SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 13

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MIRIAM COBIAN DE LEO,

Plaintiff,

- against -

BO HA, DDS, STANLEY EINBENDER, DDS, and NASSAU-QUEENS ENDODONTICS, P.C.,

Defendants.

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DECISION AND ORDER

Index No: 20303/10

Motion Seq. Nos: 001, 002 & 003
Original Return Date(s): 10-27-11

P R E S E N T :
HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 11 were submitted on these three motions and cross-motions on December 8, 2011:

	Papers numbered
Notice of Motion and Affirmation (Seq. 1)	1-2
Notice of Cross-Motion and Affirmations [2] in support of Cross-Motion and in opposition to Motion (Seq. 2)	3-5
Notice of Cross-Motion and Affirmations [2] in support of Cross-Motion and in opposition to Motion (Seq. 3)	6-8
Affirmation in Opposition and Reply	9
Reply Affirmation in Further Support of Cross-Motion	10
Reply Affirmation in Further Support of Cross-Motion	11

The motion by the plaintiff, Miriam Cobian DeLeo, pursuant to CPLR 3103 granting her a protective order; an Order pursuant to CPLR 3124 compelling discovery including depositions; and an Order pursuant to 22 NYCRR 130-1.1 awarding her the costs of this motion, is **denied**.

The cross-motion by the defendants Stanley Einbender, D.D.S. and Nassau-Queens

Endodontics, P.C., and the cross-motion by defendant Bo Ha, D.D.S., both for an order pursuant to CPLR 3126 dismissing the plaintiff's complaint; or, in the alternative, an order pursuant to CPLR 3124 and 3126 compelling the plaintiff to provide discovery; or, in the alternative, an order directing an in camera inspection of the plaintiff's attorney's legal file in the case of Miriam Cobian v Robert Smolen and Judith Smolen (Nassau County Index No. 005424/10); and an order pursuant to 22 NYCRR 130-1.1 awarding them the costs of this motion is determined as provided herein.

The plaintiff in this action seeks to recover damages for dental malpractice, lack of informed consent, and breach of warranty. In May of 2008, the plaintiff was treated twice by the defendants. She alleges that their negligent performance of a root canal procedure caused her tooth to crack. She seeks money damages for pain and suffering as well as dental costs incurred for remedial purposes. More specifically, in her complaint, the plaintiff alleges that she was rendered "sick, sore, lame and disabled, and upon information and belief, was permanently injured and so remains, was compelled to remain away from his [sic] usual duties and vocation, and was compelled to incur divers obligations and in the future, will be further compelled to incur divers obligations in an effort to heal and cure himself [sic] of his [sic] injuries, all to his [sic] damage." She also alleges to have suffered "conscious pain and suffering" and "personal injury." In her Bill of Particulars, the plaintiff alleges that she "sustained a crack to tooth No. 14 necessitating its removal," as well as "further and different treatment with associated pain and suffering and expense." Under the affirmation of injuries section in the Preliminary Conference Order, the following is noted: "Loss of a tooth, remedial dental work w/ potential compromise to other teeth."

Approximately one year after she was treated by the defendants, the plaintiff was in a motor vehicle accident, as a result of which she allegedly incurred injuries to her back and neck as well as

Temperomandibular syndrome, i.e., TMJ. In Cobian v Smolen (Nassau County Index No. 5424/10), which emanated from that motor vehicle accident, the plaintiff alleges in her complaint that she "was rendered sick, sore, lame, and disabled and suffered and still suffers great pain and anguish and sustained severe and serious injuries in and about her head, body, limbs, nerves and nervous system and was obligated to and did seek medical treatment, aid and assistance and was disabled and incapacitated in the performance of her normal duties for a considerable period of time, and her habits and pattern of life was varied." In her Bill of Particulars in that action, she alleges to have suffered "Temperomandibular syndrome and post-concussion headache." In that action, the plaintiff testified that she has had pain in her jaw and neck, headaches, tingling and earaches since the car accident. She also testified that the accident re-aggravated her TMJ from which she had suffered 27 years earlier. When seeking treatment at Long Island Oral and Maxilofacial Surgery on June 4, 2009 for injuries incurred in the motor vehicle accident, she complained of constant pain in her jaw since the date of the accident and that it hurts when she chews or bites. In fact, the office chart reflects a handwritten note that the plaintiff has pain in both jaws, her neck and her shoulders as a result of the motor vehicle accident and that she is lightheaded and experiences dizziness and excruciating headaches.

