

**Parker v Winthrop Univ. Hosp.**

2007 NY Slip Op 33906(U)

November 30, 2007

Supreme Court, New York County

Docket Number: 0100914/2005

Judge: Walter Tolub

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

PRESENT: WALTER B. TOLUB  
*Justice*

PART 15

CHARLES PARKER and DANIELLE PARKER,

INDEX NO. 100914 /2005

Plaintiffs,

MOTION DATE 10/26/07

- v -

MOTION SEQ. NO. 001

WINTHROP UNIVERSITY HOSPITAL, WINTHROP  
UNIVERSITY HOSPITAL ASSOCIATION, and  
TURNER CONSTRUCTION COMPANY,

Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

**FILED**

DEC 03 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/30/07

[Signature]  
WALTER B. TOLUB, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
CHARLES PARKER and DANIELLE PARKER,

Plaintiffs,

-against-

WINTHROP UNIVERSITY HOSPITAL, WINTHROP  
UNIVERSITY HOSPITAL ASSOCIATION, and  
TURNER CONSTRUCTION COMPANY,

Defendants.  
-----x

Index No. 100914/05  
Mtn Seq. 001

**FILED**  
DEC 03 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

On August 7, 2003, plaintiff Charles Parker claims that he sustained a back injury while working on a construction site as a laborer for a masonry subcontractor that was hired to complete construction work at Winthrop University Hospital. Mr. Parker claims that on the date of his injury, his job required him to carry a heavy decorative stone with one of his co-workers. While carrying the stone, he claims that the co-worker tripped, and let go of the stone. The resulting sudden shift in weight caused Mr. Parker's back injuries.

Plaintiffs commenced this action on January 5, 2005. The complaint contains four causes of action, including one advanced by Mr. Parker's wife, Danielle, for loss of consortium. Initial discovery did not reveal any other ongoing legal actions involving either Mr. or Mrs. Parker. However, at deposition, Mrs. Parker testified that she sustained injuries in an unrelated automobile accident which occurred in either July of 2003 or

2004, and that those injuries were the subject of a lawsuit in Nassau County (Danielle Parker v. Wanda D. Mallard, Nassau Co. Index No 017467/2005 ("the automobile action")). It was also learned that in 2006, Mrs. Parker commenced a matrimonial action in Nassau County (Danielle Parker v. Charles E. Parker (Index No. 200230/2006)). The Parkers have since reconciled.

Following Mrs. Parker's deposition, defendants made a demand for additional discovery, specifically seeking non-privileged materials from the attorney's file for the automobile action, and an authorization allowing the examination of the court file in the divorce action. Plaintiffs did not produce these materials, and the instant motion followed.

By this motion, defendants move for an order pursuant to CPLR 3124 compelling plaintiffs to respond to defendants' December 1, 2006 demand for supplemental discovery. Plaintiffs cross-move for an order directing defendants to produce copies of any and all statements or transcripts of telephone statements made by a non-party witness, Adam Crockett.

#### Discussion

The request for prior statements made by Adam Crockett to defendants' counsel is denied. Pursuant to the CPLR, materials which are produced in anticipation of litigation or trial may become discoverable in those instances where a moving party demonstrates a substantial need for the materials and is unable,

without undue hardship, to obtain the "substantial equivalent of the materials by other means" (CPLR 3101(d)). Here, although plaintiffs claim that Mr. Crockett's testimony is inconsistent with that of Mr. Parker and nonparty witness Bruce Poole,<sup>1</sup> Mr. Crockett's testimony does not appear to contradict any of his own previously made statements: he testified that while he worked on the job site, he did not recall working with Mr. Parker at the time of his accident, and did not recall falling (Notice of Cross Motion Ex. E, p. 34-35). Moreover, Mr. Crockett stated that statements made to investigators and defense counsel in the months and years after Mr. Parker's accident contained the same information: he did not recall either falling near or working with Mr. Parker at the time of Mr. Parker's accident (id., p. 34-35, 39). Inasmuch as plaintiffs have not established a substantial need for access to prior statements made to defense counsel by Mr. Crockett, the cross-motion is denied.

The next issue, is whether defendants are entitled to access both the attorney's file for Mrs. Parker's automobile injury action, and the Nassau County court file for the Parkers' matrimonial action. Defendants claim that access to all of the

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<sup>1</sup>Mr. Parker claims that Mr. Crockett witnessed the accident and was the person working with him at the time. According to Mr. Parker, Mr. Crockett tripped on a missing scaffold plank, and dropped the portion of the stone he was carrying. Nonparty witness Bruce Poole, a labor foreman, also testified that Mr. Crockett told him that he had tripped while carrying a stone with Mr. Parker (Reply Affirmation, Ex. A).

non-privileged documents and records from plaintiffs' attorney in the automobile injury action is warranted because information contained within that file directly relates to her loss of consortium claim and what activities she can, and cannot, perform.<sup>2</sup> The court file for the matrimonial action, as argued by defendants, is warranted because it was filed subsequent to the filing of the instant action, which as previously noted, contains a claim for loss of consortium.

This court agrees that given the claim for loss of consortium and the deposition testimony which has been annexed to the papers, the non-privileged documents and records in Ms. Parker's automobile case may bear some relevance to the instant action. They are therefore discoverable, and shall be produced. Matrimonial records in this State, however, are sealed by statute, and remain sealed unless a showing is made warranting overriding the statutory protection. It is this court's position that defendants have not met this threshold. The couple was married at the time of the accident in 2003. They were separated for six months in 2006, at which time a divorce action was pending, and the couple has since reconciled. Without more, this

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<sup>2</sup> As argued by defendants: "Mr. Parker testified that he is no longer able to help his wife perform certain activities around the house. If Ms. Parker testified in her own action that she is unable to perform those activities which her husband claims he cannot perform, Defendants are entitled to discovery on these matters" (Affirmation in Opposition, p.9).

court finds no reason to override the statutory protections afforded to matrimonial court files. As such, it is

ORDERED that the portion of defendants' motion seeking production of all non-privileged materials contained within the attorney's file for the automobile action commenced in Nassau County by plaintiff Danielle Parker, captioned, Danielle Parker v. Wanda D. Mallard, Nassau Co. Index No 017467/2005 is granted; and it is further

ORDERED that plaintiffs shall produce an authorization for said file within 30 days of service of a copy of this decision with notice of entry; and it is further

ORDERED that the balance of defendants' motion, is denied; and it is further


ORDERED that plaintiffs' cross-motion is denied.

Counsel for the parties are directed to appear for a Status Conference in IA Part 15, Room 335, at 11:00 a.m. on January 11, 2008.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/30/07

**FILED**  
DEC 03 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.