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| Jordan-Covert v Petroleum Kings |
| 2019 NY Slip Op 34307(U) |
| February 11, 2019 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 51886/2017 |
| Judge: Joan B. Lefkowitz |
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
JANINE JORDAN-COVERT,

Plaintiff,

DECISION & ORDER

-against-

Index No. 51886/2017
Motion Date: Feb. 11, 2019

PETROLEUM KINGS and KENNETH MARIN

Seq. 3

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order 1) pursuant to § 3126 of the CPLR, dismissing plaintiff's Complaint with prejudice in its entirety based upon plaintiff's failure to provide defendants with the authorizations requested in defendants' Combined Demands dated May 25, 2018, defendants' Demand for Medical Information for Prior and Subsequent Injuries dated September 26, 2018, defendants' Post Deposition Demand for Authorizations dated November 5, 2018 and plaintiff's failure to respond to this Court's Orders of June 11, 2018, September 27, 2018, October 26, 2018 and December 6, 2018, or in the alternative: (a) precluding plaintiff from introducing evidence regarding plaintiff's alleged damages at the time of trial, or (b) compelling plaintiff to provide defendants with the authorizations requested in defendants' Combined Demands dated May 25, 2018, defendants' Demand for Medical Information for Prior and Subsequent Injuries dated September 26, 2018, defendants' Post-Deposition Demand for Authorizations dated November 5, 2018 and plaintiff's failure to respond to this Court's Orders of June 11, 2018, September 27, 2018, October 26, 2018 and December 6, 2018, (2) staying defendants' independent medical examinations of the plaintiff until after medical records have been received by defendants pursuant to the foregoing authorizations, and (3) for such other and further relief as this Court may deem just and proper.

Order to Show Cause - Good Faith Affirmation - Affirmation in Support - Exhibits
Affirmation in Opposition - Exhibit

Upon the foregoing papers and the proceedings held on February 11, 2019, this motion is determined as follows:

Plaintiff commenced this action to recover for injuries allegedly sustained as a result of a motor vehicle accident which occurred on February 20, 2014 in Briarcliff Manor, New York. On or about June 5, 2017, defendants moved to dismiss the case pursuant to CPLR § 3211. The

motion was granted only as to defendant Kenneth Marin. Issue was joined by the remaining defendant, defendant Petroleum Kings LLC, on or about May 25, 2018, at which time defendant served discovery demands. On June 11, 2018, counsel entered into a Preliminary Conference Stipulation pursuant to which, plaintiff was to serve a response to defendant's Combined Demands by June 29, 2018 and serve authorizations by June 29, 2018 for defendant to obtain plaintiff's records from physicians and/or hospitals; employment records for the period 2012 - present; no-fault file; and pharmacy and diagnostic films.

On or about July 5, 2018, plaintiff served a Verified Bill of Particulars wherein plaintiff claims she sustained serious and permanent injuries, including central disc herniation and mild grade 1 anterolisthesis at the C4-C5 level, mild spinal cord effacement, central disc herniation/cephalad disc extrusion at the C5-C6 level, concentric/asymmetric disc bulge (right greater than left) at the C6-C7 level, and migraines.

In pertinent part, the Bill of Particulars states as follows:

“The subject trauma has and will result in injury and damage to all the surrounding supportive and bony tissues thereof, including bones tissues, damage to joints, ligaments, muscles, membranes, blood vessels, nerves and other her general health and physical and mental well being, all resulting from the trauma, the disability, and confinement, **severe traumatic neurosis, nightmares, difficulty sleeping due to pain, discomfort and anxiety, the requirement of undergoing constant and prolonged sedation and medication; immense physical and mental suffering and anguish. Each and every injury above-described is permanent in nature.**” (emphasis added).

The Bill of Particulars further stated in pertinent part:

“All of the injuries mentioned herein, manifestations, resulting disabilities and involvements may, if they progress, or fail to heal, require surgery, and indeed surgery may be required in the future; said injuries are associated with further soft tissue injury to the areas traumatically affected, including tearing, derangement, involvement of and damage to the surrounding muscles and muscle groups, ligaments, tendons, blood vessels, and blood supply, nerves and nerve tissue, with epithelial tissue, body tissues and bone structure, all concomitant to the specific injuries and related to the various portions mentioned herein, with resultant pain, deformity, disability, stiffness, weakness, swelling, tenderness, edema, atrophy, ecchymosis, impairment of use, restriction and limitation of motion, pain on motion, possible loss of use, atrophy, disfigurement, **and have all prevented and will continue to prevent enjoyment of the normal fruits of life and has been permanently and substantially impaired, impeded, diminished, and reduced.**”(emphasis added)

