

Garber v City of New York
2017 NY Slip Op 30188(U)
January 11, 2017
Supreme Court, Queens County
Docket Number: 702955/14
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IA PART 6

 BARBARA GARBER,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

Index No: 702955/14

Motion Date: July 27, 2016

Motion Cal. No. 56

Motion Seq. No. 6

The following papers read on this motion by defendants JJP Coleman LLC, 23 Manhattan Valley North, LLC, Daniel Weiss, David Weiss, 6466 LLC, and Baruch Singer for an order pursuant to CPLR 3126 striking the complaint; or compelling plaintiff to provide outstanding discovery; or precluding plaintiff from introducing evidence at trial; and compelling plaintiff to appear for a supplemental deposition.

**Papers
Numbered**

Notice of Motion-Affirmations -Affidavits-Exhibits.....	EF 224-235
Opposing Affirmation-Exhibits.....	EF 239-242
Reply Affirmation.....	EF 243-244

Upon the foregoing papers the motion is determined as follows:

Plaintiff Barbara Garber alleges that she sustained personal injuries on April 30, 2011, as a result of a trip and fall on the sidewalk located at 44-35 Purves Street, Astoria, New York. Ms. Garber sustained a Jones Fracture of the 5th metatarsal of her right foot, and underwent surgery to repair the fracture. Ms. Garber, in her bill of particulars dated

June 30, 2015, alleges, among other things, that as a result of her injury she developed complex regional pain syndrome, reflex sympathetic dystrophy, early onset arthritis and osteoarthritis, traumatic arthritis, loss of strength and motion, extreme prolonged swelling, difficulty exercising, walking, standing, sitting, lifting, driving, bathing and showering, dancing, traveling, carrying, sleeping, household chores, cannot walk more than two blocks, pain in using stairs and getting up from a seated position, diminished reflexes, depression, emotional distress, headaches, “loss of enjoyment of life in connection with injuries related to this incident only”, loss of range of motion, numbness, tingling, paresthesia, radiculopathy, spasm and subluxations. Plaintiff’s request for damages includes past and future pain and suffering, and past and future loss of enjoyment of life, and she alleges in her bill of particulars that her “social, recreational, occupational, family and home life has been impaired.”

Plaintiff was deposed on January 14, 2014 and March 31, 2015. She testified that she takes Nifedipine on a daily basis for treatment of Reynaud’s Syndrome, which was prescribed prior to her accident and that she takes Effexor on a daily basis, an anti-depressant or anti-anxiety medication, that was first prescribed prior to the accident; that she had taken both medications the evening before the accident; that she had migraines some years prior to the accident; that she had been prescribed Arthrotec, but only took it occasionally and was not taking it at the time of the accident or thereafter. She stated that in January 2013, she told her internist, Dr. Andrew Milano, that she had experienced some discomfort in her esophagus for a period of two weeks; that he told her that it might be GERD; that she did not have these symptoms at the time of her deposition; and that she was not taking any medication for it. She stated that she was never diagnosed with depression, and had no official diagnosis of anxiety. At her March 31, 2015 deposition, Ms. Garber stated that she was not experiencing any headaches since the accident; that she was not currently treating with a psychologist; and that she had not been diagnosed with depression since the accident. She also testified that she was treated by Dr. Michael Ianiello, a podiatrist, at various times during 2011.

At her January 14, 2014 deposition, Ms. Garber stated that in the early 1990s, when she lived in Maplewood, New Jersey, she slipped on ice going into her home, and broke a bone in her right foot. She stated that she did not recall what bone was fractured, or whether it was her toe, heel or other part of the foot; that it was not the Jones fracture; that she did not go to a hospital and did not have surgery; and that she wore a boot cast and had physical therapy. She did not recall the name of the doctors or facilities where she was treated for said prior foot injury.

At the January 14, 2014 deposition, counsel for defendants requested various authorizations for the plaintiff’s medical records or treatments, including those of Dr.

Richard Crane, her treating rheumatologist; Dr. Juline Bryson, her treating neurologist; Devonshire Medical Facility or Medical Center; Dr. Susan Goldstein, a physical therapist; Dr. Alex Moroz, a physiatrist at the Rusk Institute; and Dr. Scott Ellis. Apparently, a supplemental notice for discovery and inspection dated February 3, 2014, was thereafter served on plaintiff, and pursuant to a preliminary conference order dated February 18, 2015, plaintiff was required to respond to all outstanding discovery demands within thirty (30) days. A supplemental demand for discovery and inspection dated May 8, 2015 was also served on plaintiff's counsel.

