

Katz v 260 Park Ave. S. Condominium Assoc.

2016 NY Slip Op 32821(U)

April 15, 2016

Supreme Court, New York County

Docket Number: 155146/2013

Judge: Kelly A. O'Neill Levy

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY
Justice

PART 19

Index Number : 155146/2013
KATZ, COHL
vs.
260 PARK AVENUE SOUTH
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**Decided in accordance
with the accompanying
memorandum decision/order**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4-15-16

Kelly O'Neill Levy
J.S.C.
HON. KELLY O'NEILL LEVY

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
COHL KATZ,

Plaintiff,

- against -

260 PARK AVENUE SOUTH CONDOMINIUM
ASSOCIATES, 260 PARK AVENUE SOUTH
CONDOMINIUM OWNERS CORP. and
MAXWELL KATES BROKERAGE,

Defendants.
-----X

DECISION AND
ORDER

Index No. 155146/2013
Mot. Seq. 001

KELLY O'NEILL LEVY, J.:

Defendants move in this personal injury action to dismiss the complaint pursuant to CPLR 3126 or in the alternative preclude plaintiff from presenting any evidence at trial pursuant to CPLR 3042(c) and 3126. Plaintiff opposes the motion and cross-moves for an order granting a protective order pursuant to CPLR 3103(a), compelling defendants to respond to outstanding discovery, and/or striking defendants' answer to preclude defendants from offering evidence at trial pursuant to CPLR 3126. Upon review of the papers and after oral argument, the motion and cross-motion are granted in part for the reasons set forth below.

Defendants seek relief based upon plaintiff's alleged failure to furnish discovery and comply with discovery orders. Defendants contend that certain discovery has not been produced, namely authorizations for medical providers Dr. Brian Saltzman and Dr. Anthony Lujack (also referred to as "Dr. Anthony Mark"),¹ all records from IME Watchdog, Inc. (IME Watchdog) related to the orthopedic independent medical examination (IME) conducted on

¹ Defendant states that Dr. Anthony Lujack's full name is Anthony Mark Lujack and that the references to "Dr. Anthony Mark" contained in plaintiff's medical records actually refer to Dr. Lujack.

plaintiff by Edward Crane on July 24, 2014; and x-rays of areas alleged to have been injured as a result of the October 30, 2012 accident at issue.

Plaintiff cross-moves, arguing, among other things, that defendants have failed to provide it with certain discovery. The court notes that on the day of oral argument, a portion of the cross-motion was resolved in that defendants agreed to respond to plaintiff's June 13, 2014 Post-Examination Before Trial Notice for Discovery and Inspection within 45 days which was memorialized by status conference order of same date. In any event, that branch of the motion as well as the one seeking relief pursuant to CPLR 3126 is denied for plaintiff's failure to submit with the motion an affirmation of good faith showing attempts to resolve the dispute as is required under 22 NYCRR 202.7. *See Molyneaux v. City of N.Y.*, 64 A.D.3d 406, 407 (1st Dep't 2009), *Natoli v. Milazzo*, 65 A.D.3d 1309, 1310-11 (2d Dep't 2009).

It is well-settled that when a plaintiff brings an action relating to her physical condition, she waives the physician-patient privilege not for her entire physical condition but only for the conditions affirmatively placed in controversy. *See Felix v. Lawrence Hosp. Ctr.*, 100 A.D.3d 470, 471 (1st Dep't 2012), *Manassis v. New York Dept. of Transp.*, 2002 WL 31115032 at 2 (S.D.N.Y. 2002). *See also Koump v. Smith*, 25 N.Y.2d 287, 294 (1969). Here plaintiff states in her opposition/cross-motion that no cause of action or damages sounding in emotional distress was pled in the complaint and that the inclusion of language in both her original and supplemental bill of particulars that "as a result of the [claimed] injuries, plaintiff's experiences severe depression, nervousness, anxiety, inability to attend to daily vocation and avocation" was inadvertent. (Abramoff Aff. at FN 4) Plaintiff further indicates that "[her counsel's] office has placed Defendants on notice of this error and has affirmatively stated that Plaintiff is not making a claim for any emotion [*sic*] injuries...and is prepared to so-stipulate." (Abramoff Aff. at FN 4) In light of those assertions, the court denies defendants' request for an

authorization for the records of psychiatrist Dr. Anthony Lujack (also referred to as “Dr. Anthony Mark”) without prejudice to renew should plaintiff not provide such stipulation to defendants within ten (10) days of service of this decision/order with notice of entry.

The court finds, however, that defendants are entitled to limited disclosure of the records of plaintiff’s primary care physician. Within thirty (30) days of service of this order with notice of entry, plaintiff is directed to furnish to defendants a duly executed authorization for the records of her primary care physician, Dr. Brian Saltzman, from one year before the date of the alleged accident, October 30, 2012, to the present. Such authorization shall be restricted to treatment (including referrals made) for injuries plaintiff alleges in her verified bills of particulars, namely to her left foot/ankle/leg, left wrist/hand, cervical spine, lumbar spine, head/face/brain, and left front tooth.

The court next considers the IME Watchdog records. On July 24, 2014, plaintiff appeared for an orthopedic IME with Dr. Edward S. Crane. Accompanying the plaintiff to the appointment was an employee of the IME Watchdog, hired by defense counsel to accompany plaintiff to the IME and observe what took place during the examination. (Abramoff Aff. at ¶ 16) During the examination, the IME Watchdog employee objected to Dr. Crane taking x-rays of the plaintiff, and as a result, they were not taken.

