

Terzo v Hospital of Special Surgery

2010 NY Slip Op 33120(U)

October 29, 2010

Supreme Court, New York County

Docket Number: 111839/2009

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis
Justice

PART 6

Index Number : 111839/2009
DEL TERZO, DIANE
vs.
HOSPITAL OF SPECIAL SURGERY
SEQUENCE NUMBER : 001
PRECLUDE

INDEX NO. _____
MOTION DATE 9/21/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Exhibits ...

PAPERS NUMBERED

1-10
11-12
13

Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

NOV 05 2010

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
+ order.

Dated: 10/29/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
DIANE DEL TERZO,

Plaintiff,

Index No. 111839/2009

- against -

Decision and Order

HOSPITAL OF SPECIAL SURGERY, CHRISTOPHER EDMONDS, M.D., and ANSWORTH ALLEN, M.D.,

FILED

Defendants.

NOV 05 2010

-----X
JOAN B. LOBIS, J.S.C.:

**NEW YORK
COUNTY CLERK'S OFFICE**

Defendants Hospital of Special Surgery, Christopher Edmonds, M.D., and Answorth Allen, M.D., move for an order dismissing plaintiff's complaint for failure to comply with discovery demands, or in the alternative, ordering plaintiff to provide authorizations related to plaintiff's medical history. This motion was the subject of numerous and occasionally contentious court conferences during which the court attempted to settle all discovery disputes. For the reasons discussed below, the motion is granted to the extent that plaintiff shall provide authorizations for medical care she received since 2002 related to her upper extremities as well as collateral source authorizations for the period of 2002 until the present.

Plaintiff commenced this case by the filing of a summons and complaint on or about August 19, 2009. Defendants served separate answers on September 15, 2009. Plaintiff served bills of particulars for each defendant on or about January 22, 2010. She alleges that defendants negligently performed a left shoulder arthroscopy and negligently administered anesthesia. Plaintiff alleges that she suffers from pain and weakness on the left side of her neck and left shoulder. She further alleges that as a result of the pain and weakness, she cannot carry or lift with her "left upper

extremity"; she cannot swim; and her ability to drive, perform household chores, and work have been compromised.

As part of their answers, defendants made discovery demands in which they requested authorizations pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Plaintiff provided most authorizations, including an authorization for the records of Phillips Ambulatory Care Center with a notation on that authorization was for an MRI ordered by a Frances Cuomo, M.D. Plaintiff refused to provide HIPAA authorizations for a Lawrence Schwartz, M.D., William Kuhel, M.D., Jeffrey Fishman, M.D., and Columbia Presbyterian Hospital, maintaining that they did not provide treatment "relevant to this action" and contending that defendants were required to prove the relevance of the treatment. Plaintiff also refused to provide authorizations for all medical care she received and medical prescriptions she obtained from 2002 to the present and for all treatment related to her upper extremities, neck, and shoulders since she was born. Plaintiff contended that such demands were "palpably improper." For the authorizations actually provided, she refused to authorize the release of alcohol/drug treatment information, mental health information, or HIV-related information.

Defendants were unsatisfied with plaintiff's responses and made the instant motion. Defendants argue that plaintiff's actions violate C.P.L.R. § 3101(a).¹ With regard to the alcohol/drug treatment information, mental health information, and HIV-related information, defendants argue

¹ Defendants actually moved for relief under C.P.L.R. § 3101(d). The court will disregard this obvious mistake and decide the motion under C.P.L.R. § § 3101(a) & (b). See C.P.L.R. § 2001.

that they are entitled to this information because it could shed light on plaintiff's ability to perform normal daily functions. Defendants also argue that "institutions reject authorizations where [this information is not affirmatively authorized for release], presumably because they want to avoid liability for improper disclosure and do not have the administrative resources to comb through every chart[.]" Defendants maintain that plaintiff does not have the right to unilaterally decide which medical records are relevant, and that plaintiff's alleged physical limitations could be caused by any number of injuries. Defendants also take issue with the authorization for Phillips Ambulatory Care Center arguing that it was improperly limited to the MRI.

Plaintiff contends that her alcohol/drug treatment information, mental health information, and HIV-related information is confidential and that defendants have no good faith basis for believing that such information exists. She maintains that she was never treated by a Dr. Kuhel; that Dr. Fishman was her employer and not a medical treater; that she gave birth to a child at Columbia Presbyterian Hospital; and that the MRI was the only care provided by Phillips Ambulatory Care Center. Plaintiff argues that defendants' requests for all rheumatologists that she visited from 2002 until the present; for all physicians that she consulted about collagen vascular disease; for all medical treatment rendered and medical prescriptions obtained from 2002 until the present; and for all medical treatment rendered for the upper extremities were overly broad.

