Statland v Silverman
2006 NY Slip Op 30815(U)
October 13, 2006
Supreme Court, New York County
Docket Number: 116404/05
Judge: Eileen Bransten

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

HOWARD STATLAND,

Plaintiff,

-against-

DAVID SILVERMAN and MARK EBERLE,

Defendants.

----------X

Index No. 116404/05
Motion Date: 10/3/06
Motion Seq. No.: 01

PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 3124 and 3110, defendants David Silverman ("Dr. Silverman") and Mark Eberle ("Dr. Eberle") (collectively "Defendants") move to compel plaintiff Howard Statland ("Mr. Statland"), to appear for a continued examination before trial and "respond properly and fully to any inquiry which flows naturally from the blocked questions [posed at his initial deposition]." Order to Show Cause, at 1. Defendants alternatively seek an Order precluding Mr. Statland "from claiming any damages with respect to 'emotional, psychological and mental distress' as alleged in the Bills of Particulars. Order to Show Cause, at 2.

Background

In this medical malpractice action, Mr. Statland alleges that "defendants failed to timely diagnose and properly treat an infection of [his] knee." Affirmation in Opposition ("Opp."), at ¶ 5. Consequently, Mr. Statland maintains that he "sustained serious personal injuries, including multiple hospitalizations and surgeries, joint damage, septic

right knee, joint fibrosis, joint inflammation, premature arthritis, multiple aspirations and need for future knee joint and bone replacement." Opp., at ¶ 5. In his Bill of Particulars, Mr. Statland further sets forth that as a result of Defendants' malpractice he suffered "emotional, psychological and mental distress." Affirmation in Support ("Supp."), Ex. D, Bill of Particulars, at ¶ 19.

On July 21, 2006, Mr. Statland was deposed. Supp., at ¶ 6. At his deposition, he was asked if he had ever been treated by a mental healthcare professional--a psychologist, psychiatrist, social worker or "anything relating to mental health." Supp., Ex. F. Mr. Statland responded: "I have a psychologist." *Id.* (emphasis added). Defense counsel followed up by asking for the psychologist's name. Plaintiff's counsel objected and instructed his client not to answer the question. *Id.*

Defendants now move for an Order compelling Mr. Statland to appear for a further deposition and answer the question that was blocked and any follow-up questions so that they may be afforded an opportunity "to prepare a complete and intelligent defense and to prevent undue prejudice." Supp., at ¶ 15. Defendants assert that the information sought is not protected by the physician/patient privilege because commencement of this medical malpractice action waives any protection. Supp., at ¶ 14.

Mr. Statland vigorously opposes the motion, arguing that it would be an "assault [on his] right of privacy for this Court to require the plaintiff to waive a privilege that

courts traditionally consider particularly private * * * and expose his most intimate and clearly unrelated emotional world that may encompass very private relationships with parents, siblings and partners." Opp., at ¶ 6. Mr. Statland maintains that the allegations of "emotional, psychological and mental distress" in his Bill of particulars "are intended to be limited to the natural and emotional sequelae of his physical injury, namely his 'loss of enjoyment of life' and pain and 'suffering.'" *Id.*, at ¶ 8. To clarify the issue and eliminate any misunderstanding, plaintiff "stipulates to the modification of the bill of particulars by withdrawing the allegation of 'emotional, psychological and mental distress' as set forth in the Bill of Particulars and amending the claim to read: 'the natural emotional sequelae of the alleged physical injuries.'" *Id.*

Analysis

CPLR 3101 mandates that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has explained that the words "material and necessary" are to be liberally construed "to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason," *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406–07 (1968), and the "CPLR requires the disclosure of all evidence relevant to the case and *all*

information reasonably calculated to lead to relevant evidence." *See,* Siegel, New York Prac. § 344, at 525 (3d ed.) (emphasis added).

Consistent with this liberal standard for disclosure, the scope of permitted questioning at a deposition is broad. *White v. Martins*, 100 A.D.2d 805 (1st Dept. 1984) (scope of examination at deposition is broader than what may be admissible at trial); *see also*, *Orner v. Mount Sinai Hosp.*, 305 A.D.2d 307, 309-10 (1st Dept. 2003). Indeed, *all* questions asked at a deposition are to be answered unless they are "clearly violative of a witness's constitutional rights, or of some privilege recognized in law [or are] palpably irrelevant." *Roggow v. Walker*, 303 A.D.2d 1003, 1004 (4th Dept. 2003); *see also*, *Dibble v. Consolidated Rail Corp.*, 181 A.D.2d 1040 (4th Dept. 1992); *Freedco Prods., Inc. v. New York Telephone Co.*, 47 A.D.2d 654, 655 (2d Dept. 1975).

