SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

JOSE LUIS MELENDEZ PEDRAZA a/k/a JOSE LUIS MELENDEZ a/k/a JOSE L. PEDRAZA,

Plaintiff,

- against -

Index No. 159366/2013

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and ANGEL RIVERA,

Decision and Order

Defendants.

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on October 26, 2012, at approximately 7:49 a.m., he fell onto the tracks at the Spring Street subway station, and a southbound No. 6 train operated by defendant Angel Rivera struck him. According to plaintiff, he lost his left arm as a result of the incident.

The instant motion and cross motion concern discovery disputes and various objections and directions not to answer made at plaintiff's deposition. Plaintiff moves for an order striking defendants' answer, deeming plaintiff's deposition completed, compelling defendants to produce discovery, and compelling the deposition of the train operator to be held at the office of

plaintiff's counsel. Defendants cross-move for summary judgment and dismissal of the complaint, on the ground that the conduct of plaintiff's counsel at the deposition violated the Uniform Rules for the Conduct of Depositions. Defendants also seek an order compelling plaintiff to appear for a further deposition regarding objections raised at his deposition and to provide responses to defendants' discovery demands dated March 18, 2014 and December 12, 2014.

I.

Prior to the commencement of this action, plaintiff appeared at a hearing to answer questions about the incident. Through a Spanish interpreter, plaintiff testified that, on October 26, 2012, he had been working as a delivery person at La Mia Pizza pizzeria on East 78th Street and First Avenue since the end of August 2012, from Sunday to Friday from 6 p.m. until 2:00 a.m. or 3:00 a.m. (Defendants' Reply Affirm., Ex B [Pedraza Tr.], at 24-26.) Plaintiff also stated that he was working a second Job at Sophie's, from Mondays to Fridays from 12-4 pm, since 2009 until the date of the incident. (*Id.* at 26-28.) According to plaintiff, he did not go back to work since the incident. (*Id.* at 63.)

Plaintiff stated that, on October 26, 2012, he had drunk two beers after he got out of his job at La Mia Pizza, around 5:20 a.m. (*Id.* at 32-33.) Plaintiff

stated that he had boarded the 6 train at the 77th Street subway station, intending to go to Fulton Street, but he got off at the Spring Street station by mistake. (*Id.* at 37.) Plaintiff sat on a bench and waited for the next train. (*Id.* at 42-43.)

Plaintiff testified as follows:

"Q Okay. Can you tell me exactly how your accident happened?

A I heard the noise, I heard the noise of the train. I got up from the benches. I walked to the front. And then I just fell down. I heard the noise and that's all I can remember.

* * *

Q What's the first thing you remember after falling onto the tracks? What, if anything, did you do?

A The only thing I can remember is that I was waiting for the train. I was standing, waiting for the train. I fell down and that's it.

Q Do you remember seeing the train before you were struck?

A No, I can't remember.

Q Do you remember hearing a horn before you were struck?

A No, nothing.

Q Did you hear brakes screeching?

A No.

Q So it's fair to say that you never saw the train before you were struck?

[PLAINTIFF'S COUNSEL]: He said, he doesn't recall.

A When I was laying down on the tracks, the only thing I can remember is listening to the noise. But I never saw the train.

* * *

Q Okay. When you were laying in the tracks, as you said, can you tell me what position you were in? How were you laying in relations [*sic*] to the tracks? Were you laying between the tracks? Were you laying across the tracks? Or something else?

A I can't remember in what position I fell down, but the only thing I can remember was the noise. And when I woke up, I was already in the hospital.

Q Okay. Did anyone ever tell you—withdrawn. So you only remember hearing the train and then you woke up in the hospital; nothing in between that?

A No, nothing.

Q You don't remember being removed from the tracks?

A. No, nothing.

Q. Did anyone ever tell you what happened?

A No.

Q When did you first become aware that you've been involved in this accident?

A Twenty-six days after the incident occurred.

Q And where were you at that time?

A Presbyterian Hospital."

(Pedraza Tr. at 43, 46-47.) Plaintiff testified that his brother Rufino told him that he was initially taken to Bellevue Hospital for four days, and then

transferred to Columbia Presbyterian Hospital "because that's when Sandy hit us. . . ." (*Id.* at 48-49.)

B.

This action was commenced on October 10, 2013. A Request for Judicial Intervention was filed on February 7, 2014. Defendants served a Demand for Authorizations dated March 18, 2014, which sought, among other things, medical records, employment records, and income tax records. (Defendants' Affirm., Ex E.)

