

Slater v Fleishman

2016 NY Slip Op 32882(U)

July 19, 2016

Supreme Court, Albany County

Docket Number: 6340-14

Judge: Michael H. Melkonian

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

2 COUNTY OF ALBANY

STEPHANIE A. SLATER,

Plaintiff,

-against-

**DECISION
AND
ORDER**

JESSICA C. FLEISHMAN, M.D., Individually and
d/b/a JESSICA C. FLEISHMAN, M.D., P.C.;
HOWARD L. TANENBAUM, M.D.; NORTHEAST
VITREO-RETINAL ASSOCIATES, P.C. d/b/a THE
CENTER FOR SIGHT d/b/a THE CENTER FOR
SIGHT NEW YORK; LASIKPLUS MEDICAL OF
NEW YORK, P.C. d/b/a LASIKPLUS d/b/a
LASIKPLUS VISION CENTER; ALBANY
REGIONAL EYE SURGERY CENTER, L.L.C. d/b/a
ALBANY REGIONAL EYE SURGERY CENTER,
Defendants.

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(Supreme Court, Albany County, Motion Term, May 9, 2016)
Index No. 6340-14
(RJI No. 28-1-2015-0116)

(Acting Justice Michael H. Melkonian, Presiding)

APPEARANCES: Tabner, Ryan and Keniry, LLP
Attorneys for Plaintiff
(Tracey L. Bullett, Esq., of Counsel)
18 Corporate Woods Boulevard
Albany, New York 12211

Maguire Cardona, P.C.
Attorneys for Howard L. Tanenbaum, M.D. and
Northeast Vitreo-Retinal Associates, P.C.
(Alicia M. Dodge, Esq., of Counsel)
16 Sage Estate
Albany, New York 12204

Thorn, Gershon, Tyman and Bonanni, LLP
Attorneys for Albany Regional Eye Surgery Center,
L.L.C. d/b/a Albany Regional Eye Surgery Center
(Brendan S. McGrath, Esq., of Counsel)
5 Wembley Court
P.O. Box 15054
Albany, New York 12212-5054

Napierski, Vandenburg, Napierski & O'Connor,
LLP
Attorneys for Defendants Jessica C. Fleischman,
M.D., Individually and Jessica C. Fleischman,
M.D., P.C., and The Center for Sight of New York
(Christine M. Napierski, Esq., of Counsel)
296 Washington Avenue Extension
Albany, New York 12203

MELKONIAN, J.:

In separate motions/cross-motion, defendants Howard L. Tanenbaum, M.D., Northeast Vitreo-Retinal Associates, P.C., Jessica C. Fleischman, M.D., Individually, Jessica C. Fleischman, M.D., P.C., and The Center for Sight of New York (the “Fleischman defendants”) move for an Order pursuant to CPLR § 3126, striking plaintiff Stephanie A. Slater’s (“plaintiff”) complaint given her failure to adequately respond to defendants’ demands for medical authorizations or, in the alternative, pursuant to CPLR § 3124, compelling plaintiff to provide the authorizations as requested by defendants. Defendant Albany Regional Eye Surgery Center, L.L.C. cross-moves for the same relief.¹ Plaintiff opposes. The motions and cross-motion are consolidated for disposition.

Plaintiff commenced this medical malpractice action by the filing of a Summons and Complaint on December 12, 2014 seeking to recover damages for personal injuries

¹Defendants are collectively referred to herein as “defendants.”

stemming from LASIK eye surgery performed on January 9, 2013. Plaintiff alleges, *inter alia*, that defendants were negligent in performing the procedure, when such procedure was contraindicated. Plaintiff alleges that as a result of defendants' negligence, she has sustained, *inter alia*, a decrease in visual acuity and visual quality in her left eye, and the need for post-operative care and treatment. Plaintiff further alleges that she continues to suffer from "serious and severe personal injuries causing her great pain and suffering and restricting her activities," and alleges that she was obliged, and will be obliged in the future, to seek further medical care and treatment "in an effort to alleviate her pain and suffering and be cured of her injuries." She alleges that her injuries are permanent.