The motion was discussed at court conferences on August 3, 2010; August 31, 2010; and September 21, 2010. During the first conference, counsel for defendants reiterated their concern that because plaintiff had not expressly authorized the release of release of alcohol/drug treatment

information, mental health information, and HIV-related information, treaters would not honor the authorization. Nevertheless, counsel for defendants had no documentary evidence to support this contention. Defense counsel also maintained that he should be entitled to HIV-related information since plaintiff was claiming permanent injuries. Counsel for plaintiff remained unwilling to have his client expressly authorize the release of this information, but assured defense counsel that plaintiff was not HIV-positive. The court attempted to discern why plaintiff believed that the records of certain treaters were irrelevant to this action, but counsel for plaintiff could not state a basis for such belief other than identifying Columbia Presbyterian Hospital as the place where plaintiff gave birth to a child. Defense counsel responded by assuring plaintiff's counsel that he did not need the birth records. Discussion on the motion was adjourned until August 31, 2010, and then again until September 21, 2010. Plaintiff was advised to identify the treatment rendered by or the specialties of the contested treaters. Plaintiff was also instructed to provide collateral source authorizations to defendants. By September 21, the parties still had not reached a settlement of the issues raised in the motion and both parties reverted back to their initial positions. Defendants' counsel argued that he was entitled to HIV-related information and plaintiff's counsel argued that the burden was on defendants to prove relevance of the contested medical records. The motion was deemed fully submitted on September 21.

Under C.P.L.R. § § 3101(a) & (b), "all matter material and necessary in the prosecution or defense of an action" shall be disclosed unless, inter alia, the matter is privileged. A plaintiff in a medical malpractice action waives the physician-patient privilege with respect to the injuries and malpractice alleged, but the waiver does not apply to "unrelated illnesses or treatments."

Gill v. Mancino, 8 A.D.3d 340, 341 (2d Dep't 2004). The burden is on the party seeking disclosure to demonstrate that medical records are material and necessary. See Carcana v. New York City Hous. Auth., 47 A.D.3d 523, 524 (1st Dep't 2008). The phrase "material and necessary" is "interpreted liberally" as meaning "relevant" or as permitting "disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968).

Defendants have demonstrated that some of the records that they seek bear on the disputed issues in this case. Although the physical limitations that plaintiff claims were caused by malpractice may relate to a multitude of medical treatment, defendants are not entitled to a blanket authorizations for all treaters. See Kantor v. Kaye, 114 A.D.2d 782 (1st Dep't 1985). They must identify the treaters from which they seek records and why those treaters are relevant to the injuries alleged. The court notes that it is uncontested that the records for Columbia Presbyterian Hospital are irrelevant. On the other hand, defendants' request for all medical treatment rendered for the upper extremities is not overly broad, since the area surrounding the left extremity is the situs of plaintiff's injury, (cf. id.), but should be limited to the period of 2002 to the present. Plaintiff should also provide collateral source authorizations for medical care and prescriptions obtained for the period of 2002 until the present so as to aid defendants in identifying treatment rendered.

For treaters that plaintiff cannot remember, defendants should use plaintiff's deposition as a method of identifying these treaters. See id. As for the dispute concerning Phillips

Ambulatory Care Center, again, defendants should depose plaintiff in order to ascertain the extent of its treatment. There is no basis at this point to require plaintiff to authorize the release of alcohol/drug treatment information, mental health information, and HIV-related information. Accordingly, it is

ORDERED that plaintiff provide authorizations for medical care she received for her upper extremities since 2002 as well as collateral source authorizations for medical care and prescriptions for the period of 2002 until the present within thirty (30) days of service of this order with notice of entry; and it is further

ORDERED that the branch of the motion ordering plaintiff to authorize the release of alcohol/drug treatment information, mental health information, and HIV-related information is denied with the right to renew upon the showing that treaters are not honoring the authorizations; and it is further

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

ORDERED that the parties shall appear for a compliance conference on November 9, 2010 at 9:30 a.m.; and it is further

Dated: October 29, 2010.

FILED
NOV 05 2010
NEW YORK
JOAN E. LOUIS, J.S.C.
COUNTY CLERK'S OFFICE