any additional information regarding the Allstate No Fault Claim by October 13, 2023. Within 30 days of receipt of such additional identifying information, the

Plaintiff is directed to provide the Defendants with an authorization related to the Allstate No Fault file for the February 7, 2012 accident.

As for the October 16, 2010 “hunting accident”, the Plaintiff is to confirm in writing whether the incident involved a hunting accident or a “slip and fall” by October 13, 2023. At this time, the Defendants have not shown how such records are material and necessary. Moreover, the Plaintiff has provided an authorization for Putnam Hospital for records related to this 2010 incident, which the Plaintiff has asserted was related to a fall. Therefore, that branch of the motion which seeks authorizations for an October 16, 2010 “hunting accident” or fall is denied at this time. As no evidence has been submitted showing that a lawsuit was filed as a result of the October 16, 2020 incident, that part of the motion which seeks an authorization is also denied.

As for the unidentified 2015 “accident”, the Plaintiff denies being involved in such an accident and no evidence has been submitted that shows such an accident occurred other than apparently a single reference in a medical record. Moreover, the Plaintiff has provided an authorization for Putnam Hospital for records related to his 2015 gall bladder surgery. Therefore, that branch of the motion which seeks authorizations for an unidentified 2015 accident is denied at this time. As no evidence has been submitted showing that a lawsuit was filed as a result of a 2015 accident, that part of the motion which seeks an authorization is also denied.

If the Defendants are able to conduct a claims search or other investigation that may identify additional details as to the alleged October 16, 2010, February 7, 2012 and 2015 incidents, they are permitted to serve a demand, which provides such details to enable the Plaintiff to identify relevant medical providers. Such demand shall be served by November 30, 2023; Plaintiff shall serve a response within 30 days of receipt.

As for an authorization as to Cerner Imaging, as Plaintiff identified and disclosed this provider in the Plaintiff’s October 2021 discovery response, but such authorization was not attached to the response, the Plaintiff is directed to provide an authorization permitting the release of the Plaintiff’s records by October 13, 2023. If Cerner Imaging is not a provider related to the subject incident, or a provider related to the prior cervical and lumbar injury, and was incorrectly disclosed, Plaintiff is directed to advise the Defendants in writing, identify the correct provider and provide a duly executed authorization.

As for the Defendants’ request for the Plaintiffs’ employment records for five years predating the subject accident, Plaintiff has provided the authorization (NYSCEF Doc. 54).

Therefore, that aspect of the motion is moot. If this authorization has an old address for the Defendants, as counsel's address has now changed, the Plaintiff is directed to provide a fresh authorization by October 13, 2023.

As for the requested Arons authorizations, the Defendants acknowledge receipt of same, but, request that the Plaintiff provide fresh authorizations as counsel's address has now changed. The Plaintiff is directed to provide fresh Arons authorizations with counsel's new address by October 13, 2023.

Accordingly, it is hereby

ORDERED that the Defendants' motion to vacate the note of issue is denied without prejudice; and it is further

ORDERED that the note of issue is not vacated, and that the case shall remain on the trial calendar; and it is further

ORDERED that the Defendants' motion to preclude the Plaintiff is denied; and it is further

ORDERED that the Defendants' motion to compel further discovery is granted to the limited extent that the Plaintiff is directed to provide the Defendants the authorizations set forth above by October 13, 2023; and it is further

ORDERED that no adjournments of the above are permitted absent Court approval; and it is further

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

9/20/2023
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

[Signature]
HON. DENISE W. DOMINGUEZ
 J.S.C.