

Brennan v Dormitory Auth. of State of N.Y.

2008 NY Slip Op 33342(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 109497/06

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Justice

Index Number : 109497/2006

BRENNAN, RICHARD P.

vs.

DORMITORY AUTHORITY

SEQUENCE NUMBER.: 002

COMPEL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

per attached

is decided

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

FILED

DEC 15 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 12/4/08

[Signature]

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
RICHARD P. BRENNAN and PATRICIA BRENNAN,

Plaintiffs,

Index No. 109497/06

-against-

THE DORMITORY AUTHORITY OF THE STATE
OF NEW YORK, et al.

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

FILED
DEC 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this Labor Law action, Third Party Defendant Fleet Building Maintenance, Inc. (Fleet) moves to compel Plaintiff Richard Brennan (Brennan) to provide authorizations related to his low back injury in 1994 or 1995 and a re-injury to his low back in 2005 (motion seq 002). In support of the motion, Fleet cites Caplow v Otis Elevator Co. (176 AD2d 199 [1st Dept 1991] [treatment for gout and cellulitis on legs occurring subsequent to plaintiff's alleged upper back injury was discoverable]) and Trustees of Northport-East Northport Public Library v Preferred Mutual Ins. Co. (276 AD2d 788 [2d Dept 2000] [treatment regarding low back injury was discoverable where plaintiff alleged a knee injury because nature and severity of low back injury may have an impact on damages]). Fleet maintains that it needs such discovery because the low back injury may be the reason why Brennan maintains that he cannot work, as opposed to the hip injuries claimed in this action. Third Party Defendant Adams Management joins in the request.

Three of the Defendants/Third Party Plaintiffs similarly move to compel (motion seq 003). They submit a copy of an Affirmation of Dr. Crane, an orthopedic surgeon who

states that the pain and weakness which Brennan testified resulted from his hip injury is consistent with symptoms from back injury and is atypical of hip injury after a hip replacement. Those Defendants also argue that Brennan affirmatively placed his medical condition regarding his back at issue but point to nothing specific except one statement in the Verified Bill of Particulars regarding "Aggravation/exacerbation of pre-existing condition." However, this notation is listed as an injury under the column denominated "RIGHT HIP." The Verified Bill makes no mention of any back injury.

Plaintiffs oppose both motions on the basis that the conditions at issue in this lawsuit solely relate to Brennan's left and right hip. Specifically, Plaintiffs allege that as a result of a slip and fall in November, 2005, Brennan injured his right hip and was compelled to undergo a total hip replacement. Brennan was also compelled to undergo a left hip replacement as well, allegedly due to overuse of the right hip. Brennan states that on August 4, 2008, he provided unlimited authorizations for treatment to both hips. Although Brennan acknowledges that he had a lower back injury in 1994 or 1995, which resulted in his being out of work five years, he maintains that he returned to work without any major interruption for about five years prior to this accident, except in January 2005 when he re-injured his back and stayed out of work for two months. Plaintiff then returned to work and worked approximately seven months until the accident.¹ Plaintiffs

¹Plaintiff's employment records indicate that for the period of May 2005 through November 2005 (the month of the accident) that Plaintiff worked close to, or more than, a 35 hour work week.

maintain that no damages are being claimed for back injuries and therefore, because the same anatomical parts were not placed at issue, Brennan did not waive the doctor-patient privilege regarding his low back records.

No party disputes that the physician-patient privileged is waived when a party affirmatively places his or her medical condition at issue (Dillenback v Hess, 73 NY2d 278 [1989]). What is disputed is the application of this well settled principle to the facts of this case. Certainly, had Brennan claimed that the accident aggravated a pre-existing back condition, the Court would compel discovery of his prior back treatment (see Rega v Avon Products, Inc., 49 AD3d 329 [1st Dept 2008] [discovery of prior and subsequent injuries permitted because “[p]laintiff voluntarily placed his physical condition in issue by averring in his bill of particulars that it was aggravated or exacerbated by the injuries at issue in the action, and that he was permanently, albeit partially, disabled as a result”]).² However, the Bill of Particulars language cited by Defendants is solely related to his right hip and nothing in the Bill of Particulars specifies a back injury. Moreover, Defendants