The plaintiff vehemently disputes the defendants' entitlement to the production of the plaintiff's medical records beyond her dental records, including medical records of treatment received as a result of the motor vehicle accident and the plaintiff's psychological and mental health records.

By Notice to Produce dated June 21, 2011, defendants Einbender and Nassau-Queens Endodontics, P.C., sought the production of the non-privileged portion of materials associated with

the plaintiff's legal file in possession of the Law Office of Gregory J. Volpe, in connection with her motor vehicle accident of June 1, 2009. Such materials were to include, but not be limited to, prior sworn testimony, pleadings, physical examinations, and all materials not covered under the attorney-client privilege. The plaintiff did not respond to that Demand. By Notice to Produce dated April 5, 2011, counsel for Dr. Ha made the same Demand. Again, plaintiff did not respond.

By "So Ordered" stipulation dated July 19, 2011, the plaintiff was directed to produce "authorizations for no-fault carries for MVA and [to] provide non-privileged documents including depositions, pleadings, B/P with regard to MVA." She was also directed to "confirm whether plaintiff sought/received medication (prescription) and if so, authorization to be provided for pharmacy."

Upon reviewing the State Farm file, the attorney for Dr. Einbender and Nassau-Queens Endodontics, as well as the attorney for Dr. Ha, discovered allegedly related documents which have not been produced, to wit: all paperwork associated with the Independent Medical Examination performed by Dr. Jacqueline Emmanual, including what the plaintiff submitted in connection with that examination; and all records in her attorney's file, including physical therapy records, Winthrop Hospital records, records of Dr. Butani, Examination report of Dr. Katzman, Evaluations of Mike Bernardo DPT, Evaluations of Teresa Errigo-Vitale, PT, and any other medical records.

Written demands for those documents were sent on August 29, 2011 and September 15, 2011, and defense counsel made further demands for authorizations from additional providers not previously disclosed who treated plaintiff in connection with her motor vehicle injuries which included complaints of jaw pain, TMJ, headache and other relevant complaints.

"The scope of discovery in a civil action is governed by CPLR 3101(a) which provides, in

relevant part, that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' " Friel v Papa, 87 AD3d 1108, 1110 (2nd Dept 2011). "The phrase 'material and necessary' 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.' " Friel v Papa, supra, at p. 1110, quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 (1968). "In other words, the requested information must be sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable (quotations omitted)." Friel v Papa, supra, at p. 1110, quoting Allen v Crowell-Collier Publ. Co., supra, at p. 406-407, quoting Weinstein-Korn-Miller, N.Y. Civ Prac.¶ 3101.07 (1st ed).

"A party does not have the right to uncontrolled and unfettered disclosure." (Congel v Malfitano, 84 AD3d 1145(2nd Dept 2011), citing Merkos L'Inyonei Chinuch, Inc. v Sharf, 59 AD3d 408, 410 (2nd Dept 2009); Gilman v Ciocia, Inc. v Walsh, 45 AD3d 531, (2nd Dept 2007). But discovery is to be permitted whenever it might lead to the disclosure of admissible evidence. Montalvo v CVS Pharmacy, Inc., 82 AD3d 611, 612 (2nd Dept 2011) (citations omitted).

