

Rosenblum v Valentino
2020 NY Slip Op 35305(U)
January 29, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 611398/15
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

LONNY ROSENBLUM and ABBY ROSENBLUM,

**Index No.
611398/15**

Plaintiffs,

-against-

**Motion Seq:
004 Mot D
005 Mot D
007 Mot D**

Decision/Order

**DANIELLE VALENTINO, GREAT NECK NISSAN
LLC and JAMES CUSH,**

Defendants.

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	89-101; 103-17; 155-63
Answering Papers.....	143-48; 149-54; 205-12
Reply.....	234; 236
Briefs: Plaintiff’s/Petitioner’s.....	
Defendant’s/Respondent’s.....	

This series of motions concerns whether plaintiff Lonny Rosenblum’s rehabilitation records from Sierra Tucson, located in Arizona, certain pharmacy records from 110 Pharmacy and CVS Pharmacy, and HIPPA authorizations for Empire Blue Cross collateral source records and Steven Silverman, M.D. should be disclosed to defendants in this motor vehicle accident lawsuit whereby plaintiffs seek to recover damages for personal and derivative injuries allegedly sustained as a result of the subject accident that occurred on October 1, 2014.

Defendant Danielle Valentino moves this Court for an Order dismissing the complaint for failure to respond to the defendant’s Notice for Discovery and Inspection dated July 24, 2018 (July 24th D & I), or in the alternative, to compel the plaintiffs to provide complete responses by a date certain (Motion Sequence 004).

Defendant James Cush requests the same relief relative to his discovery demand dated October 30, 2018 in Motion Sequence 005.¹

Plaintiffs move this Court for a protective order concerning the same discovery demanded by both moving defendants, precluding the defendants from compelling the plaintiff Lonny Rosenblum to sign section 9A of HIPAA authorizations for his rehabilitation records, or in the alternative, having this Court conduct an *in camera* review of the subject records to determine which records are discoverable (Motion Sequence 007).

Plaintiffs oppose Motion Sequences 004 and 005. The moving defendants oppose Motion Sequence 007, maintaining that since plaintiff Lonny Rosenblum has not specifically withdrawn his claim for loss of enjoyment of life, they are entitled to the entirety of the subject records, without an *in camera* inspection by this Court.

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,” and the words “material and necessary” “are . . . 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]).

Discovery requests must be evaluated on a case-by-case basis, and absent an error of law or an abuse of discretion, the determination of a discovery dispute rests within the sound discretion of the trial court (*Forman v. Henkin*, 30 NY3d 656, 662 [2018]; *Andon v. 302-304 Mott Street Assocs.*, 94 NY2d 740, 747 [2000]).

Plaintiffs have served a Bill of Particulars and six Supplemental Bills of Particulars.² The original Bill of Particulars contains the language claiming that the many injuries Lonny Rosenblum alleges he sustained as a result of the subject motor vehicle accident have “prevented [him] from enjoying the normal fruits of social activities.” The First through Fifth Supplemental Bills allege either the same language or that the injuries caused and/or contributed to “a lesser quality of life.” Clearly, this type of language would entitle the defendants to the requested discovery in its entirety because by so claiming, plaintiff Lonny Rosenblum has put his entire medical condition in controversy. The requested discovery would be material, relevant and necessary to the issue of damages (*Greco v. Wellington Leasing, L.P.*, 144 AD3d 981 [2d Dept 2016]; *Montalto v. Heckler*, 113 AD3d 741 [2d Dept 2014]; *M.C. v. Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]).

In this case, however, plaintiffs contend that they have withdrawn the claim implicating loss of enjoyment of life by serving their Sixth Supplemental Bill of Particulars dated November

¹ In the interest of judicial economy, the Court will nonetheless consider defendant Cush’s motion although it is improperly denominated as a cross-motion to Valentino’s motion.

² This Court has not yet issued a trial Certification Order; therefore, no Note of Issue has been filed in this action.

13, 2018 that does not contain any of the loss of enjoyment of life language contained in the preceding Bills/Supplemental Bills.³ The Court has reviewed the Sixth Supplemental Bill and it does not contain any of the language at issue. Whether the plaintiffs should have served an “amended” Bill of Particulars to effect the withdrawal of the loss of enjoyment of life claim is, at this point, most efficiently dealt with by this Court’s determination that, based upon plaintiffs’ representation that they no longer assert a claim for loss of fruits of life, mental anguish, anxiety, or loss of enjoyment of life, coupled with the Sixth Supplemental Bill eliminating this language, the Sixth Supplemental Bill of Particulars is deemed an amendment/withdrawal of plaintiffs’ claims in that regard; however, the analysis does not end here.

