

**Chisolm v City of New York**

2009 NY Slip Op 31803(U)

August 7, 2009

Supreme Court, New York County

Docket Number: 107083/08

Judge: Eileen A. Rakower

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART **Part 5**

Index Number : 107083/2008  
**CHISOLM, JEROME**  
VS.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 001  
ORDER OF PROTECTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2, 3  
4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER**  
**FILED**  
AUG 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/1/09

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

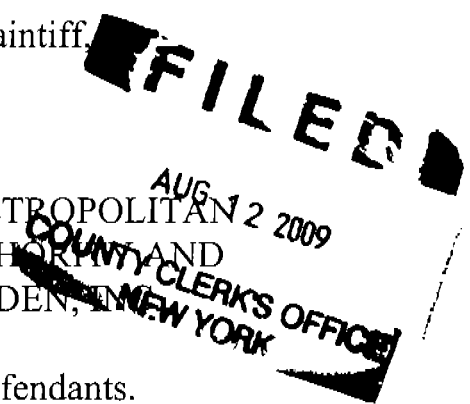
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
JEROME CHISOLM,

Plaintiff.

- against -

CITY OF NEW YORK, METROPOLITAN  
TRANSPORTATION AUTHORITY AND  
MADISON SQUARE GARDEN, INC.,  
Defendants.



Index No.  
No.107083/08

**DECISION  
and ORDER**

Mot. Seq.  
001

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action to recover for personal injuries allegedly sustained when he tripped and fell on the sidewalk on the southeast corner of West 33<sup>rd</sup> Street and 8<sup>th</sup> Avenue in the City, County, and State of New York on January 31, 2008.

Currently before the court is a motion by Plaintiff for a protective order pursuant to CPLR §3103(a). Plaintiff seeks an order protecting Plaintiff from Defendant Metropolitan Transportation Authority's ("MTA") demands for medical authorizations to health care providers and pharmacies pertaining to treatment for medical conditions, which Plaintiff claims are unrelated to the subject trip and fall. Plaintiff has submitted an affirmation in support of his motion, wherein Plaintiff states that "[t]he only injury claimed by the plaintiff here is a fractured right knee. Any claims of emotional distress are hereby withdrawn by the plaintiff." Annexed to Plaintiff's affirmation as exhibits are correspondence from counsel for MTA regarding MTA's efforts to obtain said medical authorizations.

MTA has cross-moved for an order (1) striking Plaintiff's complaint pursuant to CPLR §3126 for his alleged failure to provide discovery; (2) precluding plaintiff from offering evidence at trial pursuant to CPLR §3042; and/or (3) compelling Plaintiff to provide authorizations for his mental health records, pursuant to CPLR §3124. MTA submits an affirmation in support of its cross-motion. Annexed thereto as exhibits are correspondence from counsel from MTA to Plaintiff's counsel seeking

the subject authorizations; Plaintiff's summons and complaint; Plaintiff's verified bill of particulars; and Plaintiff's prescription records from Friendly Pharmacy, which were provided by Plaintiff in the course of discovery.

The City of New York has submitted an affirmation in opposition to Plaintiff's motion, taking the position that Plaintiff's motion for a protective order is premature, as Plaintiff's deposition is currently scheduled for August 18, 2009. Further, the City notes that, while it does not currently seek authorizations for Plaintiff's mental health records, it reserves the right to seek authorizations and records regarding any medications taken by Plaintiff "that would have affected his spatial awareness and gait at the time of his fall."

Defendant Madison Square Garden ("MSG") has cross-moved pursuant to CPLR §3124 for an order (1) compelling Plaintiff to provide MSG with a supplemental bill of particulars, setting forth the location of Plaintiff's accident with greater specificity; and (2) compelling Plaintiff to provide authorizations for Plaintiff's mental health and pharmacy records. MSG submits an affirmation in support of its cross-motion. Annexed to MSG's affirmation as exhibits are Plaintiff's bill of particulars; MSG's answer and combined discovery demands; and MSG's 10/30/08 letter to Plaintiff, wherein MSG requests, *inter alia*, that Plaintiff identify the location of his accident with greater specificity. MSG argues that Plaintiff's mental health records remain discoverable because Plaintiff asserts claims for pain and suffering, and because the Defendants are entitled to records of the medications Plaintiff was on prior to the accident to ascertain whether the potential side effects of Plaintiff's prescriptions contributed to the accident in any way.

