

Carter v City of New Rochelle
2015 NY Slip Op 33001(U)
August 31, 2015
Supreme Court, Westchester County
Docket Number: Index No. 55298/13
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
EDWARD CLINTON CARTER,

Plaintiff,

DECISION & ORDER

-against-

Index No. 55298/13

Motion Date: Aug. 31, 2015

CITY OF NEW ROCHELLE, ROBERT BOYKO
LOUIS SANTIAGO and CATALINO RAMOS,

Seq. No. 1

Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendants City of New Rochelle and Robert Boyko (hereinafter "moving defendants") for an order, pursuant to CPLR 3126 (3), striking plaintiff's complaint based upon his failure to provide certain discovery in contravention of court orders, or, alternatively, compelling plaintiff to answer questions at a further deposition regarding his substance abuse treatment during the years prior to the accident.

Order to Show Cause - Affirmation in Support - Exhibits A-D
Affirmation in Opposition - Exhibit

Upon the foregoing papers and the proceedings held on August 31, 2015, this motion is determined as follows:

Plaintiff commenced this action to recover damages for personal injuries which he allegedly sustained as the result of a motor vehicle accident. In addition to shoulder injuries, plaintiff alleges in his bill of particulars that he will "continue to experience impairment, disruption and difficulty with daily activities, way of life and enjoyment of life including significant impairment of numerous daily activities that plaintiff had previously taken for granted" (Ex. C to Affirmation in Support at ¶ 10).

On April 17, 2015, plaintiff appeared for a deposition. Plaintiff's counsel directed plaintiff not to answer questions regarding his substance abuse in 2012, including what type of substances plaintiff abused.

By multiple Compliance Conference Orders, including an order dated July 13, 2015, plaintiff was directed to provide defendants with authorizations without date limitation for his Social Security Disability records. By Compliance Conference Order dated July 13, 2015, plaintiff was also directed to appear for a further deposition.

Moving defendants now move for an order striking plaintiff's complaint or compelling plaintiff to answer questions regarding his substance abuse the year prior to the accident, including what substance plaintiff abused, at his further deposition which has already been scheduled. Moving defendants contend that since plaintiff has alleged a loss of enjoyment of life, they are entitled to discovery regarding his substance abuse in the year prior to the accident. In their supporting affirmation, moving defendants also contend that plaintiff has failed to provide an unrestricted authorization for his Social Security Disability records despite court orders directing the production of an unrestricted authorization. Moving defendants assert that plaintiff's failure to provide the unrestricted authorization and the failure to answer questions at his deposition regarding his substance abuse in the year prior to the accident constitutes willful and contumacious conduct warranting the dismissal of the complaint. Alternatively, moving defendants contend that plaintiff should be directed to answer questions at a further deposition regarding his treatment and substance abuse in the year prior to his accident, including what substances he abused.

Plaintiff opposes the motion. Plaintiff asserts that an unrestricted authorization for his Social Security Disability records was provided on July 29, 2015, and annexes as an exhibit the authorization served on defendants. Plaintiff also contends that his further deposition has been scheduled. Accordingly, plaintiff contends that the motion is moot.

Although plaintiff has established that an unrestricted authorization for his Social Security Disability records has now been provided to defendants, plaintiff has failed to demonstrate that the remaining branch of the motion with respect to plaintiff's substance abuse is moot. Notably, plaintiff only contends that his further deposition is scheduled, but fails to consent to answer questions at the further deposition regarding his substance abuse in the year prior to his accident, which were blocked by plaintiff's counsel at his deposition. Accordingly, the branch of the motion seeking either dismissal of the complaint or an order directing plaintiff to answer deposition questions regarding his substance abuse during the year prior to the subject accident must be decided by this court.

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]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, 74 AD3d at

1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden 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*, 74 AD3d at 1140). 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]).

It is well settled that a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue (*Fox v Marshall*, 91 AD3d 710 [2d Dept 2012]; *Lombardi v Hall*, 5 AD3d 739, 740 [2d Dept 2004]). In *Coddington v Lisk* (249 AD2d 817 [3d Dept 1998]), the court held that plaintiff's drug addiction records may lead to evidence bearing on plaintiff's claim for personal injuries allegedly sustained in an automobile accident and should be disclosed in view of plaintiff's allegations of "permanent weakness and instability," "permanent effect of pain," and "loss of enjoyment of life." Similarly, in *Azznara v Strauss* (81 AD3d 578 [2d Dept 2011]), where plaintiff sought damages for loss of enjoyment of life resulting from chiropractic malpractice, the court held that plaintiff's alcohol and drug abuse records were material and necessary to plaintiff's claim for damages. In *Steward v New York City Housing Authority* (302 AD2d 449 [2d Dept 2003]), the court held that plaintiff's alcohol and substance abuse records should be disclosed as they may be useful in preparation for trial and lead to relevant evidence bearing on the plaintiff's claim for damages for personal injuries.

CPLR 3126 provides that if any party "willfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading, or preclusion, a court must determine that the party's failure to disclose is willful and contumacious (*Arpino v F.J.F. & Sons Elec. Co.*, 102 AD3d 201, 210 [2012]; *Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]).

In the present action, as in *Coddington* and *Azznara*, plaintiff's broad allegations of loss of enjoyment of life are sufficient to place his history of substance abuse and treatment in the year prior to the subject accident into controversy. Although plaintiff's counsel directed plaintiff not to answer certain questions at his deposition regarding his substance abuse and treatment, it cannot be said that the failure to answer these questions rises to the level of willful and contumacious. Accordingly, that branch of the motion seeking dismissal of the complaint is denied. The branch of the motion, however, seeking to compel plaintiff to testify at his further deposition regarding his substance abuse and substance abuse treatment during the year prior to the subject accident, however, is granted. The inquiry into the issues of plaintiff's substance abuse and any treatment he received for the substance abuse in the year prior to the accident may lead to information which is material and relevant to plaintiff's claims of personal injuries in view of his broad allegations of loss of enjoyment of life.

Accordingly, it is

ORDERED that the branch of the motion seeking an order dismissing the complaint is denied; and it is further

ORDERED that the branch of the motion seeking to compel plaintiff to answer questions regarding his substance abuse and substance abuse treatment at his further deposition, which is scheduled for September 9, 2015, is granted and plaintiff is directed to answer questions with respect to his substance abuse and substance abuse treatment during the year prior to the accident; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on September 14, 2015 at 9:30 a.m.

Dated: White Plains, New York
August 31, 2015


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

TO:

William Schwitzer & Assocs., P.C.
By Brian Valdivia, Esq.
Attorneys for Plaintiff
112 Madison Ave., 10th Floor
New York, NY 10016
By NYSCEF

City of New Rochelle Department of Law
By Brian J. Powers, Esq.
Attorneys for Defendants City of New Rochelle
and Robert Boyko
515 North Ave.
New Rochelle, NY 10801
BY NYSCEF

Law Office of Bryan M. Kulak
Attorneys for Defendants Louis Santiago
and Catalino Ramos
90 Crystal Run Rd., Ste. 409
Middletown, NY 10941
By NYSCEF

cc: Compliance Part Clerk