

Betties v New York City Tr. Auth.
2017 NY Slip Op 30753(U)
April 17, 2017
Supreme Court, New York County
Docket Number: 158994/14
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 21

KIMBERLY BETTIES

INDEX NO. 158994/14

- v -

MOT. DATE

MOT. SEQ. NO. 002

NEW YORK CITY TRANSIT AUTHORITY et al.

The following papers were read on this motion to/for compel, etc.

- Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

- ECFS DOC No(s). 20-56
ECFS DOC No(s). 60-95, 98-109, 110-112
ECFS DOC No(s). 112

This is a personal injury action. Defendant New York City Transit Authority ("NYCTA") moves for an order compelling co-defendants Fire Department of the City of New York and The City of New York (collectively the "City") and plaintiff to provide certain discovery and adjourning depositions. Plaintiff cross-moves for a protective order, an order compelling defendants to comply with court ordered discovery and appear for depositions before plaintiff's deposition. The City joins NYCTA's motion with regards to plaintiff but opposes that portion of the motion directed to it. The court's decision follows.

The bottom line is that both plaintiff and the City failed to timely object to the discovery that NYCTA seeks by way of the motion-in-chief. Therefore, as NYCTA correctly argues, the only objections the plaintiff and the City can now raise are that discovery demands were palpably improper or the discovery sought was within one of the exclusionary provisions of CPLR § 3101.

From plaintiff, NYCTA seeks:

- 1) A supplemental verified Bill of Particulars as to injuries/conditions that were aggravated and/or exacerbated by the March 19, 2014 accident and relevant records/reports;
2) A supplemental Verified Bill of Particulars for Paragraph Nos. 11(A), 15, 16 and 16(A);
3) an authorization for the City for plaintiff's medical expenses paid by the City;
4) Item Nos. 1-8 and 11-12 of the Demand for Authorizations dated October 21, 2015;
5) A copy of plaintiff's 50-H Hearing transcript taken by the City;
6) Authorizations for all of plaintiff's collateral sources stemming from her February 19, 2003 accident and August 14, 2005 accident, her employment records and follow-up authorizations for medical providers, etc., in connection with the subject prior accidents;

Dated: 4/17/17

HON. LYNN R. KOTLER, J.S.C.

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

- 7) In connection with plaintiff's January 8, 2008 accident: [a] a copy of the non-privileged portions of the legal file, [b] new authorizations for plaintiff's medical providers, and [c] the identity of the facility where radiological studies and an authorization for said facility;
- 8) In connection with plaintiff's September 13, 2012 accident: [a] a new authorization for Indemnity Insurance of North America or the proper Worker's Compensation Carrier, and [b] a new authorization for plaintiff's entire medical record from Dr. Struhl;
- 9) In connection with plaintiff's March 13, 2014 accident: [a] authorizations for Dr. Drukman and Grand Central Physical Medicine & Rehabilitation, and [b] other authorizations;
- 10) Other authorizations requested in the Demand for Authorizations dated October 30, 2015;
- 11) Authorizations requested in the Demand for Authorizations dated November 16, 2015 including: [a] an authorization for Ace Property and Casualty Company to obtain plaintiff's Worker's Compensation file for her September 13, 2012 accident, and [b] authorizations for medical records concerning plaintiff's stem cell injections;
- 12) An authorization for plaintiff's chiropractor;
- 13) An authorization for State Farm Insurance and its subsidiaries/affiliates, MVAIC and American Transit in relation to plaintiff's March 13, 2014 accident;
- 14) Authorizations requested in the Demand for Authorizations dated December 23, 2015;
- 15) A new authorization for Harlem Hospital Center;
- 16) New authorizations in place of all prior authorizations that plaintiff has provided;
- 17) Future authorizations;
- 18) In connection with plaintiff's subsequent September 24, 2015 accident: [a] a copy of the non-privileged portions of the legal file, [b] new authorizations for plaintiff's medical providers; and finally,
- 19) a Supplemental Verified Bill of Particulars as to injuries/conditions that were aggravated and/or exacerbated by the March 19, 2014 accident and relevant records/reports.

