

Garriz v City of New York
2012 NY Slip Op 31623(U)
June 13, 2012
Supreme Court, New York County
Docket Number: 107770/10
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
LOUIS GARRIZ,

Plaintiff,

Index No. 107770/2010

- against -

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, and JUDLAU CONTRACTING, INC.,

Decision and Order

Defendants.
-----X

FILED

HON. MICHAEL D. STALLMAN, J.:

JUN 19 2012

Plaintiff alleges that, on April 9, 2009, he was as an elevator constructor sent to a construction site within the 59th Street and Columbus Circle subway station. Plaintiff testified at his deposition that, he was tidying up the work area when a train came through, the walls started to vibrate, and a temporary wall protecting tile behind it fell forward and hit plaintiff across the back. (Sondhi Affirm, Ex E [Garriz EBT], at 20-22.)

According to the bill of particulars, plaintiff sustained, among other injuries, a meniscal tear and chondromalacia of the right knee; aggravation, activation, and exacerbation of a pre-existing laminectomy at L4-S1, and of pre-existing degenerative changes at T11-T12; ristrolesthes L3-L4 with bilateral foraminal stenosis; bulging discs at L2-L3, L3-L4, L4-L5, and L5-S1; sciatica; and an antalgic gait. (Sondhi Affirm., Ex B.) The bill of particulars also vaguely states that plaintiff "has been and

will, in the future, be severely restricted in participating in the daily activities of his life including, but not limited to, duties connected with household chores, avocations, social relationships, and physical relations.” (*Id.*)

At his deposition, plaintiff testified that he was diagnosed with chronic asthma from dust and dirt after September 11, 2001, while plaintiff was working on a building located on the West Side Highway, about a quarter of a mile north of Ground Zero. (Garriz EBT, at 86-87.) Plaintiff testified, “I was there eight months and one day I had a massive asthma attack and that’s what they attributed it to. It took them a while to find out, but they medicated me. I got on an asthma medication program and I’ve been doing fine since.” (*Id.*)

Defendants moved either for an order compelling plaintiff to provide certain authorizations and records in response to their second and third-supplementary demands, and to a letter demand dated November 16, 2011, or in the alternative, for an order precluding plaintiff from introducing into evidence at trial any records relating to plaintiff’s medical injuries and/or treatment (Motion Seq. No. 002). While that motion was pending, plaintiff attempted to file the note of issue, which prompted defendants to move for an order vacating the note of issue, compelling completion of discovery prior to the refiling of the note of issue, and for an extension of the time for the parties to file dispositive motions. (Motion Seq. No. 003). Plaintiff opposed both

[* 4]
motions.

This decision addresses those motions. Given the authorizations that plaintiff provided in opposition to defendants' first motion, the only remaining discovery issue presented is whether defendants are entitled to discovery of medical records relating to the diagnosis and treatment of plaintiff's asthma.

DISCUSSION

"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, 456-457 [1983][citations omitted].)

"Thus, once the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition."

(*Farrow v Allen*, 194 AD2d 40, 46 [1st Dept 1993].) "However, a party does not waive the privilege with respect to unrelated illnesses or treatments." (*McLane v Damiano*, 307 AD2d 338, 338 [2d Dept 2003].)

Defendants argue that plaintiff affirmatively put his asthma at issue because "plaintiff's broad physical and mental allegations, including a loss of enjoyment of

life and permanent disability, placed his medical condition at issue.” (Sondhi Affirm. dated 2/9/12 ¶ 15.) Defendants further argue that the treatment of plaintiff’s asthma is “relevant to plaintiff’s alleged injuries for emotional distress, anxiety, irritability, nervousness, depression, distress, difficulty sleeping. . . .” (Sondhi Affirm. dated 12/1/11 ¶ 21.)

Defendants are entitled to discovery to determine the extent, if any, that plaintiff’s claimed injuries are attributable to causes or circumstances other than the alleged accident. (*McGlone v Port Auth. of NY & NJ*, 90 AD3d 479, 480 [1st Dept 2011]; *Rega v Avon Prods., Inc.*, 49 AD3d 329 [1st Dept 2008].) However, defendants have not demonstrated a sufficient nexus between any specific allegations bearing on the loss of enjoyment of life to plaintiff’s asthma condition, which he testified at his deposition was controlled on medication. Because plaintiff’s asthma records would not be “related to any physical or mental conditions affirmatively placed in controversy by plaintiff in this action against defendants” (*Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008][citation and quotation marks omitted]), plaintiff has not placed his asthma condition into controversy. Therefore, defendants are not entitled to discovery of medical records relating to the diagnosis and treatment of plaintiff’s asthma.

The Court disagrees with defendants that plaintiff asserted broad allegations

of physical injury and mental anguish that place his entire medical condition at issue. Contrary to defendants' assertion, the bill of particulars does not allege that plaintiff is totally disabled, but rather the bill of particulars and supplemental bill of particulars allege that some of the injuries "are believed to be permanent in nature" and that plaintiff has been unable to return to work since his alleged accident. (Sondhi Affirm., Ex B.) Thus, those Appellate Division, Second Department cases which ruled that the plaintiff affirmatively placed his entire medical condition at issue are inapposite. (See e.g. *DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d 1092, 1093 [2d Dept 2010].)

Therefore, defendants' motion to compel is denied.

Defendants' motion to vacate the note of issue and to extend the time for dispositive motions is denied as academic. Plaintiff's counsel states that the note of issue was rejected for filing (DeMaio Opp. Affirm. ¶ 4), and court records do not indicate that a note of issue has been filed.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion to compel, or in the alternative, for an order of preclusion (Motion Seq. No. 002) is denied; and it is further

ORDERED that defendants' motion to vacate the note of issue and to extend

the deadline for dispositive motions is denied.

FILED

Dated: 6/13/12
New York, New York

ENTER: 

J.S.C. JUN 19 2012
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

HON. MICHAEL D. STALLMAN