In her Bill of Particulars, Amended Bill of Particulars and Second Amended Bill of Particulars, plaintiff alleges that her injuries include, *inter alia*, left eye disturbances, permanent left eye visual deficiencies, blurred vision, left eye swelling, left eye pain, as well as a general claim of injury to her left eye. In addition to injuries relating to her left eye, the Second Amended Bill of Particulars identifies further alleged injuries including anxiety and depression. She claims that "[a]s a result of her injuries, [she] has endured great pain, suffering, discomfort, emotional distress and mental anguish preventing her from performing her normal daily activities." Plaintiff also claims damages in the form of a loss of income and claims that she was prevented from working for approximately eight weeks, commencing January 9, 2013. She further alleges that she has been "partially incapacitated from employment from January 9, 2013 and continuing to the present."

After receiving records from plaintiff's primary collateral source provider, Capital District Physician's Health Plan (CDPHP), defendants requested authorizations compliant

with the Health Insurance Portability and Accountability Act (HIPAA) from plaintiff's medical providers that were identified in CDPHP's records. After plaintiff's deposition, defendants' requested additional authorizations. Plaintiff's counsel ultimately rejected defendants' demands for authorizations for the foregoing asserting that the medical treatment of plaintiff's other conditions is irrelevant. Thereafter, on March 17, 2016, a conference with the parties' counsel was conducted by the undersigned in an effort to resolve this dispute. The parties, however, were unable to come to a resolution.

Defendants now move/cross-move to strike the complaint (or another, less drastic remedy) on the ground that plaintiff failed to comply with the demands for authorizations (see, CPLR § 3126). Alternatively, defendants move to compel the production of medical authorizations from Dr. Ben (gastroenterologist), Dr. Fabian (thoracic surgeon), Dr. Paty (vascular surgeon), Drs. Storey and Wang (neurologists), Dr. Shaoo (pain management), Dr. Abraham (orthopedist) and Albany ENT & Allergy Services (see, CPLR § 3124).

Defendants generally contend that by commencing this personal injury action, plaintiff has waived any privilege regarding her medical records and must execute authorizations for the demanded medical records. Defendants contend that the foregoing authorizations are necessary and material to defend plaintiff's claims. Defendants contend that plaintiff has placed her entire medical condition in controversy by making broad allegations of physical injury and mental anguish. Defendants rely upon plaintiff's allegations of future pain and suffering, future disability, further medical treatment and future loss of enjoyment of life. Defendants contend that absent the requested authorizations, defendants are unable to properly evaluate the matter and the defense will

be prejudiced.

Plaintiff disputes the defendants' entitlement to the production of the plaintiff's medical records beyond her ocular records. Plaintiff contends that the authorizations at issue are palpably improper inasmuch as they do not relate to the injuries alleged herein and thus she should not be compelled to provide the same.

At her deposition conducted on December 17, 2015, plaintiff testified, among other things, that she presently is under the care of Dr. Ben, a gastroenterologist, for "gastrointestinal issues." She testified that in 2013, she had a surgical procedure (a "Nissen fundoplication") to address her severe acid reflux, which was performed by Dr. Fabian. She testified that she continues to take medication for acid reflux. She testified that she also underwent a surgical procedure for "SMA syndrome" also known as "nutcracker syndrome."² She testified that this surgery was performed by Dr. Paty and was to address her severe gastrointestinal issues including nausea, vomiting and regurgitating of food. She testified that this condition caused her to lose weight and rendered her unable to eat. Plaintiff further testified that she is also under the care of several neurologists because she has "bad arthritis." She testified that she also sees a pain management specialist who gives her cortisone injections in her spine. She testified that she sees an ENT specialist for

²The medical records attached to the Fleischman defendants' papers indicate that plaintiff was seen by Dr. Fabian on 2/25/13 for severe gastroesophageal reflux disease, which had worsened after being kicked in the abdomen by a horse. Dr. Fabian recommended a laparoscopic Nissen fundoplication, stating: "Overall, Stephanie has somewhat atypical symptoms, but clinically when we discuss her history there is very little question that she is continuously regurgitating from her stomach and this significantly interferes with her quality of life, ability to work and it has simply been progressing in its severity relentlessly." These records indicate that Dr. Fabian performed the surgery on 3/4/13 at Albany Medical Center Hospital and that he saw her again on 11/6/13 for complaints of new symptoms of nausea and vomiting digested food and blood.

sinusitis and receives allergy shots. She testified that in July 2015, she had surgery on her knee after she slipped unloading a hay wagon.

