

Hogarth v New York City Tr. Auth.

2021 NY Slip Op 33940(U)

January 15, 2021

Supreme Court, Queens County

Docket Number: Index No. 707296/2017

Judge: Joseph Risi

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI, A.J.S.C.

IA Part 3

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PASCALE HOGARTH and PHILLIPE HOGARTH,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, MTA
BUS COMPANY and METROPOITAN
TRANSPORTATION AUTHORITY,

Defendants.
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Index Number: 707296/2017

Motion Date: August 25, 2020

Motion Sequence #2

FILED

DECISION/ORDER

**1/22/2021
9:36 AM**

**COUNTY CLERK
QUEENS COUNTY**

The following EF numbered papers read on the following motion by defendants for an Order, *inter alia*, striking the note of issue and compelling plaintiffs to comply with outstanding discovery and appear for depositions and physical examinations.

	Papers Numbered
Notice of Motion, Affirmation in Support, Exhibits, Service	EF 30 – 39
Affirmation in Opposition, Exhibits, Service	EF 40 – 47
Reply and Service	EF 48

Upon the foregoing papers, it is ordered that motion is determined as follows:

Plaintiffs commenced this action by the filing of a summons and complaint on May 26, 2017, seeking damages for personal injuries allegedly sustained as plaintiff Pascale Hogarth (“Pascale”) was boarding a bus on June 21, 2016 at or near the intersection of 223rd Street and Linden Boulevard, County of Queens, City and State of New York. Defendants interposed a verified answer with various demands dated July 5, 2017.

Defendants now move to, *inter alia*, strike the note of issue and compel plaintiffs to comply with outstanding discovery named in the Preliminary Conference Order dated April 4, 2019,

including, but not limited to, the deposition of Plaintiff Phillippe Hogarth (“Phillipe”) and the independent medical examination(s) (“IME(s)”) of Plaintiff Pascale and HIPAA authorizations.

CPLR §3101 states that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The terms “material and necessary” in this statute “must ‘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’” (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, [1968]). However, a party is “not entitled to unlimited, uncontrolled, unfettered disclosure” (*Geffner v Mercy Med. Ctr.*, 922 NYS2d 470 [2d Dept 2011]).

Here, defendants not only failed to timely designate and hold Plaintiff Pascale’s IME, they also failed to notice and hold Plaintiff Phillippe’s deposition, which they now seek the Court’s intervention to compel their completion. Defendants also seek to compel the production of certain HIPAA authorizations for Plaintiff Pascale’s medical providers and a supplemental Bill of Particulars addressing items not responded to in the first Bill of Particulars.

The Court notes that the Compliance Conference Order dated October 17, 2019 is devoid of language for plaintiffs to provide specific outstanding medical reports and authorizations as stated in the Preliminary Conference Order dated April 4, 2019. Furthermore, the defendants’ good faith letter is dated June 26, 2020, the same day the motion was filed. The Court also notes that the defendants’ Demand for Discovery and Inspection was filed on June 25, 2020 and dated the same. Defendants have offered no explanation as to their delay in requesting the outstanding discovery from plaintiffs. However, in the interest of justice, the Court will grant this motion to a limited extent.

This is not to say, however, that defendants are entitled to unfettered access to all of Plaintiff Pascale’s medical records. The burden is on the party seeking disclosure to demonstrate that the

request will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims (*Forman v Henkin*, 30 N.Y.3d 656, 661 [2018] see *Quinones v 9 E. 69th St., LLC*, 18 N.Y.S.3d 106, 108 [2015]). “[T]he supervision of discovery is generally left to the trial court's broad discretion” (*Geffner*, at 998 [2d Dept 2011]), and “each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure” (*Forman*, at 662 [2018] quoting *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 74 [2000]).

In opposition, plaintiffs assert that they have already provided all medical reports and HIPAA authorizations for the injuries sustained in the subject accident. However, defendants aver that said authorizations were not duly executed as they lacked the necessary initials in the 9(a) section.

A party must provide duly executed authorizations when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition at issue (*Nesbitt v Advanced Serv. Solutions*, 173 A.D.3d 1056, 1057 [2d Dept 2019]; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457, [1983]). However, Public Health Law §2785 (1) provides that, “[n]otwithstanding any other provision of law, no court shall issue an order for the disclosure of confidential HIV related information,” and the only exception to that prohibition requires a showing of “a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding” (Public Health Law §2785 [2][a]).

Here, defendants have failed to demonstrate a showing of a “compelling need” for the disclosure of HIV-related medical records or alcohol/drug treatment records. Moreover, defendants fail to establish that records for alcohol/drug treatment and HIV-related information are relevant to this action. Accordingly, this branch of the motion is denied.

In addition, defendants seek HIPAA compliant authorizations for Baker’s Drugs Pharmacy,

NYC Health & Hospitals Home Care and Plaintiff Pascale's treatment with Mitchell E. Levine, M.D. However, there is no basis in defendants' supporting papers for such disclosures. Said providers are not listed in defendants' Demand for Discovery dated June 25, 2020 nor mentioned in Plaintiff Pascale's deposition. Accordingly, this branch of the motion is denied. Accordingly, the motion is granted to the extent that it is hereby

ORDERED that plaintiffs provide defendants, with: (1) a supplemental Bill of Particulars to the extent not already provided; and (2) evidence of Plaintiff Pascale's special damages and out of pocket expenses, to the extent not already provided; and it is further

ORDERED that plaintiffs are to provide defendants with HIPAA compliant authorizations for: (1) Plaintiff Pascale's employment records or W2's for two (2) years prior to the subject accident on June 21, 2016; (2) non-privileged portions of any legal files pertaining to Plaintiff Pascale's December 2016 accident, only upon evidence that such accident occurred; and (3) any and all of Plaintiff Pascale's treating doctors, medical centers and/or hospital records as per her deposition and statutory hearing testimonies in relation to the subject accident only, which occurred on June 21, 2016 only, to the extent not already provided, except that plaintiff is permitted to provide said authorizations without Section 9(a) the HIPAA authorization form initialized, within 30 days of service of this Order with Notice of Entry; and it is further;

ORDERED that the parties are to notice and complete Plaintiff Pascale's IME within 45 days of service of this Order with Notice of Entry; and it is further

ORDERED that the parties are to notice and complete Plaintiff Phillippe's deposition within 45 days of service of this Order with Notice of Entry; and it is further

ORDERED that all other applications not addressed herein are denied; and it is further

ORDERED that failure of defendants to timely notice and complete Plaintiff Pascale's IME and Plaintiff Phillipe's deposition will be deemed a waiver; and it is further

ORDERED that defendants shall serve plaintiffs with a copy of this Order, together with Notice of Entry, within 15 days of the filing of this order by the Queens County Clerk.

This is the decision and Order of the Court.

Date: January 15, 2021



HON. JOSEPH RISI, A.J.S.C.

FILED

1/22/2021

9:36 AM

**COUNTY CLERK
QUEENS COUNTY**