In addition, the Bill of Particulars stated as follows:

“Injuries Will Impact Pre-Accident Enjoyment Of Life
Associated and concomitant impairments and negative effects upon plaintiffs

preaccident enjoyment of life, day-to-day existence, activities, functions and involvements; Limitation, diminution and/or effect of functions, activities, vocation, avocation and all other activities in which the plaintiff engaged prior to the underlying accident; Inability to resume pre-accident modus-vivendi; inability to resume pre-accident social relations, contacts and participation; associated pains, disabilities, discomforts, impairments, impediments, limitations of functions and activities;

The aforesaid have and will continue in the future to affect every facet of plaintiffs pre-accident modus vivendi with resultant damages, to plaintiffs detriment. The plaintiff will continue to sustain permanent loss and impairment of physical and mental health; the plaintiff will continue to sustain loss, impairment, diminution and retardation of the enjoyment of life.” (emphasis added)

Defendant argues on this motion that plaintiff has failed to provide complete responses to its demands for authorizations and a Supplemental Bill of Particulars as to Special Damages. For example, defendant complains that plaintiff has only provided authorization for records from the date of the accident and has failed to initial the authorization so that they can obtain drug and alcohol information. Defendant points out that during her deposition, plaintiff testified that as a result of the subject accident she has tingling down her arms and her hands get numb. However, contained in the medical records from Westchester Health Associates was a July 11, 2013 report regarding an EMG that was done by Dr. Avatar Singh at Neurology Group of Westchester because plaintiff "had a history of pain and numbness in the right hand." Plaintiff was referred by Dr. Zarowitz and the report was sent to Dr. Jack Rosemarin. Accordingly, defendant contends that it is entitled to authorizations for Dr. Singh, Dr. Zarowitz and Dr. Rosemarin, unrestricted as to date. Defendant also points out that plaintiff testified that she treated with Dr. Gina Scarron prior to the subject accident and that therefore, defendant is entitled to an authorization unlimited in time for Dr. Scarron.

Defendant posits that since the Emergency Room Records from Phelps Hospital on the date of the accident indicate that plaintiff was being treated for ADD and taking Prozac and Adderall, defendant is entitled to an authorization unlimited in time for CVS. It advises that CVS will not process an authorization unless the lines for Alcohol/Drug Treatment, Mental Health Treatment and HIV-related treatment are all checked and attach a letter counsel received from CVS in this regard.

Moreover, defendant asserts that plaintiff testified that Dr. Gina Scarron and Dr. “Anna” treated her for depression, anxiety and prescribed medication and therefore, it is entitled to obtain an authorization for these providers unlimited to date. Movant has also attached plaintiff’s deposition transcript which demonstrates that plaintiff testified that she overdosed on pain medication and was treated as an inpatient and outpatient at Jacobi, St. Vincent’s and Northern Bronx Hospitals. Defendant contends that the discovery plaintiff has failed to provide is material and necessary for the defense of the action.

Plaintiff has opposed the motion and has attached copies of authorizations belatedly provided. However, it is clear that plaintiff has not fully complied with defendant’s demands. In

her opposition papers, plaintiff argues that defendant has failed to establish the relevancy of records prior to the accident or treatment for other issues.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” The phrase “material and necessary” is “to be interpreted liberally 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 Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

It is well settled that a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue (*Fox v Marshall*, 91 AD3d 710 [2d Dept 2012]; *Lombardi v Hall*, 5 AD3d 739, 740 [2d Dept 2004]). However, a party does not waive the privilege with respect to unrelated physical or mental conditions or treatment (*McLane v Damiano*, 307 AD2d 338 [2d Dept 2003]; *Cottrell v Weinstein*, 270 AD2d 449 [2d Dept 2000]; *Kohn v Fisch*, 262 AD2d 535 [2d Dept 1999]). “[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 [citation omitted] 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 NY2d 452, 456-457 [1983]; see CPLR 3121 [a]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d 1092 [2d Dept 2010]). In *DeLouise* (79 AD3d at 1093), the court held that plaintiff placed her entire medical condition in controversy through the broad allegations of physical injury and mental anguish in the complaint and bill of particulars. In *Coddington v Lisk* (249 AD2d 817 [3d Dept 1998]), the court held that plaintiff’s drug addiction records may lead to evidence bearing on plaintiff’s claim for personal injuries allegedly sustained in an automobile accident and should be disclosed in view of plaintiff’s allegations of “permanent weakness and instability,” “permanent effect of pain,” and “loss of enjoyment of life.” In *Steward v New York City Housing Authority* (302 AD2d 449 [2d Dept 2003]), the court held that plaintiff’s alcohol and substance abuse records should be disclosed as they may be useful in preparation for trial and lead to relevant evidence bearing on the plaintiff’s claim for damages for personal injuries.

