

Dewinter v Equinox Greenwich Ave., Inc.

2022 NY Slip Op 31941(U)

June 22, 2022

Supreme Court, New York County

Docket Number: Index No. 150176/2021

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** **12**

Justice

-----X

ARIONE DEWINTER,

Plaintiff,

- v -

INDEX NO. 150176/2021

MOTION DATE _____

MOTION SEQ. NO. 001

EQUINOX GREENWICH AVENUE, INC.,
 EQUINOX HOLDINGS LLC,

Defendants.

**DECISION + ORDER ON
 MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18-45 were read on this motion for discovery.

Defendant Equinox Greenwich Avenue, Inc. (Equinox) moves pursuant to CPLR 3124 for an order compelling plaintiff to provide certain authorizations, photographs, witness information, expert report, and other discovery by a date certain with “time being of the essence” and, pursuant to Part 130 of the Rules of the Chief Administrator, granting it fees, costs, and expenses, including attorney fees, incurred as a result of having to bring this discovery motion. Plaintiff opposes.

I. PERTINENT BACKGROUND

Plaintiff alleges in her complaint that on February 27, 2020, she was injured at defendants’ Manhattan gym when she fell while using a treadmill. (NYSCEF 1). She asserts in her bill of particulars that she suffered multiple injuries to her right shoulder, right knee, and lumbosacral spine, as well as left hip iliotibial band friction syndrome and abrasions, all of which resulted in the “aggravation, exacerbation and precipitation of a pre-existing latent and asymptomatic degenerative condition” and a loss of enjoyment of life. (NYSCEF 25). In her

amended bill of particulars, e-filed after this motion was fully submitted, she asserts additional injuries to her left knee, and to her right and left hip. (NYSCEF 46).

II. CONTENTIONS

Equinox claims that as plaintiff alleges a loss of enjoyment of life and exacerbation of pre-existing conditions, it is entitled to unrestricted medical authorizations addressed to all medical providers who treated the body parts injured in the alleged accident. It also seeks authorizations addressed to all fitness clubs that plaintiff attended from January 2017 to the present, any photographs of the accident location in her possession, a copy of her expert's report on the inspection of the treadmill on which plaintiff was injured, and the address of a non-party witness and any communications plaintiff had with her, along with the sneakers she wore at the time of the alleged accident for its inspection. It argues that as plaintiff's conduct in not providing the sought-after discovery is frivolous, it should be awarded the costs of filing this motion. (NYSCEF 38).

In opposition, plaintiff attaches updated responses to Equinox's demands, contending that the motion should be denied as moot. She argues that while she has provided authorizations for treating providers relating to the accident, Equinox is not entitled to unlimited authorizations for her entire medical history, only for those conditions affirmatively placed in issue. Additionally, she denies possession of several of the requested items, including an expert report, and argues that she cannot be compelled to create documents or photographs that do not exist. As she stated at her deposition, she does not recall which of two pairs of sneakers she wore at the time of her accident. She denies engaging in frivolous conduct. (NYSCEF 40).

In reply, Equinox contends that plaintiff's response remains insufficient, absent unrestricted authorizations, and does not believe that she has no expert report or photographs of

the accident site. It again maintains that it is entitled to inspect the shoes that plaintiff wore when she was injured. (NYSCEF 45).

III. ANALYSIS

Pursuant to CPLR 3101(a), “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action ...” What is material and necessary is generally left to the court’s sound discretion and may include “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” (*Forman v Henkin*, 30 NY3d 656, 661 [2018], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). A party may seek an order compelling compliance or a response to any request, notice, interrogatory, demand, question, or order under CPLR article 31. (CPLR 3124).

A party waives the physician-patient privilege when it voluntarily and affirmatively inserts into litigation the issue of a physical or mental defect or condition. (*Rega v Avon Products, Inc.*, 49 AD3d 329 [1st Dept 2008]). Such a waiver is limited in scope to conditions affirmatively placed in controversy. (*Jerez v 2141, LLC*, 191 AD3d 407 [1st Dept 2021]; *Lafata v Verizon Communications Inc.*, 180 AD3d 575 [1st Dept 2020]; *Rohan v Turner Constr. Co.*, 158 AD3d 436 [1st Dept 2018]; *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]). The burden of proving that a party’s mental or physical condition is in controversy is on the party seeking disclosure of medical records. (*Koump v Smith*, 25 NY2d 287, 300 [1969]; *Budano v Gurdon*, 97 AD3d 497, 498 [1st Dept 2012]).

While plaintiff’s claim of loss of enjoyment of life does not place her entire medical condition in controversy (*Gumbs*, 114 AD3d at 574-75 [rejecting, *sub silentio*, argument that claim of permanent inability to work and loss of enjoyment of life placed general health and

medical history at issue]), her claim of “aggravation, exacerbation and precipitation of a pre-existing latent and asymptomatic degenerative condition” entitles Equinox to authorizations unrestricted in date (*Rom v Eurostruct, Inc.*, 179 AD3d 418 [1st Dept 2020]; *McGlone v Port Authority of New York and New Jersey*, 90 AD3d 479, 480 [1st Dept 2011]).

As plaintiff represents that she has neither requested, nor received, an expert report regarding the accident, she cannot be compelled to provide it. To the extent that she has photographs of the accident location, she must produce them. And, as plaintiff claims to be unsure which of her two pairs of sneakers she was wearing at the time of her accident, she must produce both pairs for inspection.

Absent a violation of a prior court order or a showing that plaintiffs’ conduct was willful or contumacious, or due to bad faith, an award of costs is inappropriate. (*Michaluk v New York City Health and Hospitals Corp.*, 169 AD3d 496 [1st Dept 2019]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Equinox Greenwich Avenue, Inc.’s motion to compel is granted to the extent that plaintiff is directed to provide it, within 60 days of the date of this order, with HIPAA compliant authorizations unrestricted in date for the providers requested in its demands, any photographs that she has in her possession of the accident site, and to produce her sneakers for inspection; and it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their preliminary conference on or before August 10, 2022, or appear for the conference in room 341, 60 Centre Street, New York, New York, on August 10, 2022 at 2:15 pm or virtually if necessary.

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BARBARA JAFFE, J.S.C.

6/22/2022

DATE

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