

**Syyed v Murray**

2012 NY Slip Op 33223(U)

March 26, 2012

Supreme Court, Westchester County

Docket Number: 54879/2011

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X  
MUBASHIR A. SAYYED and AMTUL BASIT,

Plaintiffs,

-against-

PADRAIC J. MURRAY,

Defendant.

-----X  
LEFKOWITZ, J.

**DECISION & ORDER**

Index No. 54879/11  
Motion Date: Mar. 19, 2012  
Seq # 1

The following papers were read on this motion by defendant for an order compelling plaintiffs to respond to defendant's notice for discovery and inspection and demand for Medicare information dated October 7, 2011.

Order to Show Cause - Affirmation in Support - Exhibits  
Affirmation in Opposition - Exhibits

Upon the foregoing papers and the proceedings held on March 19, 2012, this motion is determined as follows:

This action was commenced on or about August 26, 2011 by filing of a summons and complaint. The action arises out of a motor vehicle accident which occurred on or about March 14, 2011. According to the police report from the accident, an unidentified vehicle came to a stop causing non-party vehicle operator Peter Fitzpatrick to come to a stop. The vehicle driven by plaintiff Mubashir A. Sayyed (referred to as the "injured plaintiff") struck the vehicle operated by Fitzpatrick and defendant's vehicle struck the injured plaintiff's vehicle.

On or about October 7, 2011, defendant served a notice for discovery and inspection. Among the items sought were (1) an authorization for the no-fault file for an accident of June 10, 2004; (2) HIPAA compliant authorizations for all health service providers who treated the injured plaintiff for injuries sustained in the June 10, 2004 accident; (3) an authorization for the legal file maintained by Attorney Vincent A. Giorgio for any action commenced arising out of that accident; and (4) an authorization for the no-fault file for the March 14, 2011 accident that is the subject of this litigation. In addition, on that same date, defendant served a demand for

Medicare information pursuant to the Medicare, Medicaid and SCHIP Extension Act of 2007.<sup>1</sup> Defendant's demand requested plaintiff Mubashir A. Sayyed's Social Security Number, date of birth, disclosure as to whether plaintiff Mubashir A. Sayyed receives Medicare benefits or has a Medicare card, whether plaintiff Mubashir A. Sayyed has a health insurance card, whether plaintiff Mubashir A. Sayyed has been receiving social security disability insurance for the last 24 months, or whether plaintiff Mubashir A. Sayyed is suffering from end-stage renal failure and/or amyotrophic lateral sclerosis. Plaintiffs' attorney only responded by letter to the demand for Medicare information stating that the injured plaintiff did not receive Medicare.

On or about October 19, 2011, plaintiffs responded to defendant's demand for a verified bill of particulars. In that response, plaintiffs stated that in the accident at issue, the injured plaintiff sustained injuries to, among other areas, his left shoulder, neck, lumbar spine. Plaintiffs in their bill of particulars also alleged that "no unreimbursed special damages are claimed." However, plaintiffs also alleged in their bill of particulars that "plaintiff sustained economic loss in excess of basic economic loss in that plaintiff has or will in the future incur medical, hospital and other reasonably necessary expenses that have exceeded or will exceed \$50,000" (Defendant's ex. A, Bill of Particulars at paras. 12-13)

On or about December 6, 2011, the parties executed a preliminary conference stipulation that was so-ordered by this court. Pursuant to that order, plaintiffs were directed to respond to defendant's demand for medical information, including providing, by January 6, 2012, the injured plaintiff's Social Security Number for the sole purpose of determining whether any lien exists. In addition, pursuant to that order, plaintiffs were directed to provide authorizations for medical treatment and the no-fault file for the June 10, 2004 motor vehicle accident, and if none, plaintiffs were directed to serve an affidavit to that effect by January 6, 2012.

On this motion, defendant argues that the discovery requested on or about October 7, 2011 is relevant and plaintiffs agreed to produce such information pursuant to the preliminary conference order. With respect to the no-fault file for the June 10, 2004 accident, defendant asserts that plaintiffs agreed to produce such information pursuant to the preliminary conference order. Defendant further avers that the information is relevant to the extent that the injured plaintiff allegedly sustained similar personal injuries in the 2004 accident that are alleged in the instant action, which he described as a sprain and strain. Defendant also states that the injured plaintiff filed a lawsuit arising out of the 2004 accident, that his attorney in that action was Vincent A. Giorgio, and that he is entitled to the non-privileged portions of his legal file with respect to that action. In addition, defendant argues that plaintiffs have failed to produce an authorization for the no-fault file for the carrier who paid benefits for basic economic loss allegedly sustained in the March 14, 2011 accident, which contains relevant information concerning the accident at issue. Defendant further asserts that he is entitled to the information

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<sup>1</sup> According to defendant, this act mandates that Responsible Reporting Entities (RREs) including insurance carriers who make payments of settlements or judgments make a determination if the claimant is "entitled" to Medicare.

since pursuant to plaintiffs' response to defendant's demand for a bill of particulars, plaintiffs claim to have sustained economic loss. Defendant also avers that he is entitled to the Medicare information requested pursuant to federal legislation.

