

<b>Jobe v Quick Coin Four, Inc.</b>
2020 NY Slip Op 32071(U)
June 30, 2020
Supreme Court, New York County
Docket Number: 157082/2018
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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LINDA JOBE

Plaintiff,

- v -

QUICK COIN FOUR, INC.,

Defendant.

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INDEX NO. 157082/2018
MOTION DATE 03/19/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for DISCOVERY

In this personal injury action plaintiff alleges that as a result of a fall in defendant's laundromat on April 3, 2017, she sustained a fractured hip, loss of function of her left leg and loss of enjoyment of life. (NYSCEF Doc. Nos. 16, 18, 19). Defendant Quick Coin Four, Inc., seeks an order pursuant to CPLR 3124 to compel compliance with post deposition discovery demands requesting authorizations for plaintiff's medical, employment and worker's compensation records related to a prior incident involving her knees. (NYSCEF Doc. Nos.20, 21). Plaintiff opposes the motion on the basis that the incident for which defendant seeks discovery occurred thirteen years prior to the subject complaint and involved injury to plaintiff's knees which are not in controversy in this lawsuit.

DISCUSSION

"Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. . . . The test is one of usefulness and reason." (Forman v Henkin, 30 NY3d 656, 661, 70 N.Y.S.3d 157, 93 N.E.3d 882 [2018] [internal

quotation marks and citations omitted]). “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court . . .” (*Montalvo v CVS Pharm, Inc.*, 102 AD3d 842, 843, 958 NYS2d 459 [2d Dept 2013] [internal quotation marks and citations omitted]).

Pursuant to CPLR 3124, “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” On a motion brought pursuant to CPLR 3124, the burden is on the party seeking the disclosure to establish a basis for the production sought. (*Rodriguez v Goodman, M.D.*, 2015 NY Slip Op 31412(U), \*5 [Sup Ct, NY County 2015]). “[T]he request need only be appropriately tailored and reasonably calculated to yield relevant information. . . . [T]he purpose of discovery is to determine if material relevant to a claim or defense exists.” (*Forman v Henkin*, 30 NY3d at 664). Plaintiff, as the opposing party, has the burden of establishing that the “disclosure sought is improper.” (*Roman Catholic Church of Good Shepherd v Tempco Sys.*, 202 AD2d 257, 258, 608 NYS2d 647 [1st Dept 1994]).

Here, defendant contends that the post-deposition discovery sought is both material and necessary to the claims asserted by plaintiff concerning her difficulty walking and ambulating since the incident. Defendant seeks authorizations for the release of these records so that it may explore the difference, if any, in plaintiff’s past and present physical condition as it relates to her legs, knees, and ability to ambulate. Defendant also argues that since plaintiff has denied any pre-existing conditions and has also alleged damages to her hip and legs, it is entitled to review medical records related to an alleged knee injury from 2004, to determine if any limitations plaintiff now claims may relate, even partially, to her prior knee injury. In addition, defendant maintains that since plaintiff denied at her deposition that she had a prior worker’s compensation

claim related to the prior knee injury, it is entitled to discover these records for impeachment purposes.

Defendant relies on *Brito v Gomez*, 33 NY3d 1126, 107 N.Y.S.3d 797, 131 N.E.3d 904 [2019] where the Court of Appeals reversed the First Department's finding that a plaintiff who brought claims for lost earnings and loss of enjoyment of life did not waive the physician-patient privilege with respect to prior injuries "not raised in the lawsuit". The Court of Appeals reversed, holding that the plaintiff "affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages." *Brito v Gomez*, 33 NY3d at 1126. The Court then held that the plaintiff, under the "particular circumstances" of the case, had to provide authorizations to the defendant pertaining to her knees.

Plaintiff maintains that *Brito v Gomez*, is distinguishable because plaintiff here, unlike in *Brito*, never complained about difficulty ambulating due to difficulties with her knees, contending that in this case, there is no evidence that plaintiff had any problems with her knees at or near the time of her incident. As such, plaintiff maintains that it should not be compelled to provide the authorizations sought by defendant based on a vague reference to "stiff knees" from thirteen years prior to the incident as plaintiff has simply not placed her knees at issue in this lawsuit. Additionally, plaintiff maintains that defendant is not entitled to discovery of collateral issues for impeachment purposes as a witness cannot be impeached with extrinsic evidence on a purely collateral matter, urging the court to determine that the prior knee injury is not at issue here thus rendering it a collateral issue.

In her Verified Bill of Particulars, plaintiff alleges that the injuries sustained in this accident "have resulted in associated and concomitant impairments and negative effects

upon the plaintiff's pre-accident enjoyment of life, day-to-day existence, activities, functions and involvements, limitation, diminution and/or effect of function, activities, vocation, avocation and all other activities in which plaintiff engaged prior to the underlying accident modus vivendi.