A preliminary conference was held on March 27, 2014, and plaintiff agreed to respond to defendants' Demand for Authorizations "within 30 days to the extent not previously provided." (Plaintiff's Affirm., Ex A). In the section of the preliminary conference order concerning medical reports and authorizations, the parties agreed, in relevant part: "Also, plaintiff to provide toxicology reports, which should be included in hospital records to the extent they exist." (*Id.*) The section "Other Disclosure" states, in relevant part:

> "(a) All parties, on or before 5-29-14, shall exchange...photographs, or if none, provide an affirmation to that effect.
> (b) Authorization for plaintiff (s)' employment records for the period —— shall be furnished on or before—— N/A no lost earning claim." (*Id.*)

A compliance conference was held on August 21, 2014. (Plaintiff's Affirm., Ex B.) Defendants agreed, among other things, "to produce event

data recorder data in tabular format at one second intervals to the extent available w/in 30 days. Plaintiff reserves right to make motion re this discovery if not provided in requested format." (*Id.*) Plaintiff agreed to provide "a new authorization for Bellevue Hospital specifying toxicology reports in 30 days. If no toxicology report, Π to provide affirmation stating this." (*Id.*) Plaintiff's deposition was scheduled for October 6, 2014, and depositions of Angel Rivera, the train operator of the train that struck plaintiff, and of Road Car Inspector James Horan were scheduled for October 22, 2014. (*Id.*)

However, it is undisputed that defendants' depositions were started before plaintiff's deposition. Horan's deposition was held on September 16, 2014 (Plaintiff's Affirm. ¶ 6), and that plaintiff's deposition was started on October 22, 2014. It is undisputed that Rivera's deposition did not go forward.

C.

At plaintiff's deposition, plaintiff's attorney objected 59 times (*see* Defendants' Affirm., Ex A [word index of plaintiff's EBT transcript]) and directed plaintiff not to answer eight times. (*See* Plaintiff's EBT, at 7, 11, 15, 16, 17, 19, 20, 38.) Ultimately, plaintiff's deposition was halted when defendants' counsel attempted to question plaintiff about photographs that

were not exchanged in discovery prior to plaintiff's deposition. The transcript states, in relevant part:

"[DEFENDANTS' COUNSEL]: Going to mark something.

(Whereupon, Defendant's Exhibit A through H, photographs, were marked for identification, as of this date.)

[PLAINTIFF'S COUNSEL]: Counselor, have these photographs been previously exchanged?

[DEFENDANTS' COUNSEL]: No.

[PLAINTIFF'S COUNSEL]: Can I take a look at them first?

[DEFENDANTS' COUNSEL]: You can take a look at them first (handing). I request that you do not speak to your client about the photos before he looks at them.

[PLAINTIFF'S COUNSEL]: Can we take a break while I speak to my client and take a look?

[DEFENDANTS' COUNSEL]: No.

[PLAINTIFF'S COUNSEL]: You can't—

[DEFENDANTS' COUNSEL]: Now you are going to prep him before he even looks at them.

[PLAINTIFF'S COUNSEL]: I'm going to look at—absolutely I am.

[DEFENDANTS' COUNSEL]: You're not allowed to do that.

[PLAINTIFF'S COUNSEL]: I'm allowed to talk to my client. There is no question pending. There is no question pending. We're going to take a break and I'm going to speak to my client.

[DEFENDANTS' COUNSEL]: Why don't you speak to your client before he has a chance to look at the pictures? He has to say whether or not he recalls this location. You don't have to coach him on that issue.

[PLAINTIFF'S COUNSEL]: I'm not coaching. You've never exchanged these photographs before.

[DEFENDANTS' COUNSEL]: I don't have to. We didn't even have a deposition before. You've never exchanged any photographs either.

[PLAINTIFF'S COUNSEL]: Have we served a demand for photographs? Yes.

[DEFENDANTS' COUNSEL]: We have, as well, and you have not exchanged anything. In fact, just this week I received for the first time an authorization for medical records.

[PLAINTIFF'S COUNSEL]: You have not exchanged these before.

[DEFENDANTS' COUNSEL]: I'm going to object to this, right now, this behavior of attorney and client taking a break in the middle of my Examination Before Trial, when I have photos that's [*sic*] I'm going to show him, because you are going to now coach him as to how he should answer. And that is inappropriate and that is against the rules.

So do you want to call a judge before you do this? Let's call the judge. I think it's inappropriate.

[PLAINTIFF'S COUNSEL]: You call the judge.

[DEFENDANTS' COUNSEL]: Let's call a judge before you go out to talk to your client.

[PLAINTIFF'S COUNSEL]: You call the judge and I'm going to—

[DEFENDANTS' COUNSEL]: No. This is inappropriate what you're doing. I want a judge to state whether or not you are allowed to do this. You said you wanted to look at them, I said sure you can look at them but now you are saying something else.

[PLAINTIFF'S COUNSEL]: Let's go.

[DEFENDANTS' COUNSEL]: You are not allowed to do this. I want to get a judge to decide whether you are allowed to coach him before he even looks at the pictures. So let me get a judge now.

[PLAINTIFF'S COUNSEL]: So call the judge.

[DEFENDANTS' COUNSEL]: Why do you think your client can go with you? It's inappropriate for your client to go with you.

[PLAINTIFF'S COUNSEL]: No, it's not.

[DEFENDANTS' COUNSEL]: It is. Why do you need your client to go outside while I call the judge?

[PLAINTIFF'S COUNSEL]: Because he is my client.

[DEFENDANTS' COUNSEL]: Your client needs to sit here until we get a ruling on whether you are allowed to do this or not.

[PLAINTIFF'S COUNSEL]: You can go get the judge.

[DEFENDANTS' COUNSEL]: You are not allowed to do this.

[PLAINTIFF'S COUNSEL]: Yes, I am.

