Stortz v Koplin
2017 NY Slip Op 32620(U)
December 13, 2017
Supreme Court, New York County
Docket Number: 805061/2014
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Robert K. Stortz,

Plaintiff,

- against -

Richard S. Koplin, Opthalmic Consultants. P.C., New York Eye and Ear Infirmary IPA, Inc., and The New York Eye and Ear Infirmary Ophthalmology Associates, P.C.,

Defendants.

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Index No: 805061/2014

Decision/Order
Mot. Seq.: 003

HON. EILEEN A. RAKOWER, J.S.C.

This is a medical malpractice action concerning allegations, *inter alia*, that defendant Richard S. Koplin ("Dr. Koplin") negligently performed left cataract extraction with intraocular lens implant on December 15, 2012, and right cataract extraction with intraocular lens implant on April 18, 2011, on plaintiff Robert K. Stortz ("Stortz").

Stortz filed his initial Verified Bills of Particulars on December 3, 2014. On November 16, 2015, Stortz filed a Supplemental Bill of Particular, claiming past and future lost earnings. Stortz filed an additional four Supplemental Bills of Particulars. Stortz has claimed damages for past and future lost earnings in the amount of $700,000.

Stortz was deposed on January 11, 2017. Stortz testified to cardiac conditions of exertional angina and the need for a coronary angiographic procedure and placement of two coronary stents in December 2012 and July 2016. On or about January 25, 2017, Defendant served upon Stortz a demand for authorizations to obtain the records for Stortz's current treating Florida cardiologist, ophthalmologist, optometrist and for Holy Cross Hospital, a Florida hospital where Stortz testified he received treatment.

On June 19, 2017, Defendants brought a motion to compel Stortz to provide various authorizations, including the records for his cardiologist and hospital stays at Holy Cross Hospital. Stortz opposed the motion.

On August 8, 2017, all parties presented oral argument on Defendants' motion to compel before this Court. Stortz was ordered to produce all items of discovery included in the motion except for certain private financial records. Stortz was ordered, *inter alia*, to produce *Arons* authorizations for his subsequent treating ophthalmologists, subsequent treating optometrist, authorizations for all treating cardiologists, including the records from plaintiff's 2012 and 2016 coronary angiogram procedures; and an authorization for Holy Cross Hospital.

Stortz has refused to provide the authorizations from his treating cardiologists and for Holy Cross Hospital. By notice of motion filed on September 22, 2017, Stortz moves for a protective order pursuant to CPLR 3101(a) to prohibit disclosure of these records and submits the records at issue for *in camera* review. Defendants oppose.

Stortz argues that a protective order is warranted because the medical records sought do not relate to the claimed injuries in this case. Stortz argues that to the extent that Defendants are seeking to establish a possible impact on Stortz's life expectancy, Stortz argues that this would "create confusion to an eventual jury, or can otherwise disadvantage or prejudice Mr. Stortz during the trial, but it is also improper because Mr. Stortz is not claiming that the injuries sustained by defendants are shortening his life span, he is merely claiming loss of wages through retirement." Stortz further argues that "[a] better predictor of life expectancy, however, is how Mr. Stortz is currently doing despite any past treatments or injuries that have nothing to do with the injuries claimed in this lawsuit."

Defendants, in turn, argue that Stortz has failed to establish the need for a protective order. Defendants argue that the records sought are directly related to Stortz's claims for future lost earnings, which totals $700,000 according to Stortz's seventh Supplemental Bill of Particulars. Defendants assert, "In calculating future lost earnings, plaintiffs work-life expectancy must factor in plaintiff's medical history, which includes exertional angina and need for a coronary angiographic procedure, with placement of 2 coronary stents in December 2012 and July 2016, and may also include additional procedures or conditions that the Defendants are unaware of." Defendants further assert, "[c]alculating plaintiff's work-life expectancy is an issue to be determined by a finder of fact, not by plaintiff, his counsel or one treating cardiologist Dr. Niederman." Defendants further argue that Stortz's motion for a protective order is untimely and improper because Stortz should have cross-moved for a protective order when he submitted opposition to

Defendants' underlying motion to compel discovery that was argued before the Court at oral argument on August 8, 2017.

CPLR § 3103[a] provides that a protective order may be warranted in order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR § 3101[a] generally provides that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason." (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

"It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue." (*Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 456–457 [1983] [citations and footnote omitted]). "[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim." (*Dillenbeck v. Hess*, 73 N.Y.2d 278, 287 [1989]). "[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition." (*Matter of Farrow v. Allen,* 194 A.D.2d 40, 45–46 [1st Dept 1993]). "However, it is equally well-settled that '[t]he waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illnesses and treatments.'" (*McLeod v. Metro. Transp. Auth.*, 47 Misc. 3d 1219(A), 17 N.Y.S.3d 383 (N.Y. Sup. Ct. 2015) (citations omitted).

