

Mann v Dambrosio

2007 NY Slip Op 32336(U)

July 17, 2007

Supreme Court, Suffolk County

Docket Number: 0002184/2004

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

IMIYAH MANN, an infant under the age of
fourteen by her Mother and Natural Guardian,
ANNETTE SMALLS, and ANNETTE
SMALLS, Individually,

Plaintiffs,

-against-

ANGELA DAMBROSIO and TOYOTA
MOTOR CREDIT CORPORATION,

Defendants.

ORIG. RETURN DATE: NOVEMBER 16, 2006
FINAL SUBMISSION DATE: MARCH 8, 2007
MTN. SEQ. #: 003
MOTION: MD

ORIG. RETURN DATE: FEBRUARY 26, 2007
FINAL SUBMISSION DATE: MARCH 8, 2007
MTN. SEQ. #: 004
MOTION: MG

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Upon the following papers numbered 1 to 14 read on this motion _____
TO COMPEL AND MOTION FOR A PROTECTIVE ORDER

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers
4, 5; Replying Affidavits and supporting papers 6, 7; Notice of Motion and supporting
papers 8-10; Affirmation in Opposition and supporting papers 11, 12; Replying Affidavits
and supporting papers 13, 14; it is,

ORDERED that this motion by defendant TOYOTA MOTOR CREDIT CORPORATION ("TMCC") for an Order, pursuant to CPLR 3124: (1) compelling plaintiff ANNETTE SMALLS to produce herself for a deposition and answer questions regarding whether she ever experienced symptoms typically associated with attention deficit disorder and hyperactivity and whether she was ever diagnosed with attention deficit disorder and/or hyperactivity; (2) compelling plaintiff ANNETTE SMALLS to produce herself for an examination by a neuropsychologist and neurologist, as designated by defendants, to evaluate her to determine whether she experiences and/or experienced attention deficits and/or hyperactivity that IMIYAH MANN may have inherited; and (3) compelling plaintiff to comply with defendants' outstanding discovery demands dated August 15, 2006 and August 18, 2006, and to produce IMIYAH MANN for a deposition, is hereby **DENIED**; and it is further

ORDERED that this motion by plaintiffs for an Order, pursuant to CPLR 3103 and 2304, precluding defendant from conducting a non-party deposition of NORMAN SHULDER, L-CSW, and quashing the subpoena served in connection therewith, is hereby **GRANTED**.

This action arises from a motor vehicle accident on October 11, 2003 when the vehicle operated by plaintiff ANNETTE SMALLS was allegedly struck from behind by the vehicle operated by defendant ANGELA DAMBROSIO when she fell asleep at the wheel. The four-year-old daughter of plaintiff ANNETTE SMALLS, the infant plaintiff IMIYAH MANN, was seated in a child car seat in the rear passenger seat at the time of the accident and suffered numerous injuries, including skull fractures.

In support of TMCC's motion to compel, TMCC alerts the Court that plaintiff MANN, by her representative plaintiff SMALLS, claims that she suffers from attention deficit hyperactivity disorder ("ADHD") as a result of the accident. TMCC argues that this disorder is typically genetic in origin instead of traumatically induced. As such, TMCC claims that it needs to evaluate plaintiff MANN's mother (plaintiff SMALLS) and father to verify whether the disorder is genetic or was brought on by the trauma of the accident.

On or about July 6, 2006, plaintiffs served a Supplemental Verified Bill of Particulars in which plaintiffs alleged additional injuries including "hyperactive, fidgety" and "lack of focus and concentration." The Court notes that

although TMCC alleges that it annexed a copy of the Supplemental Verified Bill of Particulars to its application, it failed to do so. In light of these alleged injuries, a further deposition of plaintiff SMALLS was held on August 7, 2006; however, plaintiff's counsel directed plaintiff SMALLS not to answer questions regarding whether she had ever suffered from attention deficit disorder and/or hyperactivity. Thereafter, TMCC served upon plaintiffs additional discovery demands, to wit: Notices for Discovery and Inspection dated August 15, 2006 and August 18, 2006, which requested authorizations for medical and mental health records as well as the names and addresses of the infant plaintiff's friends. TMCC argues that the requested information is material and relevant to either support or refute plaintiffs' claims that the infant plaintiff suffers from attention deficit disorder and/or hyperactivity as a result of the accident. TMCC also seeks to have the infant plaintiff's father, non-party BASHEEM MANN, evaluated by a psychologist and/or neurologist to determine whether the infant plaintiff's condition is genetically based.

