Cross v LQ Mgt. LLC
2015 NY Slip Op 32840(U)
October 30, 2015
Supreme Court, Westchester County
Docket Number: 51056/2015
Judge: Joan B. Lefkowitz
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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
COBEY D. CROSS,

Plaintiff,

-against-

LQ MANAGEMENT LLC d/b/a LA QUINTA INNS & SUITES,

Defendant.
---x

DECISION and ORDER

Index No. 51056/2015
Motion Date: Oct. 26, 2015
Seq. No. 1

LEFKOWITZ, J.

The following papers were read on this motion by defendant for an order pursuant to CPLR 3126 and 3124 striking plaintiff's complaint, or in the alternative, compelling plaintiff to provide duly executed and HIPAA compliant authorizations allowing for the release of (a) records of mental health treatment rendered prior to and after the date of loss, and (b) records of spinal treatment rendered prior to the date of loss, or precluding her from offering any evidence concerning her injuries at the time or trial, and granting such other and further relief as this court deems just and proper. Plaintiff opposes the motion.

Order to Show Cause - Affirmation of Good Faith -
Affirmation in Support -Exhibits A-I
Affirmation in Opposition - Exhibits A-B

Upon the foregoing papers and the proceedings held on October 26, 2015, this motion is determined as follows:

In this action, commenced by the filing of a summons and verified complaint dated January 23, 2015, plaintiff seeks damages for personal injuries allegedly sustained when she tripped and fell on a walkway at premises owned and operated by defendant. On or about April 1, 2015, plaintiff served a Bill of Particulars wherein plaintiff claimed the following injuries: closed head injury; blunt force trauma; traumatic brain injury; loss of consciousness; chronic

post-traumatic headaches; cerviocranial syndrome; concussion; posttraumatic stress; sphenoid sinusitis/ residual sinusitis in the left sphenoid; septal deviation; fractured nose; turbinate hypertrophy; chronic maxillary sinusitis and sphenoid sinus. Soft tissue thickening at the ostium of the left sphenoid sinus. Additionally, the Bill of Particulars indicates that plaintiff underwent an operative procedure on her sinuses at Yale-New Haven Hospital on June 2, 2014. The Bill of Particulars also includes claims for further and/or future sphenoid decompression; nose soreness and difficulty breathing; mucosal thickening seen in the ethmold (sic) air cells; poor balance; difficulty sleeping; weakness in neck and tingling in arms; need for pain medication; need for future surgery. The Bill of Particulars also stated that these injuries "directly affected the bones, tendons, tissues, muscles, ligaments, nerves, blood vessels and soft tissues in and about the involved areas and sympathetic and radiating pains from all of which the plaintiff suffered, still suffers and may permanently suffer." Additionally the Bill of Particulars states that these injuries have impaired plaintiff's general health and may limit her activities in her employment and her life and that as a result she may be restricted in her normal life and activities and may permanently require medical and neurological care and attention.

On or about April 1, 2015, plaintiff provided defendant with numerous authorizations for the release of medical records. Each authorization was limited to records occurring after the accident, from April 6, 2014 to present, and contained the notation limiting the release of records only to those concerning "head injury (not mental), nose and neck injuries only."

By letter dated June 24, 2015, defense counsel advised plaintiff's counsel that those authorizations were inappropriate and demanded new, unrestricted authorizations. Defense counsel stated that in the course of receiving medical records in connection with the authorizations provided, it had become clear that plaintiff had received pre-accident treatment for conditions which related directly to plaintiff's claims in the Bill of Particulars. Specifically, counsel stated that plaintiff's pre-accident history and/or treatment for multiple personality disorder, bipolar disorder, depression, nervousness and anxiety and the fact that she has been receiving disability benefits since 2012, directly relate to plaintiff's claims of closed head injury, traumatic brain injury, post-traumatic headaches, concussion, posttraumatic stress, severe shock to the nervous system, impairment of plaintiff's general health, loss of enjoyment of life, restriction of plaintiff's normal life and activities and the alleged need for ongoing neurological care. Additionally defendant stated that in light of plaintiff's documented pre-existing conditions of drop foot and cervical arthritis, a cervical MRI on October 27, 2008, outpatient therapy for her neck and an EMG, and insofar as plaintiff has claimed cervical injuries, plaintiff improperly restricted the authorizations to the date of loss. Enclosed with that letter, defendant served a Demand to Produce, which demanded, among other things, a new set of authorizations, unrestricted as to date or type of record to be disclosed, for all health care providers for whom authorizations had previously been provided; non-privileged documents pertaining to plaintiff's motor vehicle accidents which occurred in 1988 and 2008 and records concerning plaintiff's 2006 work-related injury (the "June 24, 2015 demands").

The parties appeared for a Preliminary Conference on August 12, 2015 at which time the parties discussed the issue of the outstanding authorizations and responses to the June 24, 2015 demands, and defendant was provided with a briefing schedule for the instant motion.

Defendant seeks authorizations for the release of plaintiff's medical records of spinal treatment rendered prior to and after April 6, 2014, the release of plaintiff's mental health treatment records provided prior to and after April 6, 2014, and responses to the June 24, 2015 demands. Defendant argues it is entitled to the requested records concerning plaintiff's preexisting injuries/conditions which were revealed in documents produced during discovery as they directly relate to plaintiff's claims for injuries herein. Defendant argues plaintiff is claiming significant cognitive damages, which according to plaintiff's own treating neuropsychologist can be caused by brain trauma or an underlying psychological and/or emotional condition. Defendant states that according to documents provided in discovery there is no evidence that plaintiff has suffered brain trauma as a result of the accident, but there is evidence of pre-accident psychological and emotional conditions. Similarly, defendant argues that since plaintiff is alleging cervical spine injuries, defendant is entitled to plaintiff's pre-accident treatment for cervical spine conditions, including EMG, MRI and therapy.

In opposition, plaintiff argues that defendant seeks records unrelated to the claims plaintiff is seeking. Plaintiff contends that she never opened the door for a claim for mental injuries and therefore defendant is not entitled to records concerning plaintiff's mental health history. Plaintiff specifically contradicts defendant's claim that plaintiff is alleging memory loss as part of her claim in this action. Plaintiff also argues that even if the court were to agree that defendant was entitled to discovery of the documents it seeks, then those documents should be submitted for in camera review in order to protect plaintiff's privacy. Plaintiff contends that she has not asserted claims for mental or psychological injuries and therefore defendant is not entitled to discovery concerning plaintiff's psychological treatment history. Plaintiff argues that her claim for "loss of enjoyment of life" does not open the door to plaintiff's "entire life history."

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." 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, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

The party seeking to compel production of medical records has the initial burden of making an evidentiary showing that the other party's medical condition has been placed in controversy in the action (Modern New York Discovery, Scope of Disclosure § 23:31). It is well

settled that a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue (*Lombardi v Hall*, 5 AD3d 739, 740 [2d Dept 2004]). 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 physical condition in issue (*Bravo v Vargas* 113 AD3D 577 [2d Dept 2014]; *M.C. v Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]). *see* CPLR 3121 [a]). A party affirmatively places his entire medical condition in controversy through broad allegations of physical injury or mental anguish (*O'Rourke v Chew*, 84 AD3d 1193 [2d Dept 2011]; *DeLouise v S.K.I. Wholesale Beer Corp.* 79 AD3d 1092 [2d Dept 2010]).

However, a party does not waive the physician-patient privilege with respect to unrelated illnesses or injuries. Although CPLR 3101 (a) requires full disclosure of all matter material and necessary in the prosecution or defense of an action the principle of "full disclosure" does not give a party uncontrolled and unfettered disclosure. An injured plaintiff waives the physician-patient privilege with respect to his relevant prior medical history concerning those physical conditions which he has affirmatively placed in controversy (*Romance v Zavala*, 98 AD3d 726 [2d Dept 2012]).

A review of medical documents provided as exhibits to the moving papers demonstrate that plaintiff has a pre-accident history of cervicalgia, degenerative disc disease, neuropathy, arthritis of the spine, chronic pain syndrome, migraine headaches, blurred vision, memory loss, lumbar spine bulges, insomnia, and clumsiness, all of which are relevant to plaintiff's current claims of closed head injury, blunt force trauma, traumatic brain injury, cervicocranial syndrome, poor balance, difficulty sleeping, weakness and tingling in arms; and the need for pain medication. Plaintiff has affirmatively put these conditions into controversy.

Additionally, plaintiff has alleged a claim of posttraumatic stress, and despite plaintiff's contentions otherwise, this claim has affirmatively placed plaintiff's psychological state into controversy (*Peculic v Sawicki*, 129 AD 3d 930 [2d Dept 2015]). As indicated by documents produced in discovery, plaintiff has a significant mental health history which includes treatment for depression, bipolar disorder, borderline personality disorder, and posttraumatic stress. While the court is sympathetic to plaintiff's desire to avoid the production of records relating to her mental and psychological history, insofar as plaintiff has affirmatively placed these issue into controversy by the allegations in her Bill of Particulars, plaintiff is required to provide access to those records.[1]

Moreover, plaintiff's claims that her injuries have impaired her general health and may limit her ability to partake in a normal life and may limit her enjoyment of life also entitle defendant access to her mental and physical health records (*Moreira v M.K. Travel and Transport, Inc.*, 106 AD3d 150 [2d Dept 2013]; *Vanalst v City of New York*, 276 AD2d 422 [2d Dept 2000]).

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[1] Notably, plaintiff has not cross-moved for a protective order with respect to the mental and psychological records sought herein.

Accordingly it is:

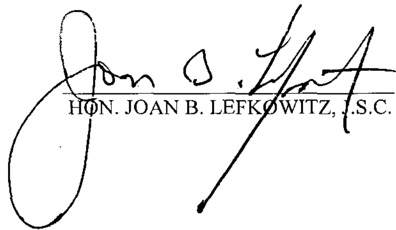
ORDERED that defendant's motion is granted to the extent that plaintiff is directed to provide new authorizations for the records of plaintiff's mental health treatment rendered prior to and after the date of loss, and authorizations for plaintiff's records of spinal treatment rendered prior to the date of loss, on or before November 13, 2015; and plaintiff is directed to respond to all outstanding demands contained in defendant's Demand to Produce dated June 24, 2015; and it is further

ORDERED that defendant is directed to serve a copy of this order with notice of entry on plaintiff within seven days of notice of entry; and it is further,

ORDERED that counsel for all parties are directed to appear for a conference in the Compliance Part, Courtroom 800 on November 16, 2015, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 30, 2015



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cc: Compliance Part Clerk