In opposition to the instant motion, plaintiffs argue that defendant is not entitled to an authorization for the injured plaintiff's "collateral source" records for the subject accident or the prior accident because the records are privileged and/or irrelevant. Plaintiffs aver that neither special damages or cost of medical care are claimed in this matter. Plaintiffs further claim that CPLR 4545 does not apply. In addition, plaintiffs assert that the fact that the injured plaintiff may have had some non-specific sprains and strains in 2004 does not mean that the occurrence of the present accident, in which the injured plaintiff sustained a shoulder injury requiring surgery, permits the extensive discovery sought by defendant. In any event, plaintiffs aver that defendant has already received an authorization for all of the injured plaintiff's medical records pertinent to the 2004 accident. With respect to the Medicare related information and the injured plaintiff's social security number, plaintiffs argue that defendant has already been advised that plaintiff is not eligible for and has not received Medicare payments, and the request for the social security number is improper as that information is confidential.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to 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 Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]).

In this case, plaintiffs have agreed to produce certain documents requested by defendant in the instant motion in the preliminary conference stipulation and order dated December 6, 2011. Accordingly, plaintiffs have waived any objections to the discovery which they agreed to produce in the preliminary conference stipulation and order.

Pursuant to the preliminary conference stipulation and order, plaintiffs agreed to respond to defendant's demand for Medicare information including providing the injured plaintiff's Social Security Number for the sole purpose of determining whether any Medicare liens exist. In any event, insofar as the injured plaintiff's identifying information is necessary to comply with the reporting requirements of section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), including his Social Security Number, the information is necessary and material to the action and defendant is entitled to the information during the discovery stage

of the action (*Seeger v Tank Connection*, 2010 WL 1665253; 2010 US Dist Lexis 49013 [D Neb Apr. 22, 2010]; *Smith v Sound Breeze of Groton Condominium Assn.*, 51 Conn L Rptr 402 [2011]; 2011 WL 803067). The court disagrees with plaintiffs' contention that it is not required to provide injured plaintiff's Social Security Number insofar as plaintiffs' counsel has already advised defense counsel that the injured plaintiff is not eligible for Medicare. As noted by the court in *Hackley v Garafano* (50 Conn L Rptr 208 [2010 Conn Superior Ct]; 2010 WL 3025597), the purpose of section 111 of MMSEA is to avoid having insurers "at the mercy" of plaintiffs to determine plaintiff's Medicare eligibility. The injured plaintiff, however, is entitled to a protective order limiting the use of his Social Security Number for the purposes of the reporting requirement of MMSEA in this action in order to protect the confidentiality of his Social Security Number (*see Smith*, 2010 WL 3025597).

In addition, plaintiffs also agreed pursuant to the preliminary conference stipulation and order to provide the no-fault file for the motor vehicle accident of June 10, 2004, or, if none existed since the accident occurred in New Jersey, to provide an affidavit to that effect. Accordingly, plaintiffs waived any common law or statutory privilege which may have attached to the no-fault file as to the prior accident. That branch of the motion, therefore, seeking to compel plaintiffs to produce the no-fault file with respect to the prior 2004 accident is granted.

Although plaintiffs did not agree to provide the no-fault file as to the subject March, 2011 accident, defendants are nonetheless entitled to the discovery. CPLR 4545 (a), as amended effective November 12, 2009, provides, in relevant part, that in an action for personal injury, where plaintiff seeks to recover certain costs, including the cost of medical care, loss of earnings or other economic loss, collateral source evidence shall be admissible for consideration by the court and, upon a finding by the court that such cost will, with reasonable certainty, be replaced or indemnified from any such collateral source, reduce the amount of the award to plaintiff by such findings. Accordingly, collateral source payments representing reimbursement for a category of loss claimed by plaintiff is material and necessary to the defense of the action (*Stolowski v 234 East 178<sup>th</sup> St. LLC*, 89 AD2d 549 [1<sup>st</sup> Dept 2011]). Although collateral source payments will not become relevant until after a trial ends in plaintiff's favor, the courts have held that pretrial discovery of collateral source providers, such as no-fault insurance files, is appropriate (*Firmes v Chase Manhattan Automotive Finance Corp.*, 50 AD3d 18, 36 [2d Dept 2008]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 75 [2d Dept 1992]).<sup>2</sup>

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<sup>2</sup> In addition, at oral argument plaintiffs' counsel for the first time argued that since defense counsel previously permitted defendant's insurance company (or an agent of the insurance company) contact the entity to request the documents pursuant to the authorization, the court should direct that only defense counsel could request the records pursuant to any future authorizations provided by plaintiffs. However, plaintiffs' argument does not appear anywhere in their opposition papers, nor have they moved for any relief associated with such request. In addition, the court notes that the authorizations expressly provide that information disclosed pursuant to such authorizations might be redisclosed by the recipient of the records.

In the present action, although plaintiffs in their bill of particulars alleged that “no unreimbursed special damages are claimed,” plaintiffs also alleged in their bill of particulars that “plaintiff sustained economic loss in excess of basic economic loss in that plaintiff has or will in the future incur medical, hospital and other reasonably necessary expenses that have exceeded or will exceed \$50,000.” Plaintiffs’ allegation regarding economic loss in excess of basic economic loss and future “medical, hospital and other reasonably necessary expenses,” asserts a claim for economic loss. Defendant, therefore, is entitled to obtain discovery regarding collateral source payments for medical and economic loss. Accordingly, defendant has demonstrated entitlement to discovery of injured plaintiff’s no-fault file regarding the subject March, 2011 accident.

Similarly, plaintiffs did not agree to produce the non-privileged portions of the legal file maintained with respect to the prior 2004 accident. On this motion, defendant failed to demonstrate that the legal file regarding the prior 2004 accident is material and necessary to the instant action or may lead to relevant material. Therefore, that branch of the motion seeking an order compelling plaintiffs to provide the legal file must be denied.

Plaintiffs also demonstrated that a medical authorization for the only physician who treated injured plaintiff following the June, 2004 accident were provided to defendant on or about February 13, 2012 (Plaintiffs’ ex. C). Accordingly, that branch of the motion seeking to compel plaintiffs to provide medical authorizations for medical records regarding the June, 2004 accident must be denied as moot.

In view of the foregoing, it is

ORDERED that branch of defendant’s motion seeking to compel plaintiffs to respond to defendant’s demand for Medicare information is granted, and plaintiff Mubashir A. Sayyed is directed to provide his Social Security Number to defendant’s counsel on or before April 5, 2012; and it is further

ORDERED that defendant is directed to use and disclose the injured plaintiff’s Social Security Number only for the purposes of complying with section 111 of MMSEA; and it is further

ORDERED that the branches of defendant’s motion seeking an order compelling plaintiff to produce certain discovery is granted only to the extent that, on or before April 5, 2012, plaintiffs shall provide defendant with authorizations to obtain: (1) the no-fault file maintained by the insurance carrier who paid benefits to plaintiff Mubashir A. Sayyed as a result of the March 14, 2011 accident; and (2) the no-fault file maintained by the insurance carrier who paid benefits to plaintiff Mubashir A. Sayyed related to the June 10, 2004 motor vehicle accident; and it is further

ORDERED that the branch of defendant’s motion to compel plaintiffs to provide authorizations for medical records related to the injuries sustained in the June, 2004 accident is

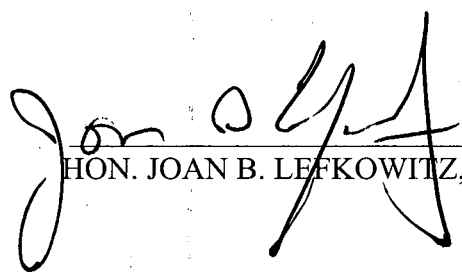
denied as moot insofar as plaintiffs have provided an authorization for the only physician who treated plaintiff Mubashir A. Sayyed after June, 2004 accident; and it is further

ORDERED that the branches of defendant's motion to compel the non-privileged portions of the legal file maintained by the attorney who represented plaintiff Mubashir A. Sayyed in an action commenced to recover for personal injuries sustained as the result of the June, 2004 accident is denied; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on April 17, 2012 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
March 26, 2012

  
HON. JOAN B. LEFKOWITZ, J.S.C.

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