MTA has submitted a reply affirmation in response to the City's opposition papers.

CPLR §3103 states, in pertinent part:

**Protective orders.**

- (a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any

person or the courts.

CPLR §3124 states:

If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.

In order to obtain discovery of records relating to a party's mental condition, the party must have affirmatively placed his or her mental condition in issue (*Dillenbeck v. Hess*, 73 N.Y.2d 278, 287 [1989]; *Brown v. Telerep, Inc.*, 263 A.D.2d 378, 379 [1st Dept. 1999]; *Aycadi v. Baron*, 302 A.D.2d 313 [1st Dept. 2003]). While a plaintiff places his mental condition in issue when he alleges that he suffered emotional distress as the result of an incident, a party may "remove the affirmative interjection of [his] mental or emotion condition from the case" by withdrawing allegations of emotional distress (*Brown* at 378) (lower court erred in granting motion to compel plaintiff's psychiatric records where plaintiff eliminated her causes of action for intentional infliction of emotional distress and defamation, and proceeded solely on her contract and tortious interference claims).

Here, in Plaintiff's affirmation in support of his motion for a protective order shielding him from disclosure of his mental health records, Plaintiff expressly withdraws all claims for emotional damages initially interposed, and seeks to recover solely for "a right knee fracture and an open reduction of the comminuted fracture of the distal right femoral shaft." Like the plaintiff in *Brown*, Plaintiff has removed the affirmative interjection of his mental condition into the action by withdrawing all claims for emotional damages, and thus Plaintiff is not required to produce his mental health records.

To the extent that Defendants seek to prove that Plaintiff's trip and fall was caused in whole or in part by a medical condition and/or the side effect of medications taken to deal with any such condition, the court notes that Plaintiff has already provided authorizations for his prescription records, which cover a period of March 13, 2006 through February 20, 2009 (*see Moore v. Superior Ice Rink, Inc.*, 251 A.D.2d 305, 305-06 [2nd Dept. 1998]) (where plaintiff stipulated that he would not claim mental anguish or loss of enjoyment of life as a result of accident, "the Supreme Court did not err in limiting the defendant's discovery of pre-accident medical and psychiatric records to information regarding the types and quantities of drugs that had

been prescribed for the plaintiff's mental disorder during the six-month period leading up to the accident.")

Turning now to MSG's motion to compel Plaintiff to submit a supplemental bill of particulars, CPLR §3043 provides, in pertinent part,

- (a) Specified particulars. In actions to recover for personal injuries the following particulars may be required:
- (2) [The occurrence's] approximate location....

"The purpose of a bill of particulars is to amplify the pleadings, limit the proof, and prevent surprise at trial" (*Twiddy v. Standard Marine Transp. Servs.*, 162 A.D.2d 264, 265 [1st Dept. 1990]). "A response that is vague, non-specific and open ended fails to satisfy the purpose of a bill of particulars" (*Alvarado v. New York City Hous. Auth.*, 302 A.D.2d 264 [1st Dept. 2003]).

In response to MSG's demand that Plaintiff specify "[t]he part or portion of the premises wherein the alleged accident occurred," Plaintiff responded as follows:

The accident occurred at the sidewalk on the southeast corner of West 33<sup>rd</sup> Street and 8<sup>th</sup> Avenue in New York County on the corner in front of the entrance to Penn Station and Madison Square Garden.

The court finds that MSG is entitled to depose Plaintiff, when MSG will have the opportunity to have Plaintiff identify the location with greater specificity. The location of the accident could then be identified through the use of photographs or by reference to some specific object or objects such that MSG is able to identify where on the sidewalk Plaintiff allegedly tripped and fell.

Wherefore it is hereby

ORDERED that Plaintiff's motion for a protective order preventing disclosure of Plaintiff's mental health records is granted; and it is further

ORDERED that Plaintiff's is hereby precluded from claiming damages for any alleged emotional damages as a result of the incident; and it is further

ORDERED that MSG's motion to compel is granted to the extent that Plaintiff shall submit to an examination before trial on notice to be served within 60 days of receipt of a copy of this order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: August 7, 2009

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
AUG 12 2009  
COUNTY CLERKS OFFICE  
NEW YORK