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

PRESENT: LOBIS Justice PART 6

SCOZZARO, ARLENE

-v-

ALAN MATARASSO, M.D., ET AL.

INDEX NO. 800125/10

MOTION DATE 5/4/12

MOTION SEQ. NO. 03

MOTION CAL. NO. ____

The following papers, numbered 1 to 30 were read on this motion to/for preclude disclosure.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-12
Answering Affidavits — Exhibits	13-15; 16-25
Replying Affidavits	26-30

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 03 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/27/12

JUAN B. LOBIS 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

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ARLENE SCOZZARO,

Plaintiff,

Index No. 800125/10

-against-

Decision and Order

ALAN MATARASSO, M.D., LAUREN ZEIFMAN, P.A., SYNERON, INC., and JEFFREY WELLS,

Defendants.

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

Defendants Syneron, Inc. ("Syneron"), and Jeffrey Wells (together the "Moving Defendants") move, by order to show cause, for an order, pursuant to C.P.L.R. § 3103, precluding the disclosure of "prior incident reports/clinical complaints and reporting re: Syneron E-Max equipment." Plaintiff Arlene Scozzaro and co-defendants Alan Matarasso, M.D., and Lauren Zeifman, P.A., oppose the motion.

This medical malpractice action arises from injuries allegedly sustained by plaintiff on February 27, 2009, after receiving a laser facial treatment administered by Ms. Zeifman at the medical office of Dr. Matarasso using equipment manufactured by Syneron. Prior to the laser treatment, plaintiff met with Mr. Wells, a marketing representative of Syneron, who assessed plaintiff and confirmed that she was a suitable candidate for the "Triniti E-Max" laser treatment. The "Trinity E-Max" is advertised as a 3-in-1 impulse light/laser system that corrects skin discoloration, tightens skin, and smooths wrinkles. After three laser sessions, plaintiff experienced facial burns and residual scarring.

In her verified complaint, plaintiff alleges six causes of action: negligence; medical malpractice; lack of informed consent; negligent hiring, retention, and supervision; negligent misrepresentation; and products liability. Plaintiff, Dr. Matarasso, and Ms. Zeifman seek the disclosure of prior incident reports and clinical complaints regarding Syneron's E-Max equipment, and demanded for same on or about June 1, 2011. On July 26, 2011, the parties appeared for a compliance conference, the result of which was an order directing the Moving Defendants to produce the requested materials pertaining to the E-Max equipment within thirty (30) days; orders dated November 22, 2011, and February 14, 2012, similarly directed the Moving Defendants to produce same by designated dates.

The Moving Defendants now seek a protective order to prevent the disclosure of prior incident reports and complaints regarding the Triniti E-Max Laser System on the grounds that the request is vague, ambiguous, overly broad, unduly burdensome, confusing, and not reasonably calculated to lead to admissible evidence. Additionally, the Moving Defendants argue that disclosure of prior complaints of the Triniti E-Max Laser System would be considerably prejudicial because there are differing factors involved in each treatment used, and that the request fails to take into account the various settings used, the number of applications, the location being treated, and the independent judgment and technique of the various operators.

Plaintiff, Dr. Matarasso, and Ms. Zeifman oppose the motion and argue that disclosure of prior incidents reports regarding the Syneron E-Max Equipment is necessary to establish prior notice of problems with the equipment, and that the Moving Defendants fail to

articulate how the demand is prejudicial and the manner in which it is overly broad, confusing, or ambiguous. Plaintiff further argues that the doctrine of res judicata precludes the Moving Defendants from prevailing in this motion, as the same issue of disclosure has been heard before the court in prior conferences and the court has issued three orders directing the Moving Defendants to produce the incident reports. Dr. Matarasso and Ms. Zeifman also argue that the Moving Defendants fail to provide an affidavit from an individual with first-hand knowledge to support the notion that the discovery demand is burdensome. In reply, the Moving Defendants explain that the demand is overly broad because it seeks disclosure of prior incident reports of treatment procedures and clinical applications that were not at all involved in the treatment of plaintiff on February 27, 2009. Additionally, they argue that, as there is no cause of action alleging inherent design defect of the equipment or strict liability, disclosure of prior incident reports is not material or necessary to plaintiff's prosecution, or co-defendants' defense, of the action.

A party is generally entitled to disclosure of all matter that is "material and necessary in the prosecution or defense of an action, regardless of the burden of proof[.]" C.P.L.R. § 3101(a). The phrase "material and necessary" is liberally interpreted and permits "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 N.Y.2d 403, 406 (1968). However, the court may, on application of a party, issue an order "denying, limiting, conditioning or regulating" the material sought. C.P.L.R. § 3103(a). Protective orders are intended to "prevent unreasonable annoyance, expenses, embarrassment, disadvantage, or other prejudice to any person or the courts." Id.

The court finds that prior reports involving similar incidents of burning or scarring resulting from E-Max equipment may be material and necessary within the meaning of C.P.L.R. § 3101 to determine whether the Moving Defendants had notice of its equipments' alleged scarring and burning tendency. See Tucker v. NewYork. City Tr. Auth., 42 A.D3d 316, 317 (1st Dep't 2007); Herbert v. Sivaco Wire Corp., 289 A.D.2d 71, 72 (1st Dep't 2001). Although plaintiff concedes that she does not allege strict products liability, she does allege negligence and products liability. Specifically plaintiff alleges that Syneron was negligent in properly designing the E-Max Laser system, ensuring it was a good fit for its intended use; training the personnel who were authorized to operate the equipment; and warning of its known risks. Thus, the reports of any alleged injuries sustained in the use of Syneron's E-Max laser treatment would be useful in bringing to light the information that Syneron possessed about the risks associated with its equipments, and whether it incorporated this information in its training sessions and warnings. The cases that the Moving Defendants cite in support of their proposition that such information is immaterial are distinguishable. See Daniels v. Fairfield Presidential Mgmt. Corp., 43 A.D.3d 386 (2d Dep't 2007); Desson v. Trustees of Net Realty Holding Trust, 229 A.D.2d 512 (2d Dep't 1996); Yoon v. F.W. Woolworth Co., 202 A.D.2d 575 (2d Dep't 1994); Berman v. Huntington Hosp., 201 A.D.2d 691 (2d Dep't 1994); Kolody v. Supermarkets Gen. Corp., 163 A.D.2d 276 (2d Dep't 1990).

To the extent that the request may be interpreted to include all incident reports, the demand is overly broad. The Moving Defendants contend that the production of all incident reports does not take into account the various applicators or treatments that could be provided using the Syneron equipment, and that of the ten different applicators, Ms. Zeifman utilized only three, namely

the SRA, ST, and Matric IR applicators. Thus, inasmuch as there exist prior reports regarding the SRA, ST, or Matrix IR applicators, the demanding parties are entitled to such disclosure, to the extent that the documents are redacted to avoid disclosing the identities of non-parties. The Moving Defendants have not demonstrated that they will be prejudiced in any other way as to warrant a broad protective order. Accordingly, it is hereby

ORDERED that the motion of Syneron, Inc., and Jeffrey Wells seeking an order precluding the disclosure of prior incidents reports and clinical complaints regarding the Syneron E-Max Laser Treatment is denied, and these defendants shall produce said documents within thirty (30) days of a copy of this decision with notice of entry, in accordance with the conditions set forth herein; and it is further

ORDERED that the parties shall appear for their previously scheduled status conference on August 7, 2012, at 10:00 a.m.

Dated: July 27, 2012

ENTER:

JOAN B. LOBIS, J.S.C.