The injuries, manifestations and sequelae are permanent and chronic. . . . and will continue in the future to effect [sic] every facet of plaintiff's pre-accident ways of life with resultant damages.”

(NYSCEF Doc. No. 24, ¶ 2). Additionally, plaintiff alleges her injuries are “permanent” and she claims to be “partially disabled from the date of the accident to date.” (*Id.*, ¶¶ 3, 4).

"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 NY2d 452, 456-457, 458 N.E.2d 363, 470 N.Y.S.2d 122 [1983]; *Dillenbeck v Hess*, 73 NY2d 278, 536 N.E.2d 1126, 539 N.Y.S.2d 707 [1989]; *Koump v Smith*, 25 NY2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 [1969].) "[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 AD2d 40, 45-46, 608 N.Y.S.2d 1 [1st Dept 1993]). For those conditions that plaintiff affirmatively placed at issue, plaintiff "may not insulate from disclosure material necessary to the defense concerning that condition." (*Hoening v Westphal*, 52 NY2d 605, 610, 422 N.E.2d 491, 439 N.Y.S.2d 831 [1981]).

Here, plaintiff urges the court to determine that she has not waived the physician-patient privilege as to her prior knee injury indicating that she has not made any claim that the condition

of her knees had anything to do with her accident in the laundromat. Conversely, defendant maintains that it is entitled to those records because plaintiff has affirmatively placed the entirety of her physical condition at issue by claiming not only injuries to her left hip and knee, but also, alleging loss of enjoyment of life. Defendant maintains therefore, that it is entitled to explore the particulars of plaintiff's condition prior to the instant accident to discover what her condition was prior and to compare it to her present and future condition. Defendant reasons that the discovery sought is relevant to the damages plaintiff has alleged and that defendant should be entitled to review medical and other records related to her knee injury to determine if any limitations plaintiff now claims may relate, even partially, to her prior knee injury.

In resolving this discovery dispute, the court must balance the competing interests presented and "the need for discovery must be weighed against any special burden to be borne by the opposing party" (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954, 705 NE2d 1197, 683 NYS2d 156 [1998] [citations and internal quotation marks omitted]).

The court finds plaintiff's allegations that her injuries are permanent and that her injuries impact every facet of plaintiff's pre-accident ways of life with resultant damages, demonstrate that records related to plaintiff's prior knee injury are material and necessary to the defense of the action and the damages claimed by plaintiff here. "By pleading loss of enjoyment of life . . . based on permanent, disabling physical injuries, the plaintiff would be deemed to have waived the physician-patient privilege for his or her entire medical history" (*McLeod v. Metropolitan Transportation Authority*, 47 Misc3d 1219 [A], 17 N.Y.S.3d 383 [Sup Ct, NY County 2015]; see also, *Vanalst v. City of New York*, 276 AD2d 789, 715 N.Y.S.2d 422 [2d Dept 2000] [holding that records of prior treatment or injury to a body part that was not at issue in the lawsuit were

discoverable because the plaintiff asserted a claim for loss of enjoyment of life for the injuries at issue]).

Defendant has demonstrated that it is entitled to the records sought in its post-deposition discovery demands because the information is necessary to present “a full and fair picture [of plaintiff’s] condition.” *Matter of Farrow*, 194 AD2d at 45. Based on the circumstances presented, the court finds that plaintiff has waived the physician-patient privilege with respect to her prior knee injury. Indeed, the nature and severity of plaintiff’s previous injuries may impact the amount of damages, if any, recoverable for plaintiff’s alleged loss of enjoyment of life from injuries sustained at defendant’s laundromat. As such, the records are material and necessary to the defense of this action. Accordingly, it is hereby,

ORDERED that defendant’s motion to compel is granted; and it is further

ORDERED that plaintiff shall produce to defendant on or before July 27, 2020 duly executed authorizations for the release of the following records; all medical providers plaintiff treated with as a result of the June 21, 2004 workers' compensation accident; employment records from Heller, Ehrman, White & MCA regarding the June 21, 2004 workers' compensation accident; and plaintiff's workers' compensation carrier at the time of the June 21, 2004 accident; and it is further

ORDERED that plaintiff’s time to file her Note of Issue is extended from July 29, 2020 to October 30, 2020; and it is further

ORDERED that counsel for the parties are directed to confer with one another by telephonic or electronic means, within 30 days of defendant’s receipt of the additional records, and promptly thereafter send a joint e-mail message to the clerk of Part 23 advising whether a status conference is necessary to schedule additional discovery.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

6/30/2020

DATE



W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE