

Pepper v NYU Hosps. Ctr.

2011 NY Slip Op 33539(U)

January 9, 2011

Supreme Court, New York County

Docket Number: 114593/09

Judge: Louis B. York

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

PRESENT: YORK
Justice

PART 2

YOLANDA PEPPER
- v -

NYU HOSPITALS CENTER

INDEX NO. 114593/09
MOTION DATE _____
MOTION SEQ. NO. 3
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

FILED

JAN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION TO DISMISS WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 1/9/11

Lly
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
COUNTY OF NEW YORK: PART 7

-----X
YOLANDA PEPPER,

Plaintiff,

-against-

Index No.: 114593/09

NYU HOSPITALS CENTER, TISCH HOSPITAL and
DOROTA POPIOLEK,

Defendants.

-----X

FILED
JAN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

YORK, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition. In motion sequence 002, defendants NYU Hospitals Center and Tisch Hospital (defendants), move, pursuant to CPLR 3124, to compel plaintiff Yolanda Pepper to provide all authorizations for health care providers requested in defendants' January 24, 2011 and March 24, 2011 demands for authorizations. In motion sequence 003, defendants move, by order to show cause, pursuant to Title 22, Part 202.21(e) of the New York Codes, Rules and Regulations, to strike this action from the trial calendar and to vacate the note of issue, because discovery remains to be exchanged. Plaintiff cross-moves, pursuant to CPLR 3103 (a), for a protective order to prohibit the disclosure of medical authorizations which she refuses to furnish.

On October 16, 2009, plaintiff commenced an action against NYU Hospitals Center, Tisch Hospital, and Dorota A. Popiolek, an employee of Tisch Hospital, alleging she received a misdiagnosis of invasive cervical cancer on July 19, 2007. Allegedly as a result of defendants' negligence, plaintiff has suffered both physical and emotional injuries. Plaintiff moved for summary judgment against the defendants on the issue of liability. On July 14, 2010, this court

ordered that plaintiff's motion and the cross motion of Popiolek for summary judgment were decided in accordance with a stipulation entered into on May 20, 2010 by counsel for plaintiff and defendants. The stipulation states that the defendants were not opposing plaintiff's motion for summary judgment on liability and that the issue of damages remains contested. Plaintiff filed a stipulation of discontinuance on August 19, 2010 as to defendant Popiolek.

On January 24, 2011, defendants served a demand for authorizations from plaintiff's medical providers. In addition, on March 24, 2011, defendants served an additional demand for authorizations from several other providers. Although plaintiff supplied some of the authorizations, plaintiff objects to providing several authorizations because she alleges that she did not either seek treatment or get treatment from those providers for the injuries alleged in this action or for conditions medically related to the injuries. Plaintiff also contends that the records she objects to provide are irrelevant and protected by the physician-patient privilege.

Plaintiff argues that she was never diagnosed with or received treatment for any mental health conditions prior to the misdiagnosis of cervical cancer. Plaintiff maintains that the discovery demands of defendants are objectionable on the grounds that they are overbroad, seek information which is not reasonably calculated to lead to the discovery of admissible evidence, and protected by the physician-patient privilege.

Defendants argue that the authorizations which plaintiff did not supply, must be provided because plaintiff has put her physical and mental conditions at issue by alleging injuries which include stomach ulcers, physical strain, and mental anguish. Defendants also point to plaintiff's expert report provided by Dr. Benjamin Hirsch, Ph.D., which states that plaintiff will need intensive psychotherapeutic intervention. Defendants contend that, even if many of the providers

are not mental health providers, the providers may have a history of plaintiff's mental health included in their records which should be disclosed. Although the note of issue was filed on June 17, 2011, defendants request that it be vacated, because of the pending authorizations.

The Court of Appeals has held that,

“where the mental or physical condition of a party is in controversy, a notice may be served pursuant to CPLR 3121 (a) requiring that the party submit to a medical examination or make available for inspection relevant hospital and medical records. The initial burden of proving that a party's physical condition is ‘in controversy’ is on the party seeking the information and it is only after such an evidentiary showing that discovery may proceed under the statute.”

Dillenbeck v Hess, 73 NY2d 278, 286-287 (1989) (citations omitted). Furthermore, the physician-patient privilege will be deemed to have been waived “when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue.” *Id.* at 287; *see also Pirone v Castro*, 82 AD3d 431, 432 (1st Dept 2011) (holding that defendants met their burden of demonstrating that medical records were relevant after plaintiff placed the records in controversy at his deposition).

