Gaston v Trustees of Columbia Univ. in the City of N.Y.
2017 NY Slip Op 31896(U)
September 7, 2017
Supreme Court, New York County
Docket Number: 154124/14
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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WILTON GASTON,

Plaintiff,

-against-

TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and NATIONAL GRID,

Defendants.

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Index No. 154124/14

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

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By notice of motion, plaintiff moves pursuant to CPLR 3126 and 3120 for an order compelling further depositions of defendants. Defendants oppose and, by notice of cross motion, move pursuant to CPLR 3042, 3124, and 3126 for an order compelling plaintiff to provide authorizations for records related to his prostate cancer or, alternatively, precluding him from providing testimony at trial based on his failure to provide the authorizations. Plaintiff opposes the cross motion.

I. MOTION FOR FURTHER DEPOSITIONS

A. Relevant background

In or about September 2013, Hercules Welding & Boiler Works was hired by defendant National Grid to repair boilers for defendant The Trustees of Columbia in the City of New York (Trustees), in a building located at 100 Haven Avenue, New York, New York (the premises).

(NYSCEF 79). By letter dated September 18, 2013, National Grid submitted an estimate for work on the boilers at the premises; the estimate is addressed to Abraham Pagan, of Columbia University Medical Center. (*Id.*).

On October 16, 2013, plaintiff, a mechanic employed by Hercules, allegedly fell from one of the boilers, injuring, *inter alia*, his left shoulder, left elbow, and left knee. (NYSCEF 61, 67).

At his deposition held on January 21, 2016, plaintiff testified, as pertinent here, that when he entered the boiler room, the boiler was on even though it should have been shut off and cooled several hours before they began work on it. Trustees's superintendent eventually turned off the boiler and plaintiff then waited approximately two hours before commencing his work. His co-worker complained that the boiler was still hot. While working on top of the boiler, plaintiff fell when his left foot slipped due to the round contour of the boiler. He fell to his knee on top of the boiler, hit his left shoulder on a fence next to the boiler, and twisted his left ankle. The boiler room remained hot the entire time. (NYSCEF 75).

In an errata sheet dated March 22, 2016, plaintiff added that the cause of his fall was also the heat of the boiler. His reason for making the change was "to clarify the record." (NYSCEF 83). The errata sheet was offered for the first time in plaintiff's reply papers, and discussed at oral argument. (NYSCEF 86).

On May 12, 2016, Trustees produced Robert Murphy, assistant director of housing facilities management, for a deposition. He testified that while he was in charge of managing certain physical plant assets, Abraham Pagan was in charge of managing the premises at issue. Pagan was also responsible for managing the operation and repair of the boilers at the premises, not Murphy, who denied personal knowledge of any work performed on the boilers in October

2013. Trustees's superintendent, who was supervised by Pagan, was also responsible for work done by contractors on the boilers. (NYSCEF 77, 86).

Victor Cordero, an employee of Hercules, testified at a deposition that on the day of the accident, he worked with plaintiff on the boilers, and that their work entailed standing on top of the hot boilers. While plaintiff worked on a boiler, Cordero heard him say he felt dizzy, and he then observed him become unconscious. Cordero jumped to the top of the boiler to grab plaintiff to keep him from falling from it. Before plaintiff lost consciousness, but after he had become dizzy, Cordero saw him put his foot between two pipes and twist his ankle. Cordero asked a National Grid employee who was also in the room to help support plaintiff so that he would not fall from the boiler. (NYSCEF 76).

Ralph Ruiz, a mechanic employed by National Grid, was also deposed. He testified that he had been sent to the premises the day of plaintiff's accident by his supervisor, Harry Feliciano, a service manager in charge of sending National Grid employees to perform work for Trustees. Feliciano was also responsible for invoicing work performed by Hercules for National Grid. While Ruiz was in the boiler room, he heard Cordero yell his name and ask for help, and he saw Cordero holding plaintiff on top of the boiler. Ruiz helped lower plaintiff to the ground. (NYSCEF 78).