In *Gumbs v. Flushing Town Center III, L.P,* 114 A.D. 3d 573, 573 [1st Dept 2014]), the plaintiff sought to recover damages for orthopedic injuries he sustained. Defendants sought authorizations for the release of records of the plaintiff's cardiologist and primary care physician. The defendants moved for an order striking the complaint due to the plaintiff's failure to provide the requested

authorizations claiming that "[p]laintiff certainly has placed his medical condition in issue and has also placed his ability to work in the future at issue as well as his life expectancy." (*Id.* at 574). The plaintiff opposed the motion based on the physician-patient privilege. (*Id.*) The lower court denied the motion on the grounds that defendants had not shown that the records sought were related to the claimed injuries. (*Id.*) By a 3–2 decision, the Appellate Division affirmed the motion court's denial of the defendants' motion. (*Id.*).

The First Department in *Gumbs* held:

> Discovery determinations rest with the sound discretion of the motion court. This Court is nonetheless vested with a corresponding power to substitute its own discretion for that of the motion court. Notwithstanding our own discretion, deference is afforded to the trial court's discretionary determinations regarding disclosure. Unlike the dissent, we find no abuse of the court's discretion given the paucity of support for the motion in the first instance. Specifically, defendants' argument regarding the relevance of Gumbs's medical history as set forth in his deposition was improperly made for the first time in their reply papers. Accordingly, the denial of defendants' motion was reasonable and supported by law.

(*Id.* at 574-575).

The First Department further stated, "Gumbs's waiver of his physician-patient privilege is limited in scope to those conditions affirmatively placed in controversy. Gumbs did not place his entire medical condition in controversy by suing to recover damages for orthopedic injuries." (*Id.*).

The dissent in *Gumbs* stated:

> [P]laintiff, by claiming that his enumerated injuries have resulted in his permanent inability to work and permanent or long lasting loss of enjoyment of life, has placed his general health and medical history at issue.
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> * * *

> I also disagree with the majority to the extent it concludes that the medical records sought by defendants are not discoverable because plaintiff claims to have suffered ankle, knee and shoulder injuries and the requested records do not pertain to those specific injuries. I believe the medical records sought by defendants directly relate to plaintiff's sweeping, broad and encompassing claims of permanent disability and loss of enjoyment of life, and it was an abuse of discretion for the trial court to fail to consider these categories of damages in fashioning the scope of discovery.
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> When a plaintiff seeks future lost earnings, he or she squarely puts his or her prior medical history at issue because his or her overall health directly bears on the question of how many years the plaintiff realistically could have continued to work had no accident occurred.

(Gumbs, 14 A.D.3d at 547).

After *Gumbs*, the court in *McLeod v. Metro. Transp. Auth.*, 47 Misc. 3d 1219(A) at *1 (N.Y. Sup. Ct. 2015), addressed whether and to what extent the plaintiff, a 56 year old man who was allegedly injured while working on a construction site, had waived the physician patient privilege as to his entire medical history by asserting claims for loss of enjoyment of life, future lost earnings and total disability due to permanent physical injuries. The *McLeod* court held:

> So long as a claim for loss of enjoyment of life or future earnings is considered as affirmatively placing at issue the plaintiff's life expectancy, work life expectancy, and general health, and so long as appellate courts continue to define 'relatedness' as 'material and necessary' or 'relevant', this Court is constrained to conclude that plaintiff in this cause has therefore waived the physician patient privilege as to his entire medical history. It bears repeating that virtually anything in plaintiff's entire medical history might be relevant to, or reasonably

> calculated to lead to admissible evidence as to the plaintiff's overall health and work life expectancy. Here, according to a claims history of plaintiff's union medical benefits, defendants sought records from providers who treated plaintiff for preglaucoma, diabetes, angina, coronary atherosclerosis, hypertension, volume depletion disorder, and chest pain, among other things. Those medical conditions are all relevant to plaintiff's overall health and life expectancy.

(*McLeod*, 47 Misc. 3d 1219(A) at *13-14). The court therefore directed the plaintiff to provide HIPAA-compliant authorizations of all medical records relating to these conditions. (*Id.* at *19)

The court has reviewed the records submitted for in camera inspection. Nothing in these records would cause embarrassment or prejudice that would warrant the issuance of a protective order. As Stortz has asserted a claim for future lost earnings, he has placed his overall health at issue and his records relating to his cardiac conditions are relevant and are therefore discoverable.[1]

Wherefore, it is hereby

ORDERED that plaintiff's motion for a protective order is denied; and it is further

ORDERED that plaintiff shall provide Defendants with authorizations for his treating cardiologists and Holy Cross Hospital.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: December 13, 2017

Eileen A. Rakower, J.S.C.

[1] There is one document that has been inadvertently produced for in camera inspection. This document is a medical record that relates to another person with a different date of birth. This document should not be produced.