

Alford v City of New York

2012 NY Slip Op 32682(U)

October 21, 2012

Sup Ct, NY County

Docket Number: 402905/08

Judge: Joan A. Madden

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

PRESENT: How Joan A. Miller
Justice

PART 11

Herbert Alford, Plaintiff

INDEX NO. 402905/08

MOTION DATE _____

- v -
City of New York, et al,
Defendants

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for protective order
cross motion for search
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 and cross motion are decided
in accordance with the annexed Memorandum Decision & Order.

FILED

OCT 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 21, 2012

[Signature]
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: IAS PART 11

-----X
HERBERT ALFORD,

Plaintiff,

Index No. 402905/08

-against-

CITY OF NEW YORK, NEW YORK CITY
HOUSING AUTHORITY, and SCHINDLER
ELEVATOR CORPORATION,

Defendants.

FILED

OCT 25 2012

**NEW YORK
COUNTY CLERKS OFFICE**

-----X
JOAN A. MADDEN, J.:

Plaintiff moves for an order (i) granting him leave to withdraw his claims for post-traumatic stress disorder and all related psychological/mental health claims, (ii) issuing a protective order to prevent the production of his medical records pertaining to his prior treatment for substance abuse and mental health treatment; (iii) precluding defendants from using any medical records already obtained pertaining to plaintiff's prior treatment for substance abuse and mental health treatment, and (iv) limiting defendants to obtaining medical records relating to plaintiff's knee and back which are the only injuries sustained as a result of the accident.

Defendant New York City Housing Authority ("NYCHA") opposes the motion and cross moves pursuant to CPLR 3126 to dismiss the complaint for failure to comply with court ordered discovery or, in the alternative, to compel plaintiff to produce outstanding discovery within thirty days. Defendant Schindler Elevator Corporation ("Schindler") also cross moves for discovery sanctions pursuant to CPLR 3126, or to compel discovery.

Plaintiff opposes the cross motions.

Background

In this action, plaintiff seeks to recover damages for personal injuries he allegedly sustained on February 20, 2007, when he fell into an elevator shaft at an NYCHA Building located at 1115 FDR Drive in Manhattan. The elevator at issue was maintained by Schindler. In his Verified Bill of Particulars, plaintiff alleges that as a result of the accident, he sustained a mensicular tear to his left knee, right knee joint effusion, disc herniations to his cervical spine, disc bulges, and that he also he suffered from post-traumatic stress syndrome. Plaintiff's counsel initially agreed to provide defendants with authorizations for medical records pertaining to any treatment of plaintiff for alcohol and substance abuse and/or mental health treatment.

The court's discovery orders submitted in connection with the motion and cross motion indicate that between January 2010 and March 3, 2011, six orders were issued requiring plaintiff to provide authorizations for medical records relating to plaintiff's treatment for psychiatric or psychological conditions and/or for alcohol and substance abuse. There is no dispute that plaintiff did not produce these authorizations. At the March 3, 2011 compliance conference, plaintiff's counsel indicated that he would be withdrawing his claims for post-traumatic stress syndrome and other psychological injuries.

On May 13, 2011, plaintiff made this motion seeking, *inter alia*, leave to withdraw its claims for post-traumatic stress syndrome and other psychological injuries, for a protective order to prevent the production of his medical records pertaining to his prior treatment for substance abuse and mental health treatment, and to limit the defendants to obtaining medical records relating to his physical injuries. Defendants oppose the motion and cross move for discovery sanctions or to compel the production of the records at issue.

By interim order dated September 22, 2011, this court directed the parties to submit to the court a list of the records at issue, and directed that plaintiff subpoena the records in issue for in-camera inspection by the court.

Discussion

The court will first address defendants' cross motions for discovery sanctions pursuant to CPLR 3126.

CPLR 3126(3) provides that if a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just," including "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." Under CPLR 3126 (1)(2), the court is also

authorized to order that the issues encompassed by the disclosure demand "be deemed resolved," or that the party be precluded from introducing certain evidence or from supporting or opposing certain claims.

"The drastic sanction of striking pleadings is justified only when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith" Roman v. City of New York, 38 AD3d 442 (1st Dept 2007) (citation omitted); see also, Marks v. Vigo, 303 AD2d 306 (1st Dept 2003) (noting that "[i]n view of the strong preference in our law that actions be decided on their merits... a court should not resort to the drastic remedy of striking a pleading for failure to comply with discovery directives unless the noncompliance is established to be both deliberate and contumacious"); cf, Couri v. Siebert, 48 AD3d 370 (1st Dept 2008) (holding that plaintiff's "dilatory, evasive, obstructive, and ultimately contumacious conduct" warranted striking his complaint) (internal citations omitted).

Here, striking plaintiff's pleading is not an appropriate remedy, as except for his failure to produce the authorizations for the records at issue, plaintiff has substantially complied with discovery and it appears that plaintiff's noncompliance was based on his counsel's delay in deciding whether to withdraw plaintiff's claims for post-traumatic stress disorder and related psychological/mental health claims. Likewise, an order of preclusion, which would decide the issues relating to the records sought in defendants' favor, is not warranted under these

circumstances.