On September 2, 2014, defendants served a demand for the records related to the IME, including the IME Watchdog report “describing exactly what took place during the examination, how long the examination lasted and any errors or lapses made by the examining physician, the last known address of [the IME Watchdog employee who accompanied plaintiff to the IME], all communication between plaintiff’s counsel and IME Watchdog, Inc. and fresh radiological studies.” Defendants requested that x-rays of plaintiff’s right wrist and elbow taken within the past 30 days be produced or that plaintiff

submit to x-rays with Dr. Crane. Defendants subsequently demanded that plaintiff return to Dr. Crane for x-rays of her cervical spine, left foot and wrist.

Plaintiff objects to producing the observational notes taken during Dr. Crane's IME, asserting that they are protected by attorney work-product privilege. Pursuant to CPLR 3101(d)(2), "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant...insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Here, it is unrefuted that plaintiff's counsel retained IME Watchdog to assist it with the prosecution of this matter and it follows that any documents prepared by IME Watchdog were prepared in anticipation of litigation. In light of same, the court finds that the IME Watchdog materials are protected by the attorney work-product doctrine, *see Oakwood Realty Corp. v. HRH Cont. Corp.*, 51 A.D.3d 747, 749 (2d Dep't 2008), and that in any event, defendants have not shown that they have a substantial need for the IME Watchdog materials. Moreover, the information contained in the IME Watchdog report is obtainable through the report of Dr. Crane, who was designated by defendants.

Plaintiff argues that there is no need for her to submit to additional x-rays as she has undergone 23 diagnostic tests since the date of the accident. Plaintiff lists each one and states that Defendant was provided with authorizations for all. (Abramoff Aff. at ¶ 48-49). Included on that list are several x-rays of plaintiff's right shoulder and left foot/ankle that pre-date the accident. To the extent that plaintiff was x-rayed from January 2012 until the date of the accident on any part of her body where she complains of injury as a result of the accident

at issue, authorizations for those x-rays are to be provided to defendants within thirty (30) days of service of this order with notice of entry.

Dr. Crane seeks recent x-rays of plaintiff's cervical spine, left foot, and left wrist. According to plaintiff, imaging was done of her cervical spine on the following dates: December 20, 2012 (x-ray) and January 15, 2013 and January 20, 2014 (MRI). Plaintiff underwent x-rays of the left foot on October 12 and 30, 2012 at Beth Israel Hospital. Plaintiff's left wrist was x-rayed at Beth Israel on October 30 and November 29, 2012 and by Dr. McCulloch on December 14, 2012. Given that the x-rays of the left wrist and foot were last taken shortly after the accident over three years ago, plaintiff is directed to provide defendants with authorizations for x-rays of her left foot and wrist taken since July 24, 2014 explicitly stating that the authorizations are for x-rays taken after that date, or, should no x-rays have been taken during that period, plaintiff is to submit to x-rays of her left foot and wrist with Dr. Crane within thirty (30) days of service of this order with notice of entry. In making this determination, the court finds that plaintiff has placed the physical condition of her foot and wrist at issue, that the x-rays are material and necessary to the defense of this matter, and that plaintiff has not established by competent medical evidence that the x-rays sought are dangerous or harmful. *See Hedgepeth v. Union Baptist Church of Brooklyn, Inc.*, 102 A.D.3d 654 (2d Dep't 2013), *Castrillon v. City of N.Y.*, 91 A.D.2d 986, 986 (2d Dep't 1983), *Lewis v. New York Univ. Med. Ctr.*, 2011 N.Y. Slip. Op. 32329(U) (Sup. Ct., New York County 2011). Further, because plaintiff underwent surgery of the cervical spine on February 20, 2014 (Abramoff Aff. ¶ 9) and the most recent authorization with which defendants were provided pre-dates that surgery, plaintiff is to provide defendants with authorizations for x-rays of her cervical spine taken since February 20, 2014 explicitly stating that the authorizations are for x-rays taken after that date, or, should no x-rays have been

taken since that date, plaintiff is to submit to x-rays of the cervical spine with Dr. Crane within thirty (30) days of service of this order with notice of entry.

Accordingly, it is ORDERED that defendants' motion and cross-motion are granted to the following extent: within thirty (30) days of service of this order with notice of entry, plaintiff is to provide to defense counsel an authorization for plaintiff's primary care physician, Dr. Brian Saltzman as directed above; and it is further

ORDERED that within thirty (30) days of service of this order with notice of entry:

Plaintiff is to provide authorizations for x-rays taken from January 2012 until the date of the accident on any part of her body where she complains of injury as a result of the instant accident; and

Plaintiff is to provide defendants with authorizations for x-rays of her left foot and left wrist taken since July 24, 2014 or submit to x-rays of her left foot and wrist with Dr. Crane; and

Plaintiff is to provide authorizations for x-rays of her cervical spine taken since February 20, 2014 or submit to x-rays of her cervical spine with Dr. Crane; and it is further

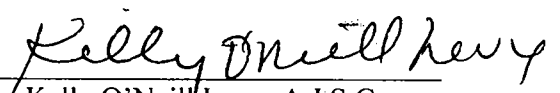
ORDERED that should plaintiff fail to comply with the above, defendants may renew their application to preclude plaintiff from offering evidence at trial of the cervical spine, left foot, and left wrist injuries alleged to have been caused by the instant accident.

The court has considered the remainder of the arguments and finds them to be without merit.

Counsel shall appear for a status conference in Room 1164B, 111 Centre Street, on June 1, 2016 at 9:30 AM.

This constitutes the decision and order of the court.

Date: April 15, 2016



Kelly O'Neill Levy, A.J.S.C.