[DEFENDANTS' COUNSEL]: I have to tell my boss and I'm going to state on the record that this is completely inappropriate what the plaintiff's attorney is doing is inappropriate and I'm asking the plaintiff's attorney to not do this because it's inappropriate and goes against the Rules of Evidence, the Rules

of Discovery, the rules that are general regarding depositions, and he is going to disregard any instructions that I have given the client. And I'm going to call the judge in the meantime. I can't force your client to sit here. This is inappropriate.

(Whereupon a recess was taken.)

[DEFENDANTS' COUNSEL]: I'm going to state on the record, we are busting this deposition because the plaintiff's attorney's counsel's [*sic*] refusal to allow his client to look at photographs that are crucial to litigation in this matter.

[PLAINTIFF'S COUNSEL]: Actually, no, that is not—

[DEFENDANTS' COUNSEL]: Okay—

[PLAINTIFF'S COUNSEL]: First of all, those are now exhibits and I want copies of those exhibits.

[DEFENDANTS' COUNSEL]: Of course you'll have them. I'm not going to do that now. You are not allowed to do what you just did and I said it on the record. I am not sitting down. I have instructions from my boss to bust the deposition. I said it clearly beforehand, and you still refused. You went outside with your client with the photos.

[PLAINTIFF'S COUNSEL]: Are you done?

[DEFENDANTS' COUNSEL]: What do you mean, 'am I done?'

[PLAINTIFF'S COUNSEL]: Can I talk now?

[DEFENDANTS' COUNSEL]: Did you get all of that, Elia?

THE COURT REPORTER: Yes.

[PLAINTIFF'S COUNSEL]: Let the record reflect that counsel has admitted on the record that those photographs have not been previously exchanged. Pursuant to the Rules of

Evidence, we made a demand for all photographs. Counsel did not respond to that demand. Counsel now shows up at the deposition with photographs and for some reason believes that she is entitled to spring them on the plaintiff without the plaintiff having any opportunity to discuss it with the attorney, which I have never heard of in my life. The client has an attorney, has the right to speak with the attorney at anytime, unless there is a pending question. There is no pending question.

Those photographs have now been marked as exhibits. I demand that I get copies of them now before I leave here today.

I object to your busing [*sic*] the deposition. The client is here. He is ready, willing, and able to testify.

I am now deeming that this deposition is closed and that you don't want to keep going with it. We'll stay here. I'll stay here another five, ten minutes. If you don't want to come back and continue the deposition then the deposition is over. We will not voluntarily produce the client again for a deposition since he is ready, willing, and able to go forward. Even if you have an objection to the photographs you can mark this for a ruling and we can continue and we can revisit the issue with the photographs later with a judge.

But in terms of him being here today, he is ready, willing, and able to go forward with this deposition and if you are going to bust it, then we are going to deem this waived and we are not going to voluntarily produce Mr. Melendez Pedraza again."

[DEFENDANTS' COUNSEL]: Are you done?

[PLAINTIFF'S COUNSEL]: Yes.

[DEFENDANTS' COUNSEL]: I've stated my objection. I've stated it very clearly before this deposition concluded. I said you are not permitted to coach your client. I'm showing him photos of the location. These are just photos of the location. These are not photos of the location at the time of the accident on the date or the time. These are photos that were taken of the accident

> location. And I wanted to know whether or not the plaintiff recalls the location of the accident. That was it. He could have answered 'yes' or 'no'.
>
> You refused to listen to the question. You refused to allow your client to answer. You refused to sit and let your client look at the photos in the presence of the reporter and the interpreter. And you refused to even ask for a judge to decide the issue. You left the room with your client, with the photos and refused to allow him to even look at them in the presence of us.
>
> And now this deposition is not being waived. This deposition is being defected based on your failure to abide by the Rules of Evidence and the Rules of Discovery."

(Pedraza EBT, at 72-80.) Plaintiff's deposition was halted at 1:41 p.m., two hours and 24 minutes after it started. (*Id.* at 84.)

D.

After plaintiff's deposition, defendants served a demand for discovery dated December 12, 2014, which reiterated defendants' prior demands dated March 8, 2014 for authorizations to obtain plaintiff's medical records, employment records, and income tax records. (Defendants' Affirm., Ex F.) Defendants also requested a new authorization to obtain records from New York Presbyterian Hospital, a copy of plaintiff's passport and birth certificate, and

> "a Due Response to all questions objected to at plaintiff's partial deposition held on October 22, 2014 from pages 5, 7, 8, 10, 11, 13, 18, 13 [*sic*], 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 47, 50, 51, 56, 58, 62, 66, 70, 71 of plaintiff's deposition transcript."

(*Id.*)

Plaintiff now moves for an order striking defendants' answer, deeming plaintiff's deposition completed, compelling defendants to produce discovery, and compelling the deposition of the train operator to be held at the office of plaintiff's counsel. Defendants cross-move for summary judgment and dismissal of the complaint, on the ground that the conduct of plaintiff's counsel at the deposition violated the Uniform Rules for the Conduct of Depositions. Defendants also seek an order compelling plaintiff to appear for a further deposition regarding objections raised at his deposition and to provide responses to defendants' discovery demands dated March 18, 2014 and December 12, 2014.

