

<b>Berg v Gun Soo Youn</b>
2015 NY Slip Op 32008(U)
October 23, 2015
Supreme Court, New York County
Docket Number: 153510/2014
Judge: Jennifer G. Schechter
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK**

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BERG, BARBARA

**DECISION AND ORDER**

INDEX NO. 153510/2014

MOTION DATE 07/29/2015

- against -

YOUN, GUN SOO

SEQ. NO. 002

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**JENNIFER G. SCHECTER, J.**

Defendant Gun Soo Youn (Youn) moves to compel unrestricted authorizations for plaintiff's treatment records including substance abuse treatment and psychological records. The motion is granted to the extent set forth below.

Plaintiff Barbara Berg commenced this action, to recover damages from Youn, the owner of the building in which she resides (Affidavit in Support [Aff Sup] Ex A). She alleges that on March 4, 2014 at 4:30 a.m. she was descending a defective interior staircase in the building when she lost her footing, tripped and fell (Affidavit of Barbara Berg [Aff Berg]; Aff Sup, Ex C at ¶ 1). Plaintiff states that she tripped because of "a broken, dangerous, slippery and defective step, stair, handrail and interior stairwell which created a tripping hazard that caused plaintiff to trip, fall and sustain injury" (Aff Supp, Ex C at ¶ 3[a]).

Consequently, she suffered a long list of injuries, including, as particularly relevant to this motion, inability to ambulate, inability to sleep, dizziness and need for prescription pain killers (Aff Supp, Ex C at ¶ 1[c]). She further asserts that the injuries resulted in, among other things, disability, weakness and instability and that she continues to suffer pain, impairment of function involving her nervous and lymphatic systems and that as a result of her injuries she was confined to her bed for months (*id.*, [d] and at ¶ 13). She alleges that all of her injuries are "permanent in nature and/or their after-effects" (*id.*).

Five months after this incident, plaintiff was admitted to the hospital after having a seizure suspected to have been brought on by alcohol withdrawal (Aff Supp, Ex D p. 24). Post-incident New York Presbyterian Hospital Records indicate that at that time plaintiff was consuming a pint of alcohol a day, treated with a psychiatrist and suffered from post-traumatic stress disorder (PTSD) all as a result of September 11, 2001 (Aff Supp, Ex D pp. 6, 7, 8, 19, 28). Pre-incident records also indicate psychological treatment, problems with substance abuse, rehabilitation and sleeplessness all since 9/11 (see e.g. Aff Sup, Ex I at 110-15, 122-24).

In February 2015, defendant demanded, among others, unrestricted authorizations for psychological and substance abuse or rehabilitation treatment records (Aff Supp, Ex E). Plaintiff objected and this motion ensued.

In support of the motion, defendant submits the affidavit of Steven A. Feyer, M.D., who is board-certified in psychiatry and neurology. He explains that alcohol abuse can impact cognitive functioning, mood, behavior, damage the heart, liver, the brain, central nervous system, pancreas, increased risk of developing certain cancers, weaken the immune system, be a risk factor for accidents and "cause permanent irreparable damages thereto" (Fayer Affidavit at ¶¶ 8-15). In addition, he explains that as a result of plaintiff's PTSD and substance abuse "plaintiff is at a high risk for diminished life expectancy" (*id.* at ¶ 16). He opines that since the plaintiff admitted to consuming a pint of alcohol a day, "it is eminently plausible her balance and coordination at the time of the accident could have been impaired, as well as her judgment . . . [f]requent occurrences in alcoholics include falls . . ." (*id.* at ¶¶ 17-18).

Defendant urges that although plaintiff does not expressly allege loss of enjoyment of life or emotional distress, her allegations impact daily living, including loss of sleep, confinement to bed and disability. Additionally, defendant urges that the demanded authorizations are needed so that a jury may take into account plaintiff's health, habits and activities and her life expectancy when they consider damages. Defendant therefore argues that he is entitled to discover these areas of her life prior to the accident. Lastly, defendant argues that he should be entitled to discover alternative explanations as to why the plaintiff is unable to sleep or leave her bed and why she is disabled.

Plaintiff opposes the motion and argues that it should be denied because plaintiff does not make a claim for psychological injuries and the need for confidentiality of mental health and substance abuse records outweighs defendant's interests and that defendant has not demonstrated that the requested records will establish that alcohol or mental illness caused the accident (Affirmation in Opposition [Aff Opp] at ¶ 3). Additionally, plaintiff urges that doctor Fayer's affidavit fails to establish that the records sought will establish that plaintiff will suffer from any disease or complication and that defendant fails to establish how these records would indicate that plaintiff was drunk or tried to injure herself on the date of the incident (Aff in Opp at ¶¶ 8, 15).

### **Analysis**

The scope of discovery is broad, allowing for the "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). Although the physician-patient privilege prohibits discovery of information acquired by a physician in attending to a patient, including information in medical records, the privilege is waived as to any material treatment, once an individual affirmatively places his or her physical or mental condition in issue (see *Dillenbeck v Hess*, 73 NY2d 278, 284, 287 [1989]). To the extent that certain medical conditions or treatment bear absolutely no relationship to what has been placed in controversy, that wholly irrelevant information remains immune from disclosure.

Here, due to the injuries alleged, the damages sought and the medical conditions that Ms. Berg has dealt with, defendant's motion must be granted to the extent that plaintiff must provide authorizations allowing disclosure relating to treatment for substance abuse and PTSD.

Defendant has established that under all standards, the authorizations must be produced since plaintiff has not withdrawn her claims for permanent injury and future damages and defendant's expert's opinion about the necessity and materiality of the information is unopposed (see generally *McLeod v Metropolitan Transp. Authority*, 47 Misc 3d 1219[A][Sup Ct, New York County 2015]).

Although plaintiff does not specifically allege loss of ability to enjoy life she lists injuries which constitute such a loss. For example, she alleges inability to ambulate, inability to sleep, dizziness and need for prescription pain killers (Aff Supp, Ex C ¶ 1[c]). She further asserts that the injuries resulted in, among other things, disability, weakness and instability and that she continues to suffer pain, impairment of function involving nervous system and lymphatic system and that as a result of her injuries she was confined to her bed for months (*id.*, [d] and at ¶ 13). And that "[a]ll of the aforesaid injuries are said to be permanent in nature and/or their after-effects" (*id.*).

Under the unique circumstances of this case and accounting for plaintiff's history of psychological and substance-abuse issues (which may well impact, for example, her ability to sleep) plaintiff has put these conditions at issue (*cf. Doe v Sutlinger Realty Corp.*, 33 Misc 3d 1206[A][Sup Ct, Kings County 2011] [ignoring the materiality of sensitive medical information under the circumstances "is not only inappropriate but would violate defendant's right to a fair trial, especially when a jury may be charged with judging plaintiff's medical condition and if appropriate placing an award on life expectancy and loss of enjoyment of life"], *affd* 96 AD3d 898 [2d Dept 2012]).

Accordingly, it is

ORDERED that within 20 days of this Decision and Order, plaintiff must provide defendant with authorizations allowing access to substance-abuse and PTSD treatment.

This constitutes the Decision and Order of the Court.

ENTERED:

Dated : 10/23/2015

New York, New York

  
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HON. JENNIFER G. SCHECTER  
Justice Supreme Court