²In permitting discovery of plaintiff’s prior neck and back injuries, the First Department in Rega relied on the Verified Bill of Particulars. The Verified Bill of Particulars indicates that the plaintiff claimed a traumatic brain injury, but additionally claimed aggravation of previous conditions “including degenerative osteoarthritis” (Record at 72 and 96). The Verified Bill of Particulars also states that the injuries were accompanied by “restriction of motion” unrelated to traumatic brain injury (Record at 71 and 95). Osteoarthritis affects the neck (see Brodeur v Cooper, 182 AD2d 666 [2d Dept 1992]) and back (see McGrath v Regan, 109 AD2d 1007 [3d Dept 1985]), among other body parts, and symptoms include restriction of motion (see Livai v Amoroso, 239 AD2d 565 [2d Dept 1997]). Accordingly, the plaintiff affirmatively placed his prior neck and back injuries at issue.

cite no testimony indicating that Brennan has affirmatively placed a back injury at issue.

In Noble v Ackerman (216 AD2d 140 [1st Dept 1995]), the First Department denied defendant's request for authorizations regarding a knee operation performed ten years before the accident because the "plaintiff does not claim that his knee was injured in the accident or that his prior knee injury was aggravated (*cf. Caplow v Otis El. Co.*, 176 AD2d 199, 200)." Similarly here, Plaintiff affirmatively denies that his back was injured in this accident, and denies that his prior back injury, occurring more than ten years before this accident (and his re-injury ten months before) was aggravated. Even if the holding in the case cited by Fleet, Caplow v Otis Elevator Co. (176 AD2d 199 [1st Dept 1991]), was controlling as opposed to Rega v Avon Products, Inc and Noble v Ackerman, the Court notes that Plaintiff's back injuries did not occur subsequent to the injuries alleged here. Unlike here, in Caplow, the treatment for the condition of gout and cellulitis (which the First Department acknowledged was not placed in controversy) occurred subsequent to the accident at issue.³

³The Court cannot reconcile Caplow with other cases applying the well settled principle that the party must affirmatively place his or her medical condition at issue in order to waive the physician-patient privilege (*see e.g., Dillenback v Hess*, 73 NY2d 278 [1989]). In determining that the gout and cellulitis condition, which the Court admitted was not placed in controversy, was nonetheless discoverable, the Court stated that those medical records "might be useful in determining to what extent his claim for lost wages is attributable thereto, and not to the lower back injury" and cited Wachtman v Trocaire College, 143 AD2d 527 [2d Dept 1988]). In Wachtman however, where plaintiff alleged a knee injury and sought lost wages, the Court permitted discovery of plaintiff's gynecological problems because actually testified that her gynecological problems caused "some disability in a period subsequent to the accident herein." Thus, in Wachtman, the

However, no party has cited to the language in Brennan's Verified Bill of Particulars stating that "[a]ll of the above injuries...have affected plaintiff's bodily systems and the skin, nerves, bones, tissues, tendons, muscles, blood vessels and other tissues." Accordingly, the parties should submit additional briefs on whether this general and vague language, standing alone, is sufficient to establish that Brennan affirmatively placed his back condition at issue, despite his counsel's representation that "Brennan is not claiming injury to his back as a result of subject accident." After submissions, the parties shall appear for oral argument. It is hereby

ORDERED that the additional submissions shall be made by January 5, 2008 and the motion is adjourned to January 8, 2009 at 3:30 PM for oral argument; and it is further

ORDERED that Brennan is directed to provide to Defendants forthwith (whether or not previously provided) authorizations unlimited in time, relating to his right and left hip, including an authorization for Dr. Zitner.

This constitutes the Decision and Order of the Court.

Dated: December 4, 2008

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 NEW YORK
EMILY JANE GOODMAN

plaintiff herself actually attributed her inability to work to the gynecological conditions thereby affirmatively placing her gynecological problems at issue; whether or not records might by "useful" was not the basis for the holding in Wachtman. Here, unlike in Wachtman, Brennan affirmatively denies that the back condition caused any disability after he went back to work.