Mr. Statland argues that questions related to his psychological treatment are irrelevant in light of the amendment to his Bill of Particulars and that information concerning communications with his psychologist is privileged. The Court disagrees.

Significantly, it is clear that a claim based on "the natural emotional sequelae of the alleged physical injuries" seeks recovery for emotional--psychological--injury. *Contrast, L.S. v. Harouche*, 260 A.D.2d 250 (1st Dept. 1999) (plaintiff's testimony regarding "loss of enjoyment of life was limited to the physical effects of defendant's malpractice" [emphasis added]). Pursuing recovery for any "natural emotional" injury

resulting from physical injury is functionally equivalent with seeking compensation for "emotional, psychological and mental distress," as set forth in Mr. Statland's original Bill of Particulars. Because Mr. Statland seeks compensation for emotional harm, Mr. Statland has placed his emotional well being at issue.

Additionally, whether Mr. Statland discussed his injuries related to the alleged malpractice with his psychologist is certainly relevant. Discussion of the physical injuries he sustained by virtue of the malpractice (or lack thereof) would certainly be probative of the significance and magnitude of the "the natural emotional sequelae of the alleged physical injuries" that he suffered. *Contrast, Cottrell v. Weinstein*, 270 A.D.2d 449, 450 (psychiatric records not subject to disclosure because "psychological condition was not at issue"); *Sternberger v. Offen*, 138 A.D.2d 480 (2d Dept. 1988) (mental condition during time preceding accident not material or necessary to defense of action).

Mr. Statland's reliance on the physician-patient privilege to insulate relevant information about his psychological treatment from disclosure is entirely misplaced. The name of his psychologist, at the outset, is not a doctor-patient communication and does not implicate disclosure of "medical information acquired by the physician through the application of professional skill or knowledge." *See, Dillenbeck v. Hess*, 73 N.Y.2d 278, 284 n.4 (1989). Moreover, to the extent that Defendants seek disclosure of the substance of any conversations that Mr. Statland had with his psychologist that relate to the injuries

he suffered as a result of the alleged malpractice or to the malpractice itself, the physician-patient privilege has been waived. *See, Carr v. 583-587 Broadway Assocs.*, 238 A.D.2d 184, 185 (1st Dept. 1997) (limited exploration of psychological history appropriate); *contrast, Cronin v. Gramercy Five Assocs.*, 233 A.D.2d 263, 263 (1st Dept. 1996) (absent showing of "any relationship between" alleged emotional distress resulting from accident and past history of substance abuse, disclosure of history of drug and alcohol abuse properly precluded). It is well-settled that a "party should not be permitted to assert a mental or physical condition in seeking damages * * * and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition." *Koump v. Smith*, 25 N.Y.2d 287, 293 (1969).

Whatever Mr. Statland may have said to his psychologist about the alleged malpractice or his injuries is undoubtedly relevant to the issues raised in this case. No one knows, however, whether Mr. Statland had any such conversations with his psychologist because Defendants' questioning was improperly blocked. Defendants must now be afforded an opportunity to obtain the information that they rightfully sought but were denied.*

---

* At the deposition, defense counsel asked Mr. Statland whether he was "prescribed any occupational therapy." Mr. Statland asked "what is that," and his own

Importantly, Defendants have not yet sought to compel Mr. Statland to provide an authorization for his psychologist's records; thus, a determination concerning disclosure psychological records would be premature. The Court is well aware that psychiatric records "will often contain intimate details of past acts, hopes, fantasies, shames, and doubts that were divulged during treatment," *see*, *Cynthia B. v. New Rochelle Hospital Med. Ctr.*, 60 N.Y.2d 452, 459 (1983), and would gladly perform an *in camera* inspection to assure that irrelevant matters having no bearing on this case remain confidential, in the event that the materials are sought.

Accordingly, it is

ORDERED that Defendants motion to compel an additional deposition of Mr. Statland is granted and Mr. Statland must appear and answer all relevant questions related to his psychological treatment within 20 days of the date of this Decision and Order; and it is further

---

attorney inquired "any other therapy other than physical therapy? Mr. Statland answered, "no." Opp., Ex. 5, at 97. This Court rejects plaintiff's attempt to characterize that testimony as a denial by Mr. Statland that he ever communicated with his psychologist about matters relevant to this suit. *See*, Opp., at ¶ 12. Defense counsel was clearly asking about forms of physical and occupational therapy, not psychological therapy (about which plaintiff's counsel had already directed his client not to answer any questions).

ORDERED that the parties are to appear for a disclosure conference on November 14, 2006, at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 13, 2006

ENTER

Hon. Eileen Bransten