B. Contentions

Plaintiff seeks to depose Pagan and Feliciano, asserting that Murphy's knowledge is insufficient, as he had identified Pagan as the person assigned to the premises who would know about the boilers involved in the accident, and absent Murphy's personal knowledge of the premises or the boilers. Plaintiff also contends that Ruiz's knowledge is insufficient as he had no

personal knowledge of the proposals and invoices pertaining to the work, whereas Feliciano has such personal knowledge. (NYSCEF 61, 86).

Defendants argue that, as no Trustees employee was in the boiler room at the time of the accident, Murphy's deposition obviates any need to depose Feliciano or Pagan. Moreover, they maintain, as Ruiz witnessed the accident, there is no reason to believe that a deposition of Feliciano would add anything, especially since his involvement was limited to paperwork. Thus, defendants deny that plaintiff has met his burden of showing that the witnesses produced had insufficient knowledge, and that depositions of Pagan and Feliciano would be productive. (NYSCEF 74, 86).

In reply, plaintiff reiterates his argument, and relies on his errata sheet to argue that whether the subject boiler was shut down before the accident is a material issue, and as Pagan is most likely to have information pertaining to the maintenance of the boilers, his deposition is necessary. (NYSCEF 61, 86).

At oral argument, defendants argued that plaintiff's errata sheet should not be considered. (NYSCEF 86).

C. Analysis

Generally, a corporation may designate who of its employees it will produce for deposition. (*Faber v New York City Tr. Auth.*, 177 AD2d 321, 322 [1st Dept 1991]). Thus, a party seeking additional corporate depositions must demonstrate that the person already deposed provided inadequate information or had insufficient knowledge, and that there is a substantial likelihood that the person sought for deposition possesses information material and necessary to the prosecution of the case. (*O'Brien v Vil. of Babylon*, AD3d , 2017 NY Slip Op 05963 [2d

Dept 2017]).

As Murphy denied having been in charge of the boilers, and alleged that Pagan was in charge, plaintiff demonstrates that Murphy has insufficient knowledge and that Pagan may have material and necessary knowledge, as the condition and maintenance of the boilers are in issue. (*See Best Payphones, Inc. v Guzov Ofsink, LLC*, 135 AD3d 585, 585 [1st Dept 2016] [plaintiff made sufficiently detailed showing that deposed associate had insufficient information regarding relevant issues such as negotiation of retainer and work allegedly performed]; *Cea v Zimmerman*, 142 AD3d 941 [2d Dept 2016] [additional depositions of two witnesses to accident warranted as testimony of first witnesses insufficient to provide information about events that occurred at accident scene]; *Black v Athale*, 129 AD3d 1661 [4th Dept 2015] [already-deposed witnesses had at most general understanding of project at issue while witness sought to be deposed had particular and specific knowledge thereof]; *Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 731 [2d Dept 2011] [previous depositions established substantial likelihood that additional witnesses sought by plaintiff would offer material and necessary information as to defective condition of tree]; *Alexopoulos v Metro. Transp. Auth.*, 37 AD3d 232, 233 [1st Dept 2007] [first witness had insufficient knowledge as to condition which allegedly caused accident and documents created by others showed that they likely had material and necessary knowledge]).

Whether plaintiff's errata sheet is relevant need not be addressed, as plaintiff seeks information from Pagan about his general and overall responsibilities with respect to the boilers and their condition, not only whether the boilers were too hot on the day of the accident. However, while Ruiz identified Feliciano as the person who prepared the paperwork for the

subject job, plaintiff fails to establish that his testimony would not be duplicative, as Ruiz already testified to the content of the service tickets prepared by Feliciano and the nature of Ruiz's work at the premises. (*See Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 41 AD3d 362, 364 [1st Dept 2007], *affd on other grounds* 11 NY3d 843 [2008] [court denied motion to compel production of additional witness as record established that testimony sought would be duplicative]).

II. MOTION TO COMPEL

A. Contentions

Defendants argue that as plaintiff testified that the accident caused him to suffer permanent disability and confinement, they are entitled to medical records pertaining to his prostate cancer. Before the accident, plaintiff received 38 radiation treatments and is still under the care of a urologist. Thus, they assert, plaintiff has placed his entire physical condition in issue. (NYSCEF 66).

In opposition, plaintiff denies that his prostate cancer is relevant, and asserts that the records related to it are privileged. As he alleges only orthopedic injuries, he maintains that he waived his privilege only as to his orthopedic medical records. (NYSCEF 82).

In reply, defendants essentially reiterate their argument, observe that plaintiff also claims lost wages as a result of his permanent disability, and distinguish the cases cited by plaintiff. (NYSCEF 84).

B. Analysis

Section 3101(a) of the CPLR requires full disclosure of all evidence material and necessary to the prosecution or defense of an action. (*Andon ex rel. Andon v 302-304 Mott St.*

Assocs., 94 NY2d 740, 746 [2000]). What is "material and necessary" is generally left to the sound discretion of the court and may include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." (*Id.*, quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). It is irrelevant whether the material is admissible at trial, as pretrial discovery extends not only to proof that is admissible but also to matters that may lead to the disclosure of admissible proof. (*Montalvo v CVS Pharmacy, Inc.*, 81 AD3d 611, 612 [2d Dept 2011]).

While the physician-patient privilege precludes disclosure of information obtained by a physician in treating a patient in her professional capacity, the privilege is waived when the patient affirmatively places his or her mental or physical condition in controversy (CPLR 3121[a]), as "a party should not be permitted to affirmatively assert a medical condition in seeking damages . . . while simultaneously relying on the [privilege] as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim" (*Dillenbeck v Hess*, 73 NY2d 278 [1989]). The party seeking the privileged information bears the burden of demonstrating that the other party's mental or physical condition is in controversy. (*Budano v Gurdon*, 97 AD3d 497 [1st Dept 2012]).

Here, plaintiff maintains that he is totally and partially disabled from the date of the accident to the present, unable to return to work, and confined to his home except for medical appointments, all of which allegedly resulted from the accident and constitute a change in his abilities and activities from before the accident. Given his diagnosis of and treatment for prostate cancer, the extent of his limitations before and after the accident are in issue, as is his prognosis and ability to work and leave his home in the future. (*See e.g., Rega v Avon Prod., Inc.*, 49 AD3d

329, 330 [1st Dept 2008] [defendants entitled to discovery as to plaintiff's prior injuries as they may have impacted ability to work after most recent accident; plaintiff's allegations of permanent partial disability warranted discovery as to extent, if any, plaintiff's injuries resulted from prior accidents]; *McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479 [1st Dept 2011] [defendants entitled to records to determine extent if any that plaintiff's injuries attributable to other accidents, as plaintiff alleged that he was disabled as result of accident]; *Caplow v Otis El. Co.*, 176 AD2d 199 [1st Dept 1991] [as plaintiff was treated for gout and cellulitis before accident, medical records related thereto might be useful to determine to what extent lost earnings related to those conditions and not to accident at issue]; *McLeod v Metro. Transp. Auth.*, 47 Misc 3d 1219[A], 2015 NY Slip Op 50705 [Sup Ct, New York County 2015] [plaintiff waived physician-client privilege as to entire medical history by seeking damages for lost earnings or lost earning capacity and by pleading "total disability"]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to compel is granted to the extent of directing defendant to produce Abraham Pagan for a deposition within 30 days of the date of this order, and is otherwise denied; it is further

ORDERED, that defendants' cross motion is granted to the extent of directing plaintiff, within 20 days of the date of this order, to provide them with a HIPAA-compliant authorization permitting the release of all medical records related to his prostate cancer diagnosis and treatment; and it is further

ORDERED, that the parties appear for a compliance conference on October 25, 2017, at

2:15 pm, at 60 Centre Street, Room 341, New York, New York.

ENTER:

Barbara Jaffe, JSC

DATED: September 7, 2017
New York, New York