Initially, the Court notes that CPLR § 3101(a) provides for disclosure of “all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR § 3101[a]). Although CPLR § 3101 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR § 3101). “If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material in the prosecution or defense.” Allen v Crowell-Collier Publishing Co., 21 NY2d 403, 407. Moreover, “New York has long favored open and far-reaching pretrial discovery” (DiMichel v South Buffalo Ry. Co., 80 NY2d 184), and “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR § 3101[a]; Northway Eng’g v Felix Indus., 77 NY2d 332).

A party must provide authorizations for the release of pertinent medical records when that party has waived the physician-patient privilege by affirmatively putting her physical condition in issue (see, CPLR § 3121 [a]; Dillenbeck v Hess, 73 NY2d 278), and CPLR § 3101(a) requires full disclosure of all evidence material and necessary to the defense of an action (see, Allen v Crowell-Collier Publ. Co., 21 NY2d 403). Generally, a party does not waive the physician-patient privilege with respect to unrelated illnesses or injuries (Iseman v Delmar Medical-Dental Bldg., Inc., 113 AD2d 276). However, a plaintiff may place in controversy her entire medical condition if she makes broad allegations of physical injury

and mental anguish resulting from the subject accident (see, M.C. v Sylvia Marsh Equities, Inc., 103 AD3d 676, 679). Relatedly, “the defense is entitled to review records showing ‘the nature and severity of the plaintiffs prior medical conditions [that] may have an impact upon the amount of damages, if any, recoverable for a claim of loss of enjoyment of life’” (Amoroso v City of New York, 66 AD3d618, 618).

Plaintiff’s contention that she is not obligated to disclose medical records related to her pre-existing gastrointestinal, neurological and vascular issues, and records related to her knee surgery and sinusitis is rejected. Plaintiff’s claim of partial disability and inability to perform her “normal daily activities,” like a claim for loss of enjoyment of life, is a sufficiently broad allegation warranting discovery as these records since these conditions could affect damages. By alleging that, as a result of the accident, she is partially or totally disabled and was unable to return to work for a period following her laser eye surgery, plaintiff has put these conditions in issue insofar as they may have contributed to her alleged disability and may have a potential impact upon her claim that she is unable to perform her normal daily activities (M.C. v Sylvia Marsh Equities, Inc., 103 AD3d 676, 679). To be sure, plaintiff claimed in her Amended Bill of Particulars and Second Amended Bill of Particulars that the eye injury she allegedly sustained and the attendant anxiety and mental anguish that she experiences “prevent[s] her from performing her normal daily activities” as well as renders her “partially incapacitated from employment from January 9, 2013 and continuing to the present.”

Accordingly, defendants’ motions/cross-motion to compel are granted to the extent that plaintiff shall, on or before August 30, 2016, provide defendants’ with authorizations

for her medical records from Drs. Ben, Fabian, Paty, Storey, Wang, Shaoo, Abraham and Albany ENT & Allergy Services.

The circumstances found here do not warrant relief pursuant to CPLR §§ 3124, 3126, i.e., striking of pleadings or orders of preclusion.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to counsel for the Fleischman defendants. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry. This Memorandum constitutes the Decision and Order of the Court.

SO ORDERED.
ENTER.

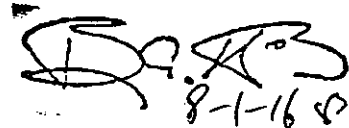
Dated: Troy, New York
July 19, 2016



MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

- (1) Notice of Motion dated April 8, 2016;
- (2) Affirmation of Alicia M. Dodge, Esq., dated April 8, 2016, with exhibits annexed;
- (3) Notice of Cross-Motion dated April 26, 2016;
- (4) Affirmation of Brendan S. McGrath, Esq., dated April 26, 2016, with exhibits annexed;
- (5) Notice of Motion dated April 6, 2016;
- (6) Affirmation of Christina D. Porter, Esq., dated April 6, 2016, with exhibits annexed;
- (7) Memorandum of Law;
- (8) Affirmation of Tracy L. Bullett, Esq., dated April 28, 2016, with exhibit annexed;



- (9) Affirmation of Lynn Knapp Blake, Esq., dated April 28, 2016;
- (10) Affirmation of Alicia M. Dodge, Esq., dated May 5, 2016;
- (11) Affirmation of Brendan S. McGrath, Esq., dated May 3, 2016.