Here, plaintiff has put her medical and psychiatric condition at issue by alleging several injuries in her September 14, 2010 verified bill of particulars and her June 17, 2011 verified amended bill of particulars. Plaintiff's alleged injuries include stomach ulcers, severe mental anguish and physical strain, major depressive and anxiety disorders, poor concentration, restlessness, feelings of hopelessness, tension, fearfulness, flashbacks, sleep disturbance, irritability, excessive weepiness, a loss of self confidence which may rise to possible suicidal ideations, feelings of betrayal, and discouragement with a concomitant mistrust of physicians and others.

Although plaintiff argues that she has no history of problems or treatment associated with her mental health, plaintiff's testimony at her March 21, 2011 deposition is inconclusive regarding whether she had ever been diagnosed with depression, claiming she did not remember. (Ratchick Affirm., ex B, at 98). Therefore, because plaintiff has placed her medical and psychiatric condition at issue in this litigation, defendants are entitled to the disclosure of medical evaluations which discuss plaintiff's mental health history and information relating to her alleged injuries of physical strain and stomach ulcers.

Plaintiff is ordered to provide authorizations for Central Park Women's Radiology Services; C. Bentiez, M.D.; P. Maslin; Bradley & Monson, P.T.; Laboratory Corporation; Manhattan Diagnostic Radiology Services; P. Fogarty-Mack, M.D.; A. Inglis Jr., M.D.; N. Cagin, M.D.; Y. Imanishi, M.D.; J. Matut, M.D.; A. Boxhill, M.D.; M. Ghesani, M.D.; B. Handler, M.D.; Manhattan Diagnostic Radiology; V. Katatikarn, M.D.; A. Attia, M.D.; Westside Radiology Management One; G. Todd M.D.; N. Kagetsu M.D.; West Side Radiology Association; Dr. Kassapedius; Eckerd Pharmacy; and Dr. Magdundyau. Plaintiff must also identify the names of the doctor who performed a sonogram for a possible aneurysm and the throat specialist with whom plaintiff treated, which defendants requested in the March 24, 2011 demand for authorizations. The above authorizations must be provided by February 2, 2012.

Although defendants maintain that they have previously requested plaintiff's tax records from 2002 to the present, in order for the disclosure of such records, defendants must demonstrate an overriding necessity for such information. *See Xamaka, Inc. v 166 East 61st St. Corp.*, 277 AD2d 35, 35 (1st Dept 2000) (there must be a showing that the information from tax returns is unavailable from other sources and is necessary to the litigation); *Editel, N.Y. v Liberty*

Studios, 162 AD2d 345, 346 (1st Dept 1990) (holding that, when requesting tax returns, there must be a strong necessity demonstrated in order to overcome the confidentiality of such information). Here, plaintiff has previously provided defendants with employment records and W-2 forms and defendants do not provide any argument as to why the disclosure of tax returns is necessary. Defendants also request authorizations from Bill Guido, an accountant and Met Life. These requests are denied without prejudice, because defendants fail to provide an argument as to why such authorizations are needed.

Although defendants also seek authorizations for gym memberships, such request is denied without prejudice. The request for the gym memberships was not previously made in the January 24, 2011 or March 24, 2011 demand for authorizations and is outside of the relief requested by the present motions. Furthermore, defendants fail to explain why the authorizations for the gyms are necessary if the alleged physical strain which plaintiff suffered from, was only for the three month period in 2007 when plaintiff was misdiagnosed.

Finally, because there are several authorizations and records which need to be exchanged, the court will vacate the note of issue. The discovery end date will be March 2, 2012 and the note of issue must be filed within 15 days of the completion of discovery. The parties are reminded that they must contact Part 2 via phone at (646) 386-3852 in order to schedule a status conference if any disclosure problems occur or if an adjournment of these deadlines is needed.

Accordingly, it is hereby

ORDERED that defendants NYU Hospitals Center and Tisch Hospital's motion to vacate the note of issue is granted and the case is stricken from the trial calendar; and it is further

ORDERED that all further discovery in this matter shall be completed on or before

March 2, 2012; and it is further

ORDERED that, within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike this case from the trial calendar and make all required notations thereof in the records of the court, and it is further

ORDERED that, upon the completion of discovery and no later than March 19, 2012, the plaintiff shall cause the action to be placed upon the trial calendar by filing a new note of issue and statement of readiness and payment of the fee therefore; and it is further

ORDERED that the above ordered authorizations are to be provided by February 2, 2012, and that defendants' requests for authorizations for IRS records, Bill Guido, Met Life, and for any gym memberships, are denied without prejudice; and it is further

ORDERED that plaintiff's cross motion for a protective order regarding her medical records is denied.

Dated: 1/9/11

FILED

ENTER: *Fly*

J.S.C.

JAN 12 2012

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK
J.S.C.