Plaintiffs have not withdrawn any of the other claims made on behalf of Lonny Rosenblum, including claims for pain, weakness, tingling, and partial restriction in range of motion in his neck/cervical spine, multiple surgeries to that body part, and that the enumerated injuries (a through pp), “resulting disabilities, aggravations, exacerbations and involvements are associated with further soft tissue injuries to the areas traumatically affected. . .”

Also, plaintiff Lonny Rosenblum has testified at deposition on July 9, 2018 that he went to Sierra Tucson rehabilitation facility “for chronic pain to treat the chronic pain and to get off of the OxyContin. . .” after he filled prescriptions for OxyContin at a CVS pharmacy and 110 Pharmacy prescribed by a local pain management specialist, Dr. Shah. Lonny Rosenblum also testified that he is presently treating with Dr. Silverman of Great Neck, New York, a different pain management specialist. Mr. Rosenblum states that while he was at Sierra Tucson, “[t]hey detoxed me off of the Oxycodone and OxyContin. They gave me physical therapy. They gave me aquatic therapy or hydrotherapy. They gave me acupuncture, massage, craniosacral therapy, trauma therapy. I saw a nutritionist and received counseling. I think that pretty much covers it.”

Since Lonny Rosenblum continues to make the aforementioned claims, especially with respect to pain, and that he acknowledges that he has received physical therapy, acupuncture, and massage at Sierra Tucson, which are therapeutic modalities commonly associated with claims of soft tissue injury, this Court determines that it is appropriate not to release the entirety of the Sierra Tucson records to defendants but to examine them *in camera* to determine what records, if any, are appropriate for disclosure to defendants. Accordingly, those branches of defendants’ respective motions seeking dismissal of the complaint is denied. Likewise, that branch of plaintiffs’ motion for a protective order is denied; however, that branch of plaintiffs’ motion requesting an *in camera* review of the records sought is granted as noted above.

Plaintiffs have provided to this Court, upon its request, a set of consecutively paginated records from Sierra Tucson so that the directives for disclosure are clear and unequivocal by

³ In a response to defendant Valentino’s D & I dated from August 2018, plaintiffs contend that they are no longer making a loss of enjoyment of life claim and they direct attention to the Fifth Supplemental Bill of Particulars. As noted by this Court, the Fifth Supplemental Bill contains the “lesser quality of life” language; therefore, plaintiffs incorrectly rely upon the Fifth Supplemental Bill as evidence of their withdrawal of this claim.

reference to page numbers. Having reviewed the submitted records for *in camera* review, and having found these records material and relevant to the issue of damages, this Court directs that plaintiffs disclose to defendants the following pages of records related to plaintiff Lonny Rosenblum's complaints of pain, treatment by physical/ acupuncture/hydrotherapy therapists and references to the subject motor vehicle accident and body parts allegedly injured as a result thereof:

45-49	150	203-204	276-294
50-55	153-163	205	297-305
56-59	164-167	209-213	306-311
80-81	168-169	216-218	314-327
88-92	170-172	220	331-334
112-114	173-177	228-229	340-342
116-117	179-180	231-236	358-360
122	182-184	238-241	371-372
127	186	244	375
129	191-192	247-267	
137	196-197	269-275	

As to the aforementioned Sierra Tucson records to be disclosed to defendants, the Court directs that those documents shall not be uploaded to the NYSCEF system but shall be delivered in hard copy to defense counsel. Furthermore, the determination made by the Court herein shall be without prejudice to an application for redaction of certain information before the trial court.

Concerning the submitted pharmacy records denominated as pages 1 through 40, the Court determines that it will discuss the disclosure of those records with counsel for the parties at the next scheduled conference of this matter.

Plaintiff Lonny Rosenblum shall provide a HIPAA authorization for his collateral source records maintained by Empire Blue Cross, and a HIPAA authorization for Steven Silverman, M.D., the pain management specialist with whom plaintiff testified he is treating.

The discovery directed by this Court to be disclosed to defendants as directed shall be provided to defendants' respective counsel on or before February 24, 2020. The next conference of this matter before this Court is scheduled for March 2, 2020, at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 29, 2020
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]