Plaintiff's counsel in a letter dated August 15, 2015, in response to the moving defendants' supplemental notice for discovery and inspection dated February 3, 2014, and supplemental demand for discovery and inspection dated May 8, 2015, asserted, in essence, that the authorizations sought were either previously provided, or were not related to the accident and plaintiff's resulting injuries, and that the claim of loss of enjoyment of life pertains to "injuries related to this incident only", and therefore were privileged and not subject to disclosure. Defendants' counsel, in a response dated August 13, 2015, reiterated the request for certain authorizations.

"It is well settled that 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 or her physical or mental condition in issue" (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]; *see Arons v Jutkowitz*, 9 NY3d 393 [2007]; *Dillenbeck v Hess*, 73 NY2d 278 [1989]; *Farrell v E.W. Howell Co., LLC*, 103 AD3d 772, 773 [2nd Dept 2013]; *Abdalla v Mazl Taxi, Inc.*, 66 AD3d 803, 804 [2d Dept 2009]). Here, plaintiff's bill of particulars alleges only specific injuries to her right foot, and thus does not place her entire medical condition in controversy with broad allegations of physical injury (*see Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916, 916-917 [2d Dept 2011]). Therefore, the injured plaintiff waived the physician-patient privilege with respect to her relevant prior medical history concerning her right foot, which she affirmatively placed in controversy (*see Koump v Smith*, 25 NY2d 287, 294 [1969]). However, although plaintiff has withdrawn her claim for depression, her claim for emotional injury is much broader, as she has not withdrawn her claim for emotional distress.

Furthermore, a claim for loss of enjoyment of life is not a separate element of damages, but rather "a factor to be considered by the jury in assessing damages for conscious pain and suffering" (*Nussbaum v Gibstein*, 73 NY2d 912, 914 [1989]), by weighing "the frustration and anguish caused by the inability to participate in activities that once brought pleasure." (*McDougald v Garber*, 73 NY2d 246, 257 [1989]).

Plaintiff's attempt to limit discovery by asserting that the claim of loss of enjoyment of life pertains to "injuries related to this incident only", is rejected. The nature and severity of the plaintiff's previous medical conditions, including her mental health, are material and necessary to the issue of damages, if any, recoverable for a claimed loss of enjoyment of life due to her current foot injury (*see Moreira v M.K. Travel & Transp., Inc.*, 106 AD3d 965, 967 [2d Dept 2013]; *Azznara v Strauss*, 81 Ad3d 578[2d Dept 2011]; *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d 768, 768769 [2d Dept 2007]; *Vanalst v City of New York*, 276 AD2d 789 [2d Dept 2000]).

Accordingly, that branch of the defendants' motion which seeks an order striking the plaintiff's complaint is denied, as defendants have not demonstrated that the failure to provide the authorizations sought was willful.

That branch of the defendants' motion which seeks to compel the plaintiff to provide the authorizations sought, is granted, as they are "material and necessary". Plaintiff is directed to provide defendants with HIPPA compliant authorizations for the following individuals:

Dr. Andrew Milano, plaintiff's primary care physician, for the three year period prior to April 30, 2011 to the present;

Dr. Richard Crane, plaintiff's rheumatologist, for the three year period prior to April 30, 2011 to the present;

Dr. Juline Bryson, plaintiff's neurologist, for the three year period prior to April 30, 2011 to the present;

Dr. Michael Iannello, plaintiff's podiatrist, for the three year period prior to April 30, 2011 to the present;

Dr. Positano and Dr. Ellis, for the period of treatment following April 30, 2011 to the present, as the evidence submitted demonstrates that these physicians treated plaintiff as a private patient and her records are not maintained by the Hospital for Special Surgery.

That branch of defendants' motion which seeks an authorization pertaining to plaintiff's injury to her right foot prior to April 30, 2011, is denied as plaintiff was unable to recall and identify the name of the person or entity who treated her for said injury.

That branch of defendants' motion which seeks to preclude plaintiff from introducing evidence at trial, is denied.

That branch of defendant's motion which seeks to compel plaintiff to appear for a supplemental deposition following the receipt of said medical records is denied, as defendants have not demonstrated that a supplemental deposition is necessary.

Plaintiff is directed to serve the above authorizations upon defendants' counsel within thirty (30) days from the date of this order.

Dated : January 11, 2017

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Howard G. Lane, J.S.C.