"'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.'" DeLouise v S.K.I. Wholesale Beer Corp., 79 AD3d 1092, 1093 (2nd Dept 2010), quoting Cynthia B. v New Rochelle Hosp. Med. Ctr., 60 NY2d 452, 456-457 (1983), citing Dillenbeck v Hess, 73 NY2d 278 (1989); Avila v 106 Corona Realty Corp., 300 AD2d 266, 267 (2nd Dept 2002). However, only where "a plaintiff affirmatively place[s] his entire medical condition

in controversy through the broad allegations of physical injury and mental anguish contained in the complaint and bill of particulars" is the patient-doctor privilege waived in its entirety. DeLouise v S.K.I. Wholesale Beer Corp., supra, at p. 1093, citing Avila v 106 Corona Realty Corp, supra at p. 267; St. Claire v Cattani, 128 AD2d 766 92nd Dept 1987); Daniele v Long Is. Jewish-Hillside Med. Ctr., 74 AD2d 814 92nd Dept. 1980). Where the bill of particulars is limited to specific injuries, only authorizations for pertinent medical records are required. Schiavone v Keyspan Energy Delivery NYC., 89 AD3d 916 (2nd Dept 2011). Under those circumstances, "demands with respect to the injured plaintiff's entire medical history are patently overbroad and burdensome." Schiavone v Keyspan Energy Delivery NYC, supra, at p. 916, citing Azznara v Strauss, 81 AD3d 578, 579 (2nd Dept 2011; Bongiorno v Livingston, 20 AD3d 379, 381 (2nd Dept 2005): Holness v Chrysler Corp., 220 AD2d 721 (2nd Dept 1995). However, the nature and severity of a plaintiff's entire medical condition becomes material and necessary to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life due to the alleged injuries. Abdalla v Mazi Taxi, Inc., 66 AD3d 803, 804 (2nd Dept 2009), citing Orlando v Richmond Precast, Inc., 53 AD3d 534 (2nd Dept 2008); Diamond v Ross Orthopedic Group, P.C, 41 AD3d 768 (2nd Dept 2007); Weber v Ryder TRS, Inc., 49 AD3d 865 (2nd Dept 2008).

Based upon the foregoing, the plaintiff is directed to provide authorizations related to all medical care rendered in connection with the June 1, 2009 motor vehicle accident. In that case, not only has she alleged that she suffered injury to her jaw which may relate to the injuries she alleges to have sustained in this case, she appears to seek here and in that action to recover for claimed loss of enjoyment of life. Discovery is appropriate. Needless to say, admissibility remains to be determined.

The plaintiff is directed to provide authorizations to conduct interviews of her treating providers. Shefer v Tepper, 73 AD3d 447 (1st Dept 2010), citing Arons v Jutkowitz, 9 NY3d 393 (2007); see also, Wright v Stam, 81 AD3d 771 (2nd Dept 2011).

The plaintiff is also directed to produce any and all proof of special damages as directed in the Preliminary Conference Order dated May 9, 2011, within 90 days of trial or be barred at trial from establishing any; authorization for all collateral source benefit providers including Empire Plan and Local Union 3 which was also requested by the Preliminary Conference Order; authorizations for the following dental providers: Oral and Maxilofacial Surgery and Implantology; Stuart Heimann, D.D.S.; Anthony Randi, D.D.S. and Ruth Ranaj, D.D. S.; Dr. Ha's two "dental plans" referred to in the plaintiff's Bill of Particulars; and authorization for pharmacies which provided medications or a statement that no medications were obtained.

The circumstances found here do not warrant relief pursuant to CPLR 3124, 3126, i.e., striking of pleadings or orders of preclusion. The applications for awards of costs is likewise denied.

Counsel for the parties shall appear for a Compliance Conference at the Courthouse, 100 Supreme Court Drive, Room 151, Mineola, New York on **February 29, 2012** at 9:30 a.m. to finalize any outstanding disclosure, including the setting of deposition dates.

Accordingly, it is

ORDERED, that the motion by the plaintiff is **denied** and the cross-motions by the defendants are **granted only to the extent as set forth hereinabove**. To the extent not specifically granted, the cross-motions are denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
February 10, 2012

ENTER:

JOEL K. ASARCH, J.S.C.

Copies mailed to:

Gregory J. Volpe, Esq.
Attorney for Plaintiff

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Fumuso, Kelly, DeVerna & Snyder, Swart & Farrell, LLP.
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