

**Garcia v 145 Edwards LLC**

2012 NY Slip Op 30401(U)

February 15, 2012

Sup Ct, NY County

Docket Number: 105164/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.  
Justice

PART 5

Index Number : 105164/2010  
GARCIA, CAROL  
vs.  
145 EDWARDS  
SEQUENCE NUMBER : 001  
COMPEL GAL # 3J

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1, 2</u>
Answering Affidavits — Exhibits _____	No(s). <u>3</u>
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, It is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

## FILED

FEB 23 2012

NEW YORK  
COUNTY CLERK'S OFFICE

BA J.S.C.  
**BARBARA JAFFE**  
NON-FINAL DISPOSITION  
J.S.C.

Dated: 2/17/12  
FEB 17 2012

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

- 1. CHECK ONE: .....  CASE DISPOSED
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
CAROL GARCIA,

Plaintiff,

-against-

145 EDWARDS LLC, MEMPHIS CANDY GROCERY  
CORP., and THE CITY OF NEW YORK,

Defendants.  
-----X

BARBARA JAFFE, JSC:

**For plaintiff:**  
Igor Grichanik, Esq.  
Novo Law Firm, PC  
299 Broadway, 17<sup>th</sup> Fl.  
New York, NY 10007  
212-233-6686

Index No. 105164/10

Motion Subm.: 11/22/11

Motion Seq. No.: 001

**DECISION & ORDER**

**FILED**

**FEB 23 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

**For 145 Edwards LLC:**  
Paul J. Felicione, Esq.  
Desena & Sweeney, LLP  
1383 Veterans Memorial Hwy.  
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Hauppauge, NY 11788  
631-360-7333

By notice of motion dated August 16, 2011, defendant 145 Edwards LLC (LLC) moves pursuant to CPLR 3126(3) for an order striking plaintiff's complaint for her failure to comply with discovery. Plaintiff opposes and, by notice of cross motion dated September 15, 2011, moves for an order protecting against disclosure of any records of substance abuse treatment she received. LLC opposes the cross motion. After oral argument, the parties resolved the motions except as to the issue of plaintiff's substance abuse records.

**I. PERTINENT BACKGROUND AND CONTENTIONS**

On January 19, 2010, plaintiff was injured when she allegedly tripped and fell on a defective portion of the sidewalk in front of defendants' premises. (Affirmation of Paul J. Felicione, Esq., dated Aug. 16, 2011 [Felicione Aff.], Exh. A). On or about April 13, 2011, LLC served plaintiff with a supplemental notice for discovery and inspection seeking, as pertinent

here, plaintiff's records and/or authorizations related to her various medical and mental health issues and treatment. (*Id.*, Exh. C).

Plaintiff argues that records of treatment she received for alcohol and/or drug abuse are irrelevant absent any connection between her treatment or abuse and the injuries she sustained, and observes that there is no evidence that she was intoxicated on the day of her accident, nor has she denied that she was then receiving methadone treatment. She thus contends that such records are more prejudicial than probative. (Affirmation of Igor Grichanik, Esq., dated Sept. 15, 2011).

In reply, LLC maintains that plaintiff waived any objection to its demands as she failed to object or move for a protective order timely, and observes that plaintiff testified that she had received methadone treatment immediately before her accident. It contends that plaintiff's physical condition is at issue to the extent it affected her ability to walk and perceive conditions on the ground, and that her mental condition is at issue to the extent that she seeks to introduce evidence related to her condition and lifestyle before the accident. (Affirmation of Paul J. Felicione, Esq., dated Oct. 7, 2011).

## II. ANALYSIS

CPLR 3101(a), which provides for full disclosure of all matters material and necessary in the prosecution or defense of an action, should be "interpreted liberally to require 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 Pub. Co.*, 21 NY2d 403 [1968]). Thus, disclosure should be permitted if the information sought is relevant to the action. (Siegel, NY Prac § 344 [4<sup>th</sup> ed]). Pursuant to CPLR 3124, a party may move to compel disclosure from another party that has not responded or

complied with any discovery request and, pursuant to CPLR 3126, if a party refuses to obey a court order to provide discovery, the court may preclude that party from submitting evidence at trial or strike its pleadings.

“It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR ... when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue.” (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]).

Substance abuse treatment records are generally confidential and not subject to disclosure unless certain requirements are met. As a predicate for ordering the disclosure of such records, the court must find that the interests of justice significantly outweigh the need for confidentiality. (Mental Hygiene Law §§ 22.05, 33.13; *L.T. v Teva Pharms. USA, Inc.*, 71 AD3d 1400 [4<sup>th</sup> Dept 2010]).

Here, LLC does not demonstrate that plaintiff has placed her mental condition in issue by, for example, asserting a claim based on a loss of enjoyment of life. (*Compare Salazar v 521-533 W. 57<sup>th</sup> St. Condominium*, 84 AD3d 927 [2d Dept 2011] [mental health and substance abuse treatment records not discoverable as plaintiff withdrew claims for injuries related to those conditions], *with Azznara v Strauss*, 81 AD3d 578 [2d Dept 2011] [plaintiff’s alcohol and drug abuse records material and necessary to damages for claim of loss of enjoyment of life]; *Coddington v Lisk*, 249 AD2d 817 [3d Dept 1998] [as plaintiff claimed loss of enjoyment of life and permanent damages, defendant entitled to records related to plaintiff’s past drug addiction]).

LLC has thus failed to demonstrate plaintiff’s entire treatment records are material and

necessary to its defense or that the interests of justice outweigh their confidentiality. (*See Wojtusiak v Elardo*, 43 AD3d 436 [2d Dept 2007] [plaintiff's drug treatment history not subject to disclosure as her mental health not in issue and it concerned illnesses and conditions unrelated to accident]).

However, to the extent that the methadone treatment plaintiff received immediately before her accident is relevant to her physical condition at the time of the accident, her treatment record for that day may contain relevant information which I will review *in camera* to ensure that only material and necessary information is disclosed need be.

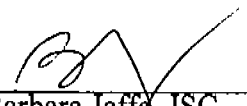
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant 145 Edwards LLC's motion to strike is denied; and it is further

ORDERED, that plaintiff's cross motion for a protective order is granted except that plaintiff is directed to provide to defendant 145 Edwards LLC, within 30 days of the date of this order, HIPAA-compliant authorizations for the record of her methadone treatment on January 19, 2010, which shall be produced for an *in camera* inspection; the authorizations must direct that the records be sent to Justice Jaffe's chambers at 80 Centre Street, Room 307, New York, New York 10013.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

**FILED**

FEB 23 2012

NEW YORK  
COUNTY CLERK'S OFFICE

DATED: February 15, 2012  
New York, New York