At the outset, the court will only address the specific discovery that NYCTA argues is outstanding. Simply referencing "other authorizations" is too vague and otherwise insufficient to demonstrate entitlement to an order compelling plaintiff to provide said authorizations, where NYCTA has not demonstrated the relevancy or need for such authorizations.

Turning to the specific demands at issue, plaintiff's counsel generally argues that NYCTA's demands are "duplicative" and were made "solely to delay the instant matter." Plaintiff maintains that she has fully complied with NYCTA's discovery demands. The court disagrees. Plaintiff has had multiple prior accidents and a subsequent accident wherein based upon the record before this court, she indisputably suffered injuries akin to the injuries she claims in this action. Pursuant to CPLR 3101(a), defendants are entitled to full disclosure of matter material and necessary in their defense of this action. The words "material and necessary" are to be interpreted liberally so as to require disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. . ." (*Allen v. Crowell-Collier Pub. Co.*, 21 NY2d 403, 407 [1968]). The test is one of "usefulness and reason" (*id.*).

The burden of showing that the disclosure sought is improper is upon the party seeking the protective order (*Roman Catholic Church of the Good Shepherd v. Tempco Systems*, 202 AD2d 257, 258 [1st Dept 1994]). Here, plaintiff has failed to meet this burden. With respect to the bill of particulars, plaintiff

claims that the pleadings are sufficient because what NYCTA requested is “matter that is evidentiary in nature” and NYCTA should wait until plaintiff testifies at her deposition as to the extent of what, if any, injuries were aggravated.

“The purpose of a bill of particulars is to amplify the pleading, limit the proof and prevent surprise at the trial” (*State v. Horsemen's Benevolent and Protective Ass'n*, 34 AD2d 769, 770 (1st Dept 1970)). While plaintiff is correct that a bill cannot be used to obtain evidence, that is not what NYCTA seeks. NYCTA seeks amplification concerning plaintiff’s claims that the underlying accident aggravated pre-existing injuries and in order to avoid the need for a further deposition on this point should defendants not be able to question plaintiff at her deposition sufficiently because plaintiff has failed to particularize this claim in her bill of particulars, this portion of NYCTA’s motion is granted and plaintiff’s cross-motion for a protective order concerning the bill of particulars supplementation is denied.

Plaintiff has provided an authorization for the City of New York in connection with the 50-h hearing transcript so NYCTA’s request on that point is moot.

Although they are numerous, the court finds that the outstanding authorizations demanded by NYCTA are warranted. Most of these authorizations concern plaintiff’s accidents on February 19, 2003 (Worker’s Compensation Claim for a back injury), August 15, 2005 (Worker’s Compensation Claim for another back injury), January 6, 2008 (head, neck, back and limb injuries from a car accident), September 13, 2012 (another Worker’s Compensation Claim, this time for bilateral knee and left shoulder injuries), March 13, 2014 (plaintiff lost consciousness and injured her chest, neck, back, right shoulder and left knee) and September 24, 2015 (a subsequent accident wherein plaintiff alleges in a Notice of Claim injuries to her head, neck, back and left knee). In this case, plaintiff claims injuries to her head, neck and back. Clearly, the injuries which plaintiff sustained in these other accidents are related to the injuries claimed in this action and therefore NYCTA is entitled to authorizations for records and reports concerning all of the medical treatment plaintiff received in connection with these other accidents, Worker’s Compensation records, and employment records. This discovery goes to plaintiff’s damages, her claim that her prior injuries were exacerbated by the accident that is the subject of this litigation, as well as to plaintiff’s own credibility.