“The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court” (*Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading or of preclusion a court must determine that the party’s failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]).

Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

In the present action, as in *DeLouise*, plaintiff's broad allegations of disability, anxiety and mental anguish are sufficient to place her medical history, including any substance abuse and treatment into controversy. In view of the foregoing, defendant has established that plaintiff's records may reasonably lead to evidence bearing on the plaintiff's claim for damages and may be useful in the preparation for trial.

Plaintiff has refused to provide complete responses to defendant's discovery demands over several months. Nevertheless, the Court is not inclined to dismiss the complaint at this time. Plaintiff will be allowed one more opportunity to respond to defendant's discovery demands.

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence or reference thereto.

Accordingly, it is

ORDERED that defendant's motion is granted to the extent that plaintiff is directed to provide to defendant, to the extent not previously provided, on or before February 28, 2019, the following authorizations:

1. White Plains School District employment records;
2. United Healthcare collateral source records;
3. AutoRx collateral source records;
4. Oxford collateral source records;
5. Blue Cross Blue Shield collateral source records;
6. Pinnacle Compounding Pharmacy;
7. Property damage file of Allstate Insurance Company relating to the vehicle owned and operated by plaintiff in the subject accident;
8. Subrogation claim of Allstate Insurance Company regarding the vehicle owned and operated by plaintiff in the subject accident;
9. Property damage file of Allstate Insurance Company relating to the vehicle operated by plaintiff in the 6/28/13 accident;
10. Property damage claim of Enterprise regarding the vehicle operated by plaintiff in the 6/28/13 accident;
11. An authorization unlimited in time for the release of plaintiff's entire medical record and diagnostic films from Neurology Group of Westchester;
12. Westchester Medical Center Advanced Imaging, including the records of the neurologist that performed an EMG;
13. An authorization unlimited in time for the release of plaintiff's entire

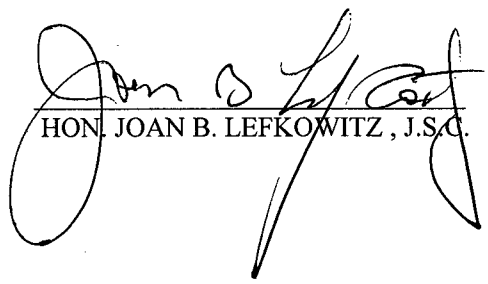
- medical record from Dr. Gina Scarron and Dr. Anna (last name unknown), including psychotherapy notes, alcohol/drug treatment and mental health information;
14. An authorization unlimited in time for the release of plaintiff's entire medical record from Dr. Wendy Thompson, including psychotherapy notes, alcohol/drug treatment and mental health information;
 15. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from St. Vincent's Hospital, including psychotherapy notes, alcohol/drug treatment and mental health information;
 16. An authorization unlimited in time for the release of plaintiff's entire pharmacy record from CVS on Tarrytown Road in White Plains, including alcohol/drug treatment. HIV-related treatment and mental health information;
 17. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from White Plains Hospital including but not limited to 11/5/16 ER visit and July 2018 ovary surgery;
 18. An authorization for the release of plaintiff's entire record from collateral source Swiss Chip;
 19. An authorization for the release of plaintiff's entire medical record and diagnostic films from the diagnostic/imaging facility on Bradhurst Avenue;
 20. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from Jacobi Hospital, including alcohol/drug treatment and mental health information;
 21. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from Northern Bronx Hospital/facility, including alcohol/drug treatment and mental health information;
 22. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from Dr. Khory, including alcohol/drug treatment and mental health information;
 23. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from Dr. Avtar Singh;
 24. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from Dr. William Zarowitz; and
 25. An authorization unlimited in time for the release of plaintiff's entire medical record, hospital records and diagnostic films from Dr. Jack Rosemarin; and it is further

ORDERED that on or before February 28, 2019, plaintiff shall serve a Supplemental Bill of Particulars as to Special Damages; and it is further

ORDERED that all other requests for relief are denied at this time, without prejudice to renew in the event that plaintiff fails to comply with this Order; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on March 7, 2019 at 9:30 a.m.

Dated: White Plains, New York
February 11, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

Counsel by NYSCEF

cc: Compliance Part Motion Clerk