By interim order dated January 30, 2015, this Court lifted the automatic stay of discovery triggered by defendants' cross motion. The order states, in relevant part: "Because the ground for summary judgment and dismissal is in the nature of a discovery dispute, the automatic stay of discovery triggered by defendants cross motion is lifted, so that discovery is not stalled while the parties are waiting for a decision."

II.

The Court addresses defendants' cross motion first.

A.

The branch of defendants' cross motion seeking summary judgment dismissing plaintiff's complaint is denied. Defendants have not set forth any legal or factual arguments demonstrating, as a matter of law, that defendants may not be held liable for the incident. Rather, defendants' arguments appear to be based on alleged violations of the Uniform Rules for the Conduct of Deposition, which is in the nature of a discovery sanction.

B.

The Court now turns to the branch of defendants' motion to compel plaintiff to comply with discovery demands dated March 18, 2014 and December 12, 2014.

Plaintiff provided authorizations for the release of plaintiff's entire medical record from October 26, 2012 to the present, for Bellevue Hospital at "462 First Ave, New York, NY 10016" and for New York Presbyterian Hospital, at "722 West 168th Street, New York, NY 10032"[1] (Plaintiff's Opp.

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[1] Defendants' counsel claims that the authorization provided for New York Presbyterian was made to an incorrect address, that it should have been 525 East 68th Street, New York, NY 10065. (Defendants' Reply Affirm. ¶ 23.) It is true that plaintiff previously provided an authorization for New York Presbyterian Hospital, at 525 East 68th Street. (Plaintiff's Affirm., Ex C.)

However, plaintiff testified at his statutory hearing that, after Bellevue Hospital, he was taken to "the one that's is [*sic*] located on 168, Columbia Presbyterian." (Pedraza Tr., at 54.) Plaintiff did not testify that he was taken to New York-Presbyterian/Weill Cornell Medical Center on East 68th Street. Defendants have not otherwise shown that the

Affirm., Ex B), which were demanded in items 1 and 2 of defendants' Demand for Authorizations dated March 18, 2014, and in item 1 of defendants' Demand for Discovery dated December 12, 2014, which reiterated defendants' demand for Bellevue medical records. On these authorizations, plaintiff also initialed the section of box 9(a) for the release of Alcohol/Drug Treatment records.

Defendants indicate that plaintiff agreed at the August 21, 2014 court conference to provide "a new authorization for Bellevue Hospital specifying toxicology reports in 30 days. If no toxicology report, Π to provide affirmation stating this." (Defendants' Affirm., Ex J.)[2] To the extent that the parties meant that plaintiff should have written, "Other: all toxicology reports" in box 9(a) of the authorization providing for the release of the entire medical record, this was not done. Therefore, plaintiff is directed to provide a new authorization

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authorization that plaintiff subsequently provided for New York Presbyterian Hospital was made to an incorrect address. (*See* Plaintiff's Opp. Affirm., Ex B.)

[2] Plaintiff did not specifically agree to provide toxicology reports from Columbia Presbyterian Hospital, although the preliminary conference order states, "plaintiff to provide toxicology reports, which should be included in hospital records to the extent they exist." (Plaintiff's Affirm., Ex A.)

To the extent that defendants are looking for toxicology reports about plaintiff's blood alcohol level on the date of the incident, the Court notes that plaintiff testified at his statutory hearing that his brother told him that plaintiff was transferred to Columbia Presbyterian four days after he had been brought to Bellevue hospital. (Pedraza Tr., at 50.)

for the release of records from Bellevue Hospital, and box 9(a) of the authorization shall specifically state "Other: all toxicology reports."

Plaintiff's objections to items 3, 4, and 8 of defendants' Demand for Authorizations dated March 18, 2014, and items 4, 5, 8 of defendants' Demand for Discovery dated December 12, 2014 are sustained. These demands sought authorizations to obtain plaintiff's employment records from Sophie's Restaurant and La Mia Restaurant, and an authorization to obtain plaintiff's income tax returns for three years prior to and including October 26, 2012. Plaintiff's counsel clearly indicated that at the preliminary conference that plaintiff is not seeking lost earnings. Defendants claim that the records are necessary to verify that plaintiff returned to work when he said he did. (Defendants' Reply Affirm. ¶ 25).

Plaintiff's objection to his employment records is overruled. However, discovery as to personal tax returns is disfavored, and defendants have not demonstrated that the information contained in plaintiff's personal tax returns "is indispensable to this litigation and unavailable from other sources." (*Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 209 [1st Dept 1997].)

Defendants are entitled to a copy of the information page of plaintiff's passport, which contains plaintiff's name, and a copy of plaintiff's birth

certificate. Plaintiff testified at his deposition that he has a passport, and that that he is not a United States citizen. (Pedraza EBT, at 5, 7.) The passport and birth certificate bear on the issue of plaintiff's identity and known aliases, if any. Plaintiff commenced the action as "Jose Luis Melendez Pedraza a/k/a Jose Luis Melendez a/k/a Jose L. Pedraza", but plaintiff testified at his statutory hearing that his name was "Jose Luis Melendez" and denied that he was known by any other name, except as "Jose Melendez." (Pedraza Tr. at 5.) At his deposition, plaintiff stated that his birth certificate listed his name as "Jose Luis Melendez Pedraza." (Pedraza EBT, at 5.)

Defendants are not now entitled to an order compelling plaintiff to provide an authorization for the release of pharmacy records, where were demanded in item 6 of defendants' Demand for Authorizations dated March 18, 2014, and again as item 6 of defendants' Demand for Discovery dated December 12, 2014. Plaintiff's counsel represented that plaintiff did not fill any pharmacy prescriptions resulting from this incident. (Plaintiff's Opp. Affirm. ¶ 16.) In response, defendants point out that plaintiff testified at his statutory hearing that he spent $100 out of pocket for medication. (Pedraza Tr., at 64.) However, defendants did not ask plaintiff if the medication he paid for out of pocket was prescription medication or over-the-counter medication. Neither was plaintiff asked where he had purchased those medications. On

the contrary, plaintiff testified at his statutory hearing that when he was discharged from Columbia Presbyterian Hospital and Bellevue Hospital, he was not given prescriptions for any medications. (Pedraza Tr., at 61-62.)

"Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition" (*Forman v Henkin*, ___ AD3d ___, 2015 WL 9115509 *1, 2015 NY App Div LEXIS 9353, 3 [1st Dept 2015] [internal quotation marks and citations omitted].) Defendants have not demonstrated a basis to compel plaintiff to provide an authorization for pharmacy records for medication that plaintiff asserts he was not prescribed. Defendants may renew their demand if hospital or medical records reveal that plaintiff was, in fact, prescribed medication for use out of the hospital.

Plaintiff has complied with defendants' remaining discovery demands. Plaintiff's counsel provide an authorization for the release of an plaintiff's Medicaid records, as demanded in item 5 of defendants' Demand for Authorizations dated March 18, 2014. In reply, defendants' counsel did not deny that the authorization was sent.

Plaintiff's counsel claims to have provided an authorization for the release of an ambulance call report from Transcare, in response to item 7 of defendants' Demand for Authorizations dated March 18, 2014, and item 7 of defendants' Demand for Discovery dated December 12, 2014. (Plaintiff's

Opp. Affirm., Ex B.) Plaintiff's counsel did not submit a copy of the actual authorization in his opposition papers, but defendants' counsel did not deny in reply that the authorization was sent.

C.

The Court now turns to the branch of defendants' motion concerning the objections raised at plaintiff's deposition, to be followed by a discussion of the conduct of the parties' counsel at the deposition.

"[T]he scope of examination on deposition is broader than what may be admissible on trial." (*White v Martins*, 100 AD2d 805, 805 [1st Dept 1984]; *cf. Orner v Mount Sinai Hosp.,* 305 AD2d 307, 309 [1st Dept 2003] ["the evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself"].) "In conducting depositions, questions should be freely permitted 'unless a question is clearly violative of a witness' constitutional rights, or of some privilege recognized in law, or is palpably irrelevant.'" (*Barber v BPS Venture, Inc.*, 31 AD3d 897 [3d Dept 2006] [citation omitted]; *Freedco Prods. v New York Tel. Co.*, 47 AD2d 654 [2d Dept 1975]; *see O'Neill v Ho*, 28 AD3d 626, 627 [2d Dept 2006].)

In 2006, the Uniform Rules for Trial Courts were amended to add Part 221, also known as the Uniform Rules for the Conduct of Depositions. Part 221 was designed to combat obstructive behavior during a deposition. 22

NYCRR 221.1 permits objections only with regard to those that would be waived if not interposed, pursuant to CPLR Rule 3115.[3] Section 221.2 requires a deponent to answer all questions, except to preserve a privilege or right of confidentiality or when the question is plainly improper and would, if answered, cause significant prejudice to any person. Section 221.2 further prohibits an attorney from directing a deponent not to answer, except in certain circumstances.[4]

1.

Plaintiff was directed by counsel not to answer eight times. (*See* Plaintiff's EBT, at 7, 11, 15, 16, 17, 19, 20, and 38.[5])

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[3] Section 221.1 provides, in pertinent part:

> "(a). Objections in general....All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.
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> (b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent....Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning."

[4] Section 221.2 states, in relevant part: "An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefore."

[5] According to defendants' counsel, plaintiff's counsel directed his client not to answer on page 72 of the transcript. (Defendants' Reply Affirm. ¶ 8.) Page 72 does not contain

The Court agrees that the following directions to plaintiff not to answer questions at his deposition were improper under 22 NYCRR 221.2, and are overruled: Page 15:24-25; Page 17:20-21. Nevertheless, the Court finds that plaintiff answered those questions sufficiently despite the directions not to answer, and therefore plaintiff does not have to be produced again to respond to those questions.

Plaintiff was improperly directed not to answer whether he has a Social Security number (Pedraza EBT, at 7:14-17.) Providing a Social Security number to defendants is reasonably calculated to lead to admissible evidence as to the issues of this action.[6] In addition, plaintiff was improperly directed not to answer a question requesting his phone number on the date of the accident. (*Id.* at 11:25-12:3). Although the question seems plainly irrelevant as to how plaintiff came to fall upon the tracks, the Court discerns no significant prejudice to plaintiff in answering the question. Therefore, plaintiff must appear at a further deposition to answer these questions.

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a direction from plaintiff's counsel not to answer a question. (Defendants' Affirm., Ex C [Pedraza EBT], at 72.)