The court is unpersuaded by plaintiff’s argument that NYCTA is attempting to go on a fishing expedition. Plaintiff’s counsel’s claim that plaintiff does not “recollect” some of the prior accidents is rejected since it is not based upon personal information. To the extent that plaintiff cannot furnish authorizations since she does not recall who, i.e., the medical providers were that provided her treatment for a particular accident, NYCTA is entitled to a sworn affidavit from plaintiff attesting to such facts and furnishing whatever information plaintiff does possess on the matter. After plaintiff’s deposition, further discovery may be warranted with regards to these matters which plaintiff cannot recall.

Further, NYCTA maintains, in its reply, that MVAIC and State Farm Insurance have records concerning matters which plaintiff cannot recall. At a bare minimum, authorizations for these records should have been provided by plaintiff.

That plaintiff sustained other physical injuries in these other accidents is of no moment, since plaintiff does not offer to redact these allegedly unrelated injuries from the subject records. Indeed, plaintiff’s counsel argues that “[i]t can only be assumed that the records sought by the defendants have no relation to her present claim for damages...” Plaintiff is not entitled to such an assumption, and such a conclusion cannot be reached by the court on this record. Further, the court cannot discern on this record whether a knee injury is in fact unrelated to the injuries plaintiff claims she sustained to her head, neck and back as a result of the subject accident. Therefore, the court rejects plaintiff’s argument that these requests for authorizations are palpably improper.

The court notes that to the extent that plaintiff has provided any of these authorizations in a letter dated September 21, 2016, as delineated in plaintiff's counsel's affirmation in support of the cross-motion, there is no need to provide further authorizations at this time.

The court does, however, agree with plaintiff that NYCTA has not demonstrated that that records concerning psychiatric treatment, heart condition/heart murmur, anxiety, migraines and arthralgia are material and relevant to her underlying claims and therefore, the court denies that portion of NYCTA's motion. Nor does the court find that NYCTA has demonstrated that records concerning stem cell treatments are relevant.

As for item number 5 requested by NYCTA as listed herein, plaintiff's counsel represents that no 50-h hearing was held so NYCTA's request for the transcript of that hearing is denied.

Finally, with regards to the non-privileged portions of plaintiff's legal file, plaintiff claims that all non-privileged portions have been provided. Plaintiff is directed to provide a privilege log to defendant identifying what records have been withheld and/or redacted and the basis for the privilege therein asserted.

In summary, NYCTA's motion as to plaintiff is granted to the following extent:

Plaintiff is directed to provide to the defendants the following, to the extent not already provided in plaintiff's letter dated September 21, 2016 (Note: all authorizations, unless otherwise indicated, should permit defendants to obtain plaintiff's entire medical record):

- 1) A supplemental verified Bill of Particulars as to injuries/conditions that were aggravated and/or exacerbated by the March 19, 2014 accident and relevant records/reports;
- 2) A supplemental Verified Bill of Particulars for Paragraph Nos. 11(A), 15, 16 and 16(A);
- 3) an authorization for the City for plaintiff's medical expenses paid by the City;
- 4) Item Nos. 1-8 and 11-12 of the Demand for Authorizations dated October 21, 2015;
- 5) Authorizations for plaintiff's employment records concerning the February 19, 2003 and August 15, 2005 accidents;
- 6) a privilege log concerning the privileged portions of plaintiff's legal files, to the extent that they exist, in connection with her accidents on February 19, 2013, August 15, 2005, January 6, 2008, September 13, 2012, March 13, 2014 and September 24, 2015. If a legal file does not exist with respect to any of these accidents, plaintiff's counsel must provide an affidavit attesting to such non-existence;
- 7) In connection with plaintiff's September 13, 2012 accident: [a] a new authorization for Indemnity Insurance of North America or the proper Worker's Compensation Carrier, and [b] a new authorization for plaintiff's entire medical record from Dr. Struhl;
- 8) In connection with plaintiff's March 13, 2014 accident: [a] authorizations for Dr. Drukman and Grand Central Physical Medicine & