SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11 Index No. 158612/13
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In the Matter of the Application of
MARIE FLAHERTY,

Petitioner,

-against-

MIDTOWN MOVING & STORAGE, INC.

Respondent.
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JOAN A. MADDEN, J.:

In this hybrid special proceeding/civil action, respondent Midtown Moving & Storage, Inc. (Midtown) moves for an order compelling petitioner Marie Flaherty ("Flaherty") to respond to various discovery requests served by Midtown, and for Flaherty to appear at a deposition and to execute a confidentiality agreement with respect to her medical, psychological and psychiatric records or, in the alternative, striking and dismissing the amended petition. Flaherty opposes the motion, which is granted to the extent set forth below.

Background

The amended petition seeks damages and other relief against Midtown, which is a storage and moving company, in connection with its removal and storage of a tenant's personal possessions when Flaherty was evicted from her apartment April 2012. Specifically, it is alleged that at the time of her eviction, which Flaherty asserts was illegal, Midtown, without her authorization, entered her apartment on and between April 20 and 30, 2012 and damaged, destroyed and/or removed her personal and household property. It is further alleged that

Midtown did not provide Flaherty with an inventory of her property when it was removed as required by the Uniform Commercial Code ("UCC").

The record indicates that over a period of almost two years, beginning in May 2012, Midtown repeatedly noticed auctions and then withdrew the notices, either on the instruction of the landlord, or of its own counsel, and that Flaherty repeatedly challenged the notices by filing special or hybrid proceedings.

The amended petition, which was filed on October 23, 2013, challenges certain of the noticed auctions, and also contains the following nine causes of action: 1) a declaration that Midtown's alleged warehouseman's lien is invalid under UCC 7-211, injunctive relief preventing respondent from taking action based on the warehouseman's lien, and compensatory, punitive damages; 2) a preliminary and permanent injunction preventing action with respect to the warehouseman's lien ; 3) conversion; 4) criminal mischief; 5) theft of property; 6) extortion; 7) interference with contract; 8) intentional infliction of emotional distress; and 9) negligent infliction of emotional distress. Midtown filed an amended verified answer in which it denied the allegations in the amended petition, asserted twelve affirmative defenses and a counterclaim seeking $21,500 for storage charges. Ms. Flaherty filed a reply to the counterclaim.

By decision and order dated April 24, 2014 (hereinafter "the April 2014 decision"), the court found that, as alleged in the first and second causes of action, the warehouseman's lien was invalid as to Flaherty and issued an order staying the sale of Flaherty's possessions, giving Ms. Flaherty 30 days to retrieve her possessions from Midtown, and directing Midtown to release Ms.

Flaherty's possessions to her without any payment by her.[1] The count found that warehouseman's lien was invalid as against Flaherty, since she was not a bailor for the purposes of UCC section 7-209 (1), which provides, in part, that " [a] warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation." Midtown subsequently moved for reargument of the April 2014 decision, which was denied. The court noted, however, that while it found that there was no valid warehouseman's lien against Flaherty under the UCC section 7-209 (1), that it made no determination as to Midtown's rights to recover for the charges incurred for storing Ms. Flaherty's goods under UCC section 206. After the court issued the April 2014 decision, the parties were directed to appear for a preliminary conference.

The parties appeared for a preliminary conference on July 3, 2014; however, after a problem arose between Flaherty and the court attorney conferencing the matter, the court adjourned the conference to August 14, 2014, on which date the conference was held. In light of issues arising in connection with discovery, the court appointed a special master to conduct the status conference scheduled for October 16, 2014. At that conference, the parties were unable to come to an agreement about discovery and Flaherty stated on the record that although she had signed the stipulation completed during the conference, she did not agree to discovery set forth in the stipulation and therefore wrote below her signature line on the order that she was "forced to sign [it]." (see transcript 10-16-14, 5-7). The court then stated on the record that it would cross

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[1]The court also granted Midtown's motion for a protective order with respect to a request for admissions served by Flaherty, and denied Midtown's motion to dismiss the amended petition.

out Flaherty signature and order the discovery. The next status conference, scheduled for December 11, 2014, was adjourned so that a special referee could be appointed to conduct subsequent discovery conferences.

By order dated April 21, 2015, upon reconsideration, the court determined that the status conference should be conducted by the court on the record. At the status conference held on May 28, 2015, Flaherty asserted that she was seeking to disqualify Midtown's attorney, and the court directed that any such relief be sought by order to show cause on or before June 19, 2015. By order dated June 23, 2015, the court declined to sign Ms. Flaherty's order to show cause finding that she "failed to allege a sufficient legal or factual basis for disqualification of respondent's counsel."

On July 2, 2015, the parties appeared for a status conference, which was adjourned at the request of Flaherty, and on consent of Midtown's counsel, so as to give Flaherty an opportunity to obtain counsel. The parties next appeared for a status conference on August 20, 2015, at which time Flaherty had not obtained counsel. At the next status conference, on November 5, 2015, the court directed that the parties seek any outstanding discovery via order to show cause to compel discovery to be made on or before December 7, 2015.[2]

The Motion

Midtown now moves for an order compelling Flaherty to respond to various discovery requests served by Midtown, and for her to appear at a deposition and to execute a confidentiality

[2]Flaherty, who does not contend that Midtown has failed to respond to her discovery requests, did not move for relief.

agreement with respect to her medical, psychological and psychiatric records or, in the alternative, striking and dismissing the amended petition for Flaherty's failure to comply with discovery. In support of the motion, Midtown submits: (1) its demand for or bill of particulars dated June 5, 2014; (2) Flaherty's rejection of the demand dated September 15, 2014; (3) its notice of discovery and inspection dated June 5, 2014, (4) Flaherty's response to the notice of discovery and inspection, dated September 15, 2014 in which she provides three documents[3] and otherwise objects to each demand and definition on various grounds including that the demands are "unduly burdensome," "vague and ambiguous," "require petitioner to create or generate documents,." "call the production of documents protected by the attorney-client privilege, work-product doctrine, the right of privacy under the New York Constitution," (5) its objections to Flaherty's response dated December 10, 2014; (6) its notice of deposition dated June 5, 2014 notifying of Flaherty of her July 1, 2014 deposition; (6) Flaherty's email response dated June 30, 2014 in which she states she is unavailable for deposition on July 1, 2014; (6) a proposed Confidentiality Agreement with respect to medical, psychiatric and psychological records requested by Midtown; (7) Flaherty's response to the request for her medical records; (8) the October 16, 2014 order.

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[3]The documents are: (1) a letter dated June 19, 2012 from the law firm of Borah, Goldstein, Altschuler Nahins & Goidel, PC (which represented the landlord in the proceeding to evict Flaherty) apparently to Midtown requesting that Flaherty's property not be auctioned, discarded or released; (2) a notice from Midtown to Flaherty advising her that on April 30, 2012, her goods were placed in Midtown's storage facility and describing its attempts to contact her by phone; (3) a notice from Midtown dated September 4, 2013, setting forth monthly storage fee charges of $1,250 incurred between 4/30/12 and 8/30/13 for a total of $18,750, and stating that these charges needed to be paid to in order to remove Flaherty's property from storage.

Flaherty opposes the motion, arguing that (1) Midtown is not entitled to discovery with respect to the first and second causes of action in the amended petition, which have been resolved in her favor; (2) she adequately responded to Midtown's discovery requests; (3) Midtown's attorney failed to comply with the court's directives at the various discovery conferences, including that he file objections to Flaherty's discovery responses by September 28, 201,5 and communicate with her via email if there were issues with Flaherty's discovery responses; (4) she was "ambushed" at the November 5, 2015 conference, when Midtown's counsel provided the court with a folder of documents without first provided Flaherty with a copy of such documents, (5) she is entitled to an evidentiary hearing to obtain testimony of three "court employees" conducting or observing discovery proceedings (i.e. the court attorney conducting a discovery conference on July 3, 2014 and an intern attending the conference, and the special master who conferenced the case on October 16, 2014).[4]

Discussion

CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The words "material and necessary" are "liberally interpreted to require disclosure, upon request, of any facts bearing on a controversy which will assist in sharpening the issue at trial." Roman Catholic Church of Good Shepherd v. Tempco Systems, 202 AD2d 257, 258 (1st Dept 1994). Disclosure is thus not limited to "evidence directly related to the issues in the pleadings." Allen v. Crowell-Collier Publishing

[4]Flaherty also erroneously argues that Midtown's affirmative defenses and counterclaim, were dismissed by the April 2014 decision and therefore Midtown is not entitled to discovery with respect to these defenses and counterclaim.

Co., 21 NY2d 403, 408 (1968).

With respect Midtown's demand for a bill of particulars, the court notes that the function of this discovery device "is to amplify the pleadings and not to afford evidentiary material." Somma v. Sears, Roebuck & Co., 52 AD2d 784, 784 (1st Dept 1976); see also , Arroyo v. Fournee Estusia Corp., 194 AD2d 309 (1st Dept 1993). In this connection, it has been held that it is improper for the demand to seek names and addresses of witnesses, although this information may be sought using other discovery devices. Nazario v. Fromchuck, 90 AD2d 483 (2d Dept 1982). The court finds that items 1-10, 12,13,14, 17,[5] 21, 30, 31 of the bill of particulars seek to amplify the pleadings and do not seek evidentiary material and are not otherwise improper. Accordingly, Flaherty must respond to these items.

As for the notice of discovery and inspection, this discovery device is governed by CPLR 3120 and provides for the production of documents and things for inspection, testing, copying and/or photographing. "The wide scope of disclosure under subdivision (a) of CPLR 3101 .... applies to discovery proceedings under CPLR 3120." Curea v. Romonel Knitting Mills, Inc., 45 AD2d 840 (2d Dept 1974). However, a party may not be compelled to produce information that does not exist or to create new documents and "may be required to produce only those items 'which are in [the party's] possession, custody or control'" CPLR 3120, subd. [a], par. 1, cl. [i]). Rosado v. Mercedes-Benz of North America, 103 AD2d 395, 398 (2d Dept 1984). Otherwise put,

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[5]While "a monetary breakdown of the damages claimed is improper in a demand for a bill of particulars where only general damages are claimed," (Leeponis v. Garcy Corp, 61 AD2d 1040, 1041 [2d Dept 1978]) the same is not true for special damages claimed in connection with the alleged loss of Flaherty's property.

"the items must be existing and tangible to be subject to discovery and production. Orzech ex rel. Orzech v. Smith, 12 AD3d 1150, 1151 (4th Dept 2004)(internal citations and quotations omitted). Thus, Items 3, 6, 9, 11, 18, 33, and 34 which request the creation of documents, and or response to questions, are stricken.

Items 32 and 39, respectively, seek all records pertaining to any psychological or psychiatric, including HIPAA compliant authorizations for treatment in the last 10 years, and HIPAA compliant authorizations, without time limitation, for each doctor, medical professional and hospital pertaining to Flaherty's treatment for emotional distress, post-traumatic stress and open heart surgery. For the reasons discussed below these requests are overly broad, and insofar as the HIPAA compliant authorizations must be created, they are not properly sought in connection with a notice of discovery and inspection. The request for Flaherty's tax returns in Item 29 is denied at this juncture as Midtown "has not establish that the information contained in the returns ... is indispensable to this litigation and unavailable from other sources." Nanbar Realty Corp. v. Pater Realty Co., 242 AD2d 208, 218 (1st Dept 1997)(internal citations and quotation omitted). Item 30 which seeks a copy of each complaint that Flaherty has filed in the courts of the State of New York and copies of the decisions in each case is overly broad and burdensome, and in any event publicly available.

The remaining items in the notice of discovery and inspection, that is Items 1-5, 7-8, 10, 12–17, 19-28, 31, 35-38, are properly the subject of the notice and seek material and relevant documents and therefore must be produced if they are in Flaherty's possession, custody and or control.

Next, to the extent Flaherty contends that certain information sought relates to privileged information, the court notes as the party seeking to assert the privilege she has the burden of proving each element of the privilege. See Spectrum Systems Intern'l Corp. v. Chemical Bank, 157 AD2d 444, 447 (1st Dept 1990), aff'd as modified, 78 NY2d 371 (1991)(holding that "[b]ecause of the strong public policy favoring full disclosure, the burden of proving each element of a privilege rests the party asserting it"). With respect to the attorney-client privilege, "the party seeking to withhold the information must show that it was a 'confidential communication' made between the attorney and the client in the context of legal advice or services." Bertalo's Restaurant Inc. v Exchange Ins. Co., 240 AD2d 452, 454 (2d Dept), lv. dismissed 91 NY2d 848 (1997) . Here, Flaherty's conclusory assertions of privilege are insufficient to meet this standard. In addition, contrary to Flaherty's position, the discovery sought by Midtown is not improper on the ground that it relates to the first and second causes of action decided in her favor.

As for Flaherty's argument that a hearing is required so that she can obtain testimony from three court employees, such argument is without merit as the issues on this motion concern whether Flaherty is required to comply with the discovery notices served by Midtown, and not whether Flaherty was obligated to comply with previously ordered discovery. Likewise, whether Midtown's attorney should have pursued the discovery in a different way is no longer an issue since after Flaherty's repeated objections on the record in this regard, the court directed at the November 5, 2015 conference that Midtown seek relief with respect to outstanding discovery by order to show cause.

With respect to Midtown's request for discovery of medical records, including

psychological and psychiatric records, the law is well established 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, 535 (2d Dept 1999)(citations omitted); see also Koump v. Smith, 25 NY2d 287 (1969); see also, Cythia B. v. New Rochelle Hosp Medical Center , 60 NY2d 452, 457 (1983). 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).

Here, the amended petition which seeks damages for unspecified "emotional and physical injuries[6]" arising out of the eviction. At this juncture, these general allegations do not appear sufficient to permit "wholesale discovery of information regarding the protected party's physical and mental condition." Carter v. Fantauzzo, 256 AD2d 1189 (4th Dept 1996). Accordingly, Midtown's request for medical records is held in abeyance pending Ms. Flaherty's service of response to the demand for a bill of particulars so as to give her an opportunity to specify the nature and extent of her physical and emotional injuries allegedly suffered as a result of Midtown's conduct. Midtown may renew its request for such records, or such other appropriate relief in light of Ms. Flaherty's response. Until such time, the court reserves decision as to issues with respect to the proposed confidentiality order.

Conclusion

In view of the above, it is

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[6]The one exception is the allegation that she had open heart surgery, although it is unclear from the amended petition if the surgery occurred before or after the alleged wrongdoing by Midtown.

ORDERED that Midtown's motion to compel is granted to the extent that on or before May 13, 2016, Flaherty shall respond to Midtown's bill of particulars and notice of discovery and inspection to the extent stated herein; and it is further

ORDERED that failure to comply with this order may result in the issuance of discovery sanctions against Flaherty pursuant to CPLR 3126, including but not limited to, the issuance of an order precluding Flaherty from introducing evidence with respect to the items demanded; and it is further

ORDERED that a status conference shall be held in Part 11, Room 351, 60 Centre Street, New York, NY on May 19. 2016, at 3:30 pm, at which conference the parties depositions shall be scheduled and issues regarding discovery of Flaherty's medical records, including psychological and psychiatric records, and the confidentiality order will be addressed.

Dated: April 13, 2016

HON. JOAN A. MADDEN
J.S.C.