In support thereof, TMCC has submitted, among other things, an affidavit of DR. ROBERT J. GOULD, a licensed pediatric neurologist, who opines that the alleged conditions of the infant plaintiff are not a result of the motor vehicle accident, and seeks information regarding the infant plaintiff's parents to confirm his opinion. Specifically, Dr. Gould alleges that at this juncture, he needs to review the infant plaintiff's parents' academic, neurological and psychological records. If the records reveal traits normally associated with hyperactivity and attention deficit disorder, Dr. Gould then seeks to have the parents submit to neurological and psychological examinations. TMCC has also annexed medical literature regarding hyperactivity and attention deficit disorder, which it claims shows a "strong" likelihood that such conditions are inherited from one's parents.

In opposition, plaintiffs argue that they have produced the infant plaintiff for a deposition on August 7, 2006, and are willing to produce her on another date. In addition, plaintiffs alert the Court that they have already produced plaintiff SMALLS for two depositions; that three school teachers of the infant plaintiff have been produced for depositions; and defendant's neuro-psychologist has examined the infant over three visits and conducted a neurological examination. In addition, plaintiffs submit that they have provided numerous authorizations to defendants, including authorizations regarding the infant plaintiff's pre-natal care records, birth records, pre-accident medical

records, accident-related records, and school records from pre-school through the first grade.

Plaintiffs argue that as the infant plaintiff was four years old at the time of the accident, defendants may evaluate the infant's pre-accident cognitive abilities, including her pre-accident medical records, which plaintiffs submit were entirely normal. Plaintiffs contend that defendants have also had an opportunity to depose the infant's pre-school teacher, who taught the infant both before and after the accident. Plaintiffs further contend that any mental health records of plaintiff SMALLS, if they even exist, should not be disclosed as plaintiff SMALLS did not put her mental condition in issue in the instant litigation; she is merely claiming injuries to her back and neck. In addition, plaintiffs indicate that they have responded to TMCC's Notices for Discovery and Inspection dated August 15, 2006 and August 18, 2006, which included authorizations for Dr. Coleman, Dr. Leon Charash, and Norman Shulder, L-CSW.

Plaintiffs have also submitted an affirmation of LEON I. CHARASH, M.D., who examined the infant plaintiff on or about July 28, 2006, who states with a reasonable degree of medical certainty that traumatic brain injury is a major cause of ADHD, specifically the subdural hematomas suffered by the infant plaintiff, and that there was no evidence that the complained of conditions existed prior to the accident. Plaintiffs have additionally submitted affidavits of the infant's parents, plaintiff SMALLS and BASHEEM MANN, in which they indicate that neither one has ever been diagnosed with ADHD or any learning disabilities. In fact, both parents are currently employed as certified nursing assistants.

TMCC has subsequently abandoned its request for neuro-psychological testing of the infant's parents. In addition, in court on January 18, 2007, plaintiffs provided updated authorizations including the release of mental health records. With respect to TMCC's request for a further physical examination of the infant plaintiff due to plaintiffs' alleged untimely exchange of Dr. Charash's report, this request must be denied as TMCC did not seek this affirmative relief within its notice of motion (see CPLR 2214[a]).

CPLR 3101(a) provides for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). By commencing the instant action to recover damages for personal injuries, the physician/patient privilege held by plaintiffs was waived

with respect to their relevant past medical history (see *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]; *Gill v Mancino*, 8 AD3d 340 [2004]; *McLane v Damiano*, 307 AD2d 338 [2003]; *DeStrange v Lind*, 277 AD2d 344 [2000]). However, a party does not waive the privilege with respect to unrelated illnesses or treatments (see *McLane v Damiano*, *supra*; see also *Sadicario v Stylebuilt Accessories*, 250 AD2d 830 [1998]). Moreover, a court may limit disclosure to a definite period of time prior to the alleged acts of negligence (*Chervin v Macura*, 2006 NY Slip Op 2845 [2d Dept]; *DeStrange v Lind*, 277 AD2d 344, *supra*). Although CPLR 3101 and 3121 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340, *supra*; *DeStrange v Lind*, 277 AD2d 344, *supra*).

As the infant plaintiff's father is not a party to this action, and was not served with the instant motion papers, the Court finds that it lacks jurisdiction over him. Therefore, that branch of TMCC's application seeking disclosure of BASHEEM MANN's medical and academic records is denied (see *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457 [2006]; *Blake v LP 591 Ocean Realty*, 237 AD2d 554 [1997]; *Nieves v 1845 7th Ave. Realty Assocs., L.P.*, 184 Misc 2d 639 [Sup Ct, NY County 2000]).

In addition, after balancing the competing interests herein, the Court finds that a denial of TMCC's request for disclosure of plaintiff SMALLS' academic and medical records is warranted. It is well-settled that discovery determinations rest within the sound discretion of a trial court, and appellate courts will usually defer to a trial court's determinations regarding disclosure (*Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740 [2000]; *Jordan v Blue Circle Atl.*, 296 AD2d 752 [2002]). In the instant action, plaintiff SMALLS' mental condition is not in controversy, and plaintiff SMALLS has submitted an affidavit that she has never been diagnosed with ADHD or any other learning disabilities. Furthermore, disclosing plaintiff's medical and academic records may lead to unfettered litigation on the factors contributing to plaintiff SMALLS' own unrelated medical and academic history (*Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, *supra*). Moreover, the Court notes that plaintiffs have already provided TMCC with substantial discovery in this matter, including authorizations relating to the infant plaintiff's period of gestation and birth, and the infant plaintiff had previously been examined by a neuropsychologist and neurologist, both designated by defendant.

In view of the foregoing, that branch of TMCC's motion seeking further responses to its discovery demands, dated August 15, 2006 and August 18, 2006, is denied. The Court finds that the additional information sought, such as the names and addresses of the infant plaintiff's friends, is not likely to lead to the discovery of information material and necessary to TMCC's defense in this action (*see e.g. Kingston v Breslin*, 38 AD3d 614 [2007]; *Beckles v Kingsbrook Jewish Med. Ctr.*, 36 AD3d 733 [2007]; *Auerbach v Klein*, 30 AD3d 451 [2006]).

With respect to plaintiffs' motion for a protective Order, pursuant to CPLR 3103 and 2304, precluding defendant from conducting a non-party deposition of NORMAN SHULDER, L-CSW, and quashing the subpoena served in connection therewith, plaintiffs allege that Mr. Shulder is a licensed clinical social worker who provided psychotherapy to the infant plaintiff following the subject accident, and that plaintiffs have twice provided defendants with authorizations to obtain medical records from Mr. Shulder. Plaintiffs argue that defendants are not entitled to depose Mr. Shulder absent a showing of special circumstances, which plaintiffs allege are not present here. In opposition, TMCC alleges that defendants are entitled to a deposition of Mr. Shulder, as plaintiff SMALLS' deposition testimony conflicts with the statements contained in the examination notes of Mr. Shulder. In addition, TMCC argues that the precise details of Mr. Shulder's conversations with plaintiff SMALLS are in the exclusive possession of Mr. Shulder and cannot be obtained from any other source.

A party seeking disclosure from a non-party witness pursuant to CPLR 3101(a)(4) must demonstrate special circumstances (*see Attinello v DeFilippis*, 22 AD3d 514 [2005]; *Lanzello v Lakritz*, 287 AD2d 601 [2001]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]). Special circumstances are shown by establishing that the information sought is not only relevant, but also cannot be obtained through other sources (*see Tannenbaum v Tenenbaum*, 8 AD3d 360 [2004]; *Murphy v Macarthur Holding B.*, 269 AD2d 507 [2000]). Here, the Court finds that TMCC failed to establish such special circumstances. TMCC seeks a deposition of Mr. Shulder mainly to refute plaintiffs' contention that the infant plaintiff suffers from ADHD and hyperactivity. However, the Court notes that plaintiffs have provided authorizations with respect to Mr. Shulder's notes and records, and as discussed, the infant plaintiff has been examined by a neuropsychologist and neurologist, both designated by defendant. As such, defendant was provided with other sources from which to obtain the sought-after information. Additionally, the Court finds TMCC's argument that Mr.

Shulder may be unavailable at trial, and therefore his notes may be inadmissible, speculative and unpersuasive. Accordingly, plaintiffs' motion for a protective order precluding defendants from conducting a non-party deposition of Norman Shulder, and quashing the subpoena served in connection therewith, is granted.

Finally, any relief requested in these applications but not specifically addressed by the Court herein is hereby **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: July 17, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court