Next, plaintiff's request to withdraw his claims for damages relating to post-traumatic stress disorder and other related mental health claims is granted, and the delay in seeking this relief is not grounds for denying this request. See e.g., Strong v. Brookhaven Mem. Hospital Medical Center, 240 AD2d 726 (2d Dept 1997) (after initially ordering plaintiff to produce relevant psychiatric records, trial court properly granted plaintiff's motion for renewal and issued protective order after plaintiff withdrew claims for damages related to mental anguish and fear of dying); L.S. v. Harouche, 260 AD2d 250 (1st Dept 1999) (permitting plaintiff to withdraw claims for emotional and psychological damage); Carboni v. New York Medical College, 290 AD2d 473 (2d Dept 2002) (permitting plaintiff to withdraw claims for psychiatric and psychological injuries).

Thus, the remaining issue is whether the medical records pertaining to plaintiff's prior treatment for alcohol or substance abuse or for a mental health condition, are discoverable even though plaintiff has withdrawn his claims for damages for post-traumatic stress syndrome and other psychological harm.

"It is well settled that a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue." Kohn v. Fisch, 262 AD2d 535 (2d Dept 1999) (citations omitted); see also Koump v. Smith, 25 NY2d 287 (1969). At the same time, however, a party does not

waive the privilege "with respect to unrelated illnesses or treatments." Sadicario v. Stylebuilt Accessories, Inc., 250 AD2d 830, 831 (2d Dept 1998). Thus, the courts have not permitted discovery of medical records relating to treatment for mental health issues or alcohol or substance abuse, when a plaintiff either does not affirmatively put his mental condition in issue, or withdraws claims relating to his mental condition. Strong v. Brookhaven Mem. Hospital Medical Center, 240 AD2d at 726; L.S. v. Harouche, 260 AD2d at 250.

Although plaintiff has withdrawn his claims for post traumatic stress syndrome and other injuries related to his mental condition, defendants argue that discovery of medical records regarding these conditions is permissible as they are relevant to issues of damages for loss of enjoyment of life. See Amoroso v. City of New York, 66 AD3d 618 (2d Dept 2009) (noting that "[s]ince the nature and severity of the plaintiff's prior medical conditions may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life, the records regarding those preexisting medical conditions are material and necessary to the defense.").

This position is unavailing. First, now that plaintiff has withdrawn his claims for damages related to his mental condition, his allegations regarding loss of enjoyment are limited to the physical injuries sustained to his back and knee. Moreover, defendants have not provided any evidence, such as medical affidavits, demonstrating that the medical records relating to

prior treatment of plaintiff's mental condition, including for alcohol and/or drug dependency, have any connection to "plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life." Budano v. Gurdon, 97 AD3d 497, 499 (1st Dept 2012) (citations omitted); See also, L.S. v. Harouche, 260 AD2d at 250 (holding that where plaintiff withdrew her claims for emotional and psychological injuries prior to trial, plaintiff's psychiatric records were inadmissible even if plaintiff's claim for loss of enjoyment of life was not withdrawn as this claim related only to her physical injuries); Mora v. Saint Vincent's Catholic Medical Center of New York, 8 Misc3d 868 (Sup Ct NY Co. 2005) (questioning patient during deposition as to whether she had ever been diagnosed with a psychological disorder was improper if patient's claim for loss of enjoyment of life was limited to the physical effects of defendant's alleged malpractice); compare Abdalla v. Mazl Taxi, Inc., 66 AD3d 803, 804 (2d Dept 2009) (plaintiff was required to provide authorizations for medical records where he claimed loss of enjoyment of life and "he affirmatively placed his entire medical condition in controversy through the broad allegations of physical injury and mental anguish contained in his bill of particulars").

Finally, while defendants are not entitled to records relating to plaintiff's prior history of alcohol abuse and mental health treatment, there is no dispute that plaintiff's condition at the time of the accident is relevant and, in this

connection, plaintiff has provided defendants with hospital and other medical records showing that plaintiff had alcohol on his breath and was admitted to the hospital for alcohol intoxication following the accident.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion is granted to the extent of (i) granting plaintiff leave to withdraw his claims for post-traumatic stress disorder and all related psychological/mental health claims, (ii) issuing a protective order with respect to plaintiff's medical records pertaining to his prior treatment for substance abuse and mental health treatment and precluding defendants from using any medical records already obtained pertaining to plaintiff's prior treatment for substance abuse and mental health treatment; and it is further

ORDERED that defendants' cross motions for discovery sanctions are denied; and it is further

ORDERED that a status conference shall be held on November 1, 2012, at 9:30 am in Part 4, Room 351, 60 Centre Street, New York, NY 10007.

Dated: October 24, 2012

FILED
OCT 25 2012
NEW YORK
COUNTY CLERKS OFFICE
J.S.C.