[6] Plaintiff's counsel argues that plaintiff's Social Security number is irrelevant because he is not seeking lost earnings. (Plaintiff's Opp. Affirm. ¶ 11 [a].) However, the Social Security number is useful, for example, in searching for plaintiff's medical records and determining the amount of plaintiff's Medicaid lien.

Plaintiff was improperly directed not to answer whether he has a green card (Pedraza EBT, at 19:18-20:5), and whether he files income taxes. (*Id.* at 38:15-17.) The objections and directions not to answer were improper because plaintiff's counsel did not provide a clear, succinct basis for the directions not to answer, such as a privilege, right of confidentiality, or constitutional right that would be violated. (22 NYCRR 221.2.) Therefore, plaintiff shall answer these questions at further deposition, but these questions are subject to any assertions of privilege, right of confidentiality, or constitutional right.

Plaintiff was directed not to produce for inspection the Metrocard he used to travel to the deposition. This direction is sustained. (*See* Pedraza EBT, at 16.) The request was plainly irrelevant. Although the plaintiff would not have been significantly prejudiced had he produced the Metrocard, such questioning constitutes harassment.

2.

As discussed above, plaintiff's attorney objected 59 times at plaintiff's deposition. Many of these objections do not appear to be based on form, but rather based on relevance. Defendants' counsel suggests that this Court "instruct plaintiff's counsel...that relevancy are not grounds for objections." (Defendants' Reply Affirm. ¶ 12.)

It is not appropriate for the Court to rule on questions in advance; neither is it appropriate to direct that plaintiff must answer every question for which an objection based on relevance is raised. "Rulings on the propriety of deposition questions should only be made once a specific question has been asked and its answer refused." (*Eliali v Aztec Metal Maintenance Corp.*, 287 AD2d 682, 682 [2d Dept 2001].)

It does not avail plaintiff's attorney to argue that plaintiff was permitted to respond to questions over objection. The 2003 and 2005 Reports of the Advisory Committee on Civil Practice in support of the Uniform Rules for the Conduct of Depositions state, "The proposed regulation would go further and provide that objections that are not required to be made, *should not be made during depositions*." (2003 Report of the Advisory Comm. on Civil Practice, https://www.nycourts.gov/ip/judiciaryslegislative/pdfs/CivilPractice_03.pdf at 175 [accessed Jan. 18, 2016]; 2005 Report of the Advisory Comm. on Civil Practice, https://www.nycourts.gov/ip/ judiciaryslegislative/pdfs/CivilPractice _05.pdf, at 91 [accessed Jan. 18, 2016] [emphasis supplied].) Thus, the Uniform Rules for the Conduct of Depositions do not permit a practice of placing relevance-based objections for the purpose of "marking" or "flagging" a deposition transcript should it be later used in motion practice or at trial.

That being said, the Uniform Rules for the Conduct of Depositions was not intended to be used as a weapon to harass an adversary's witness. One should not knowingly ask irrelevant questions at a deposition simply because objections based on relevance are not permitted at a deposition, or that the witness must answer in the absence of significant prejudice. Here, defendants' counsel asked many questions that seem irrelevant, such as when plaintiff's wife came to the United States; the color of plaintiff's hair; the Metrocard he used to come to the deposition; how plaintiff got to the Medicaid Office in Queens; if plaintiff ever served in the military in Mexico. (Pedraza EBT, at 10, 11, 13, 18, 21.) Defendants' counsel asked plaintiff how much he earned per week (*Id.* at 35), even though plaintiff does not seek lost earnings.

The conduct of the parties' counsel warrants time limits to be placed upon the completion of plaintiff's deposition. It is apparent to the Court that irrelevant questions posed by defendants' counsel prompted plaintiff's counsel to object repeatedly on grounds that were not based on form or privilege, as an attempt to halt the questioning on irrelevant matters. Imposing time limits upon defendants' completion of plaintiff's deposition will necessarily focus the questioning of plaintiff to relevant matters. At the same

time, plaintiff's counsel must be discouraged from raising objections that are not permitted under the Uniform Rules for the Conduct of Depositions.

Thus, the Court will set a time limit of five hours for defendants to completion plaintiff's deposition, not including any breaks taken.[7] If plaintiff's counsel raises an impermissible objection at the deposition, then defendants will be granted an additional 15 minutes to complete plaintiff's deposition for each such impermissible objection. An impermissible objection is an objection:

> (1) for which no ground is stated;
> (2) not based on a ground under CPLR 3115 (b), (c), or (d); or
> (3) a direction to plaintiff not to answer, where either (a) no privilege or right of confidentiality is invoked, or (b) the question is plainly improper, but plaintiff or his counsel does not state on the record that answering the question will cause him significant prejudice.

Any disagreements about whether defendants are granted additional time, or the amount of additional time, may be addressed at a future compliance or status conference, provided that a transcript of plaintiff's further deposition is brought to the conference.

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[7] The time limits on the completion of plaintiff's deposition will not apply to any cross examination taken by plaintiff's counsel.

3.

The Court now turns to the question of whether plaintiff's counsel was permitted to take a break in order to confer with plaintiff, when defendants' counsel produced photographs that had not been previously disclosed.

CPLR 3113 (c) states, "The examination and cross-examination of deponents proceeds as permitted in any trial in open court." 22 NYCRR 221.3 states, "An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules...."

Plaintiff's counsel expressly stated that he wanted a break for the purpose of communicating with plaintiff, and defendants' counsel did not consent to the break:

> "[Plaintiff's counsel]: Can we take a break while I speak to my client and take a look?
>
> [Defendants' counsel]: No.
>
> [Plaintiff's counsel]: You can't—
>
> [Defendants' counsel]: Now you are going to prep him before he even looks at them.
>
> [Plaintiff's counsel]: I'm going to look at—absolutely I am.

> [Defendants' counsel]: You're not allowed to do that.
> [Plaintiff's counsel]: I'm allowed to talk to my client. There is no question pending. We're going to take a break and I'm going to speak to my client."

(Pedraza EBT, at 72-73.) Plaintiff's counsel believed he was entitled to take a break in the deposition to confer with his client because no question was pending. Although this might have been permissible at trial, the issue presented is whether Rule 221.3's prohibition on breaks to confer with one's client applies only to interruptions made while a question is pending.[8]

Rule 221.3 provides that breaks taken for the purpose of communicating with a client are permissible in only two circumstances: either (1) upon consent, or (2) for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2. The latter

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[8] By comparison, Rule 30.4 of the Local Civil Rules for the federal district courts in the Eastern and Southern Districts of New York specifically states, "An attorney for a deponent shall not initiate a private conference with the deponent *while a deposition question is pending*, except for the purpose of determining whether a privilege should be asserted." (Lcoal Rules of the United Sates District Courts for the Southern and Eastern Districts of New York, https://img.nyed.uscourts.gov/files/local_rules/localrules.pdf [accessed January 18, 2016] [emphasis supplied]; *Few v Yellowpages.com, LLC*, 2014 WL 3507366, at *1 [SD NY 2014] ["The rules of this Court do not limit discussions between counsel and client during a deposition other than when a question is pending"].)

Compare *Hall v Clifton Precision,* 150 FRD 525 (ED Penn 1993) ("A lawyer and client do not have an absolute right to confer during the course of the client's deposition.") with *In re Stratosphere Corp. Sec. Litig.,* 182 FRD 614, 621 (D Nev 1998) ("This Court is not aware of any cases, at least in the Ninth Circuit, which precludes counsel from speaking to his or her client/witness during recesses called by the court during trial or during regularly scheduled recesses of depositions.")

implies that a question must be pending; the former does not, and the two circumstances are written in the disjunctive in Rule 221.3. The 2003 and 2005 Reports of the Advisory Committee on Civil Practice in support of the Uniform Rules for the Conduct of Depositions identically state, "[S]ome attorneys claim a right to consult with the client-deponent during questioning so as to coach the deponent whenever the questioning turns inconvenient." (2003 Report of the Advisory Comm. on Civil Practice, https://www.nycourts.gov/ip/judiciaryslegislative/pdfs/CivilPractice_03.pdf at 174 [accessed Jan. 18, 2016]; 2005 Report of the Advisory Comm. on Civil Practice, https://www.nycourts.gov/ip/judiciaryslegislative/pdfs/CivilPractice_05.pdf, at 90 [accessed Jan. 18, 2016].) The 2003 and 2005 Reports state that 221.3 was intended to address this abuse, which "would prohibit an attorney from interrupting a deposition to communicate with a deponent, except under similar narrow circumstances." (*Id.* at 176; *id.* at 92.) Thus, Rule 221.3 apparently prohibits the very type of interruption that plaintiff's counsel sought at plaintiff's deposition.

However, the Court recognizes that plaintiff's counsel requested a break in the deposition because defendants' counsel wished to depose plaintiff about photographs that were not previously produced before plaintiff's scheduled deposition. The deposition transcript appears to

indicate that defendants' counsel believed that defendants had no obligation to disclose these photographs in advance and thus supplement defendants' prior disclosure of photographs, because defendants had not received any discovery from plaintiff's counsel:[9]

> "[PLAINTIFF'S COUNSEL]: I'm not coaching. You've never exchanged these photographs before.
>
> [DEFENDANTS' COUNSEL]: *I don't have to. We didn't even have a deposition before. You've never exchanged any photographs either.*
>
> [PLAINTIFF'S COUNSEL]: Have we served a demand for photographs? Yes.
>
> [DEFENDANTS' COUNSEL]: *We have, as well, and you have not exchanged anything.* In fact, just this week I received for the first time an authorization for medical records.

(Pedraza EBT, at 73 [emphasis supplied].) Defendants' counsel downplays the noncompliance, claiming the eight photographs marked for identification "were almost identical to those previously exchanged." (Defendants' Affirm. ¶ 26.)

The Uniform Rules for the Conduct of Depositions may not be used as a sword to achieve a tactical advantage. Under the circumstances, neither

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[9] "A party may not fail to comply with [pretrial discovery orders] without consent of his adversary or an appropriate court stay." (*Pan Am. Trade Dev. Corp. v Black Diamond S.S. Corp.*, 28 AD2d 841, 841 [1st Dept 1967].)

side is entitled to sanctions against the other based on the conduct of counsel at plaintiff's deposition. However, both sides are strongly cautioned to conduct the continued deposition according to the law and court rules and to avoid "scorched earth" tactics. In the event of a disagreement, counsel shall promptly telephone for judicial guidance.

III.

Turning to plaintiff's motion, plaintiff seeks an order: (1) striking defendants' answer; (2) deeming plaintiff's deposition completed; (3) compelling defendants to produce data downloaded from the train's event recorder to be produced in tabular form, at one second-intervals; and (4) compelling the deposition of the train operator to be held at the office of plaintiff's counsel.

The basis of the branch of plaintiff's motion to strike defendants' answer is that defendants ambushed plaintiff at his deposition. Plaintiff's counsel also maintains that defendants failed to comply with a court order to produce event recorder data in tabular form, as per a so-ordered stipulation dated August 21, 2014, and a CD containing record statements of the train operator.

The "drastic relief [to strike the answer] was not warranted as a sanction for obstreperous conduct at a single deposition session." (*O'Neill v*

Ho, 28 AD3d 626, 627 [2d Dept 2006].) Neither is it appropriate to deem plaintiff's deposition completed. As discussed above, both sides bear responsibility for the breakdown that lead to the suspension of plaintiff's deposition.

As to the discovery of the event recorder data in tabular form and the recorded statements of the train operator,

> "it is well settled that the drastic remedy of striking a party's pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad faith. Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses."

(*Henderson-Jones v City of New York*, 87 AD3d 498, 504 [1st Dept 2011] [internal citation and quotation marks omitted].)

Here, the oral statements by Train Operator, Angel Rivera, were, in fact, on the CD. The so-ordered stipulation dated August 21, 2014 directed defendants "to produce event data record data in tabular format at one second intervals *to the extent available* w/in 30 days." (Plaintiff's Affirm., Ex B [emphasis added].) Pradeep Kumar, a Superintendent at the Pelham Maintenance Shop, which is responsible for the inspection and maintenance of # 6 trains, states that the event recorder data is not available in tabular format. Kumar states, "After a diligent search, I was informed the information

was no longer available most likely due to repairs to the laptop, or that the software may have been updated or corrupted which may have caused the loss of information." (Defendants' Affirm., Ex K [Kumar Aff.] ¶ 9.) The fact that defendants have provided event recorder data in tabular format in other cases does not establish that, in this case, defendants willfully failed to produce the data in the format demanded.

The branch of plaintiff's motion to compel the deposition of Angel Rivera, the train operator, at the offices of plaintiff's counsel is denied. CPLR 3110 (3) provides that a deposition within the state on notice shall be taken:

> "when the party to be examined is a public corporation or any officer, agent or employee thereof, within the county in which the action is pending; the place of such examination shall be the office of any of the attorneys for such a public corporation or any officer, agent or authorized employee thereof unless the parties stipulate otherwise.
>
> For the purpose of this rule New York city shall be considered one county."

Under General Construction Law § 66, a "public corporation" includes a "public benefit corporation." The New York City Transit Authority (NYCTA) is a statutorily created public benefit corporation. Public Authorities Law § 1201 (1). It is undisputed that Rivera is a NYCTA employee. The offices of Lawrence Heisler, Esq., who is counsel to the NYCTA, are located at 130 Livingston St, Brooklyn, NY 11201. Because the action is pending in New

York City, defendants are entitled to have Rivera's deposition held at this location under CPLR 3110 (3).

The remainder of plaintiff's motion is to compel defendants to produce the photographs shown to plaintiff for the first time at his deposition. Defendants' counsel has disclosed these photographs. (Defendants' Affirm., Exs H, I.)

Therefore, plaintiff's motion to strike defendants' answer and for other relief is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' cross motion is granted in part as follows:

(1) plaintiff shall appear for a further examination before trial within 45 days;

(2) defendants are permitted to ask, and plaintiff is directed to answer, the following questions:

(a) "Do you have a Social Security number?"

(b) "What was your phone number on the date of the accident?"

(c) "Do you have a green card?" (subject to an assertion of privilege, right of confidentiality, or constitutional right)

(d) "Do you file income taxes?" (subject to an assertion of privilege, right of confidentiality, or constitutional right)

(3) defendants shall have 5 hours to complete plaintiff's deposition;

(4) any objections to questions on the grounds of form or privilege must be clearly and succinctly (*e.g.*, "Objection as to form"). Should plaintiff's counsel raise an impermissible objection, then defendants shall be granted an additional 15 minutes to complete plaintiff's deposition for each such impermissible objection; and it is further

ORDERED that, in response to defendants' demand for authorizations dated March 18, 2014, plaintiff shall provide, within 30 days:

(1) a duly executed HIPAA-compliant authorization to obtain all of plaintiff's medical records from Bellevue Hospital for the period of October 26, 2012 to present, which shall specify "Other: all toxicology reports" in box 9 (a) of the authorization;

(2) an authorization for the release of all of plaintiff's employment records from Sophie's Restaurant at 1805 Third Avenue, New York, New York;

(3) an authorization for the release of all of plaintiff's employment records from La Mia Restaurant at 78th Street and 1st Avenue, New York, New York;

(4) a copy of plaintiff's birth certificate;

(5) a copy of the identification page of plaintiff's passport; and it is further

ORDERED that defendants' cross motion is otherwise denied.

Dated: January 10, 2016
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN