

Gross v Fishbane-Mayer
2018 NY Slip Op 30412(U)
March 7, 2018
Supreme Court, New York County
Docket Number: 805215/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Rikki Gross and Mark Gross,

Plaintiffs,
- against -

Index No:
805215/2012

Decision/Order

Mot. Seq.: 001

Jill Fishbane-Mayer, M.D.,

Defendant.

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

Defendant, Jill Fishbane-Mayer, M.D. (“Defendant”), brings a motion to compel plaintiff Rikki Gross (“Mrs. Gross”) to provide authorizations and/or complete copies of records pertaining to Mrs. Gross’ mental health and endocrinology treatment. Defendant, Jill Fishbane-Mayer, M.D. (“Dr. Fishbane-Mayer”). Plaintiffs oppose.

Factual Background

Mrs. Gross claims to have sustained injuries as a result of a labiaplasty performed by Dr. Fishbane-Mayer on August 23, 2010, and Mrs. Gross’ husband Mark Gross (“Mr. Gross”) claims loss of consortium. In the Verified Complaint, Plaintiffs allege three causes of action sounding in medical malpractice, lack of informed consent, and loss of consortium. Plaintiffs allege that Mrs. Gross “continues to suffer from the consequences of Dr. Fishbane-Mayer’s negligently and carelessly performed labiaplasty, including ... permanent loss of her right labia minora, asymmetry, permanent disfigurement and mutilation, thinning of the vaginal tissues, pain, discomfort, and chafing, permanent functional deficits, extreme emotional distress, anxiety, and anguish because of said injuries, and the prevention of the enjoyment of life.” (Paragraph 27 of the Verified Complaint).

On January 10, 2013, Plaintiffs served their Verified Bill of Particulars as to Dr. Fishbane-Mayer. Mrs. Gross claims, among other injuries, “extreme emotional distress and anxiety”, “loss of enjoyment of life”, and “increased pain and discomfort during intercourse”, among other injuries.

The parties appeared for a Preliminary Conference on April 17, 2013. Subsequent Compliance Conferences were held on June 18, 2013, October 23, 2013, January 15, 2014, April 2, 2014, May 21, 2014, and August 6, 2014. On October 9, 2013, the Examinations Before Trial of Plaintiffs took place. In October 2014, upon completion of discovery, Plaintiffs filed their Note of Issue. On August 29, 2015, Mrs. Gross received reconstructive surgery. Following the surgery, Plaintiffs filed a Supplemental Bill of Particulars and exchanged the records of the surgery for her surgeon, gynecologist and primary doctor. Plaintiff also agreed to produce Mrs. Gross for a supplemental deposition.

At her 2013 deposition, Mrs. Gross testified:

Q. How has your sex life with your husband changed since you had the surgery with Dr. Fishbane-Mayer?

A. We don't have a sex life anymore. I'm -- besides for being emotionally scared from the way I look and feeling like a freak, I -- mechanically it's just too painful. We try every few months. I end up bleeding and I'm -- it's just too painful and it's not enjoyable

(Mrs. Gross Dep. at 105:23-106:8)

Q. Have you seen anyone, whether it be a psychologist, an analyst, a therapist to talk about the emotional toll this has taken on you?

A. Not yet but it's definitely a consideration. In my mind I feel like nobody can repair this, I'm ruined. So, you know, it can emotionally make me feel better, but they can't really repair my sex life and the way I feel every day.

(Id. at 110:7-16)

Q. We've already discussed the impact of the surgery and the results that have affected your sex life and also your exercise. Has it affected anything else?

A. It's affected my mood in a very bad way. I'm sad. I feel mutilated and I carry that with me everywhere I go. I don't have the energy that I had. I don't have the joy I had. I don't love running with my dog anymore. I used to do a ton of volunteer work. I'm so depressed. My whole outlook has changed in life. And I just don't have the energy to enjoy things because I feel sick and mutilated and ugly and disgusting.

Q. Has any medical doctor recommended an antidepressant?

A. I haven't discussed this with any doctor.

(*Id.* at 110:20-111:15)

At his deposition, Mr. Gross testified that he thought "all [his] children recognize that [his] wife's depressed." (Mr. Gross' deposition transcript at 25:25-26:2).

At the beginning of Mrs. Gross' supplemental deposition in 2017, Mrs. Gross was asked what medications she was currently taking. She testified that she was taking Synthroid for her thyroid and was being treated by an endocrinologist, Dr. Haber. (See Mrs. Gross' 2017 Deposition at 8:7-10:8). She further testified that her thyroid condition has had no effect on her sex life. (*Id.* at 132:11-13).

Mrs. Gross also testified that she was taking Wellbutrin and was being treated by a psychiatrist, Dr. Bensimhon. She testified over objection that she believes that she started taking Wellbutrin in the spring of 2017. She further said, "I've only been on the medication for a few months. So, in 2013, while I was dealing with depression, I wasn't taking it." (See Mrs. Gross' 2017 Deposition at 8:7-10:8).

On November 15, 2017, the parties appeared for a compliance conference before the Honorable George Silver, J.S.C. Dr. Fishbane-Mayer demanded authorizations to obtain medical records from Mrs. Gross' psychiatrist Dr. Bensimhon and her endocrinologist Dr. Haber. The "court would not direct

[production of] same at this time and Defendant reserves the right to make a motion on these authorizations if they deem necessary.” On December 29, 2017, Dr. Fishbane-Mayer filed the instant motion seeking to compel those authorizations.

Disclosure

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 Ctr. III, L.P.* (114 A.D.3d 573 [1st Dept. 2014]), the plaintiff sought damages for a torn rotator cuff, fractured ankle and other

orthopedic injuries. The defendants moved to strike the plaintiff's complaint for his refusal to provide authorizations for the release of certain medical records, such as those from his primary care physician and cardiologist. (*Id.*) In affirming the lower court's decision to deny the defendants' motion, the Court held that the plaintiff "did not place his entire medical condition in controversy by suing to recover damages for orthopedic injuries" and that the defendants "have not shown that the records they seek are related to the claimed injuries." (*Id.*)

Mental Health Records

In *Serra v. Goldman Sachs Group, Inc.*, 116 A.D.3d 639, 640 [1st Dept 2014]), the defendant sought medical records relating to the plaintiff's mental condition. In affirming the lower court's motion to deny the defendant's motion to compel those records, the Court stated that the plaintiff "did not seek to recover damages for emotional or psychological injury, or aggravation of a preexisting emotional or mental condition." (*Serra*, 116 A.D.3d at 640). The court further held that the plaintiff's inclusion of general allegations of "anxiety and mental anguish" resulting from his back injuries did not place his medical health history into controversy." (*Id.* at 640-641).

In *Velez v. Daar*, 41 A.D.3d 164, 164-165 [1st Dept 2007], the plaintiff alleged that he sustained various psychological and emotional injuries as a result of his physician's failure to diagnose his thyroid cancer, including "anxiety and depressed emotions requiring therapy" and loss of enjoyment of life. The plaintiff provided the defendant with an authorization for the psychologist to only disclose medical/job correspondence, attendance records, reports on file, and diagnostic codes. (*Id.*) Plaintiff refused to disclose notes or tapes from the therapy sessions. (*Id.*) Plaintiff testified at his deposition that during therapy sessions, he identified family and work issues, in addition to his thyroid cancer, as causing his stress and anxiety. (*Id.*) Based on this testimony, the defendant sought an authorization for the psychologist's "complete file, including session notes, which were excluded from the previously provided authorization." (*Id.*) The plaintiff sought a protective order, claiming that although a discussion did take place with his psychologist about personal problems apart from his thyroid cancer, the "sensitive private family information" was unrelated to the claims in the lawsuit and could harm his familial relationships. The Appellate Division, First Department, reversed the trial court's granting of a protective order, finding that "[p]laintiff clearly waived his statutory social worker-patient confidentiality privilege by placing his psychological condition in controversy, which he did by acknowledging in his testimony that factors other than his thyroid cancer were causes of his psychological symptoms."

(*Id.*). According to the court, “[t]he materiality and necessity of knowing to what degree plaintiff’s psychological injuries are associated with the alleged malpractice and to what extent they are explained by other causes is manifest.” (*Id.*).

Discussion

With respect to their demand for authorizations for Mrs. Gross’ mental health records, Dr. Fishbane-Mayer assert that Mrs. Gross has placed her psychological and emotional mental health at issue and has therefore waived the privilege relating to the related records. Plaintiffs, in turn, object to production of these records as privileged. Plaintiffs argue that Mrs. Gross’ general allegations of emotional distress do not place her mental health in controversy. In the event that court determines that disclosure of Mrs. Gross’ psychiatric records is warranted, Plaintiffs request that the court issue a protective order and first examine the records in camera to avoid unrelated and potentially embarrassing details that they may contain.

Contrary to Plaintiffs’ contention, this case involves more than general allegations of emotional distress. Rather, Mrs. Gross specifically seeks damages for extreme emotional distress, anxiety, and loss of enjoyment of life as a result of the alleged malpractice. At her 2013 deposition, she testified in detail how the alleged malpractice caused her severe emotional distress. In her 2017 deposition, she testified to having received medical treatment for depression. While Mrs. Gross testified that she did not receive treatment for depression in 2013, this does not mean that the treatment that she later received is completely unrelated to the alleged malpractice. In fact, Plaintiffs acknowledge the potential link between the treatment and the alleged malpractice when they state “[c]oincidentally Rikki began to treat for depression last year for reasons perhaps not entirely unrelated to the malpractice but which are personal and deal with many things that have happened over her lifetime.” Plaintiffs’ opposition, ¶22. Dr. Fishbane-Mayer is therefore entitled to Mrs. Gross’ mental health treatment records to the extent that they relate to Mrs. Gross’ claimed injuries and to the extent they may reveal there are other causes to Mrs. Gross’ alleged loss of enjoyment of life.

Dr. Bensimhon also seeks authorizations to obtain Mrs. Gross’ endocrinology records. Dr. Fishbane-Mayer argues that since Mrs. Gross testified to taking Synthroid to treat a thyroid condition and “[i]t is known that thyroid conditions can adversely impact a woman’s libido, as well as her mental and emotional state,” Mrs. Gross’ endocrinology records are needed to determine whether there is another cause to Plaintiffs’ sexual problems. Dr. Fishbane-Mayer argues that these records are

also relevant to determine what extent, if any, Mrs. Gross' thyroid condition has negatively impacted her emotional well-being.

Here, Mrs. Gross does not claim injuries relating to her endocrine system as a result of the alleged malpractice. Additionally, Dr. Fishbane-Mayer has produced no testimony or other evidence connecting her treatment for thyroid to the claimed injuries including the pain she alleges she experienced during sex after the alleged malpractice. Dr. Fishbane-Mayer has therefore failed to make the requisite showing to permit disclosure of Mrs. Gross' endocrinology records with Dr. Haber.

Wherefore, it is hereby

ORDERED that the motion to compel is granted only to the extent that Mrs. Gross shall provide Defendant with authorizations for her psychiatrist Dr. Bensimhon.

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

Dated: MARCH 7, 2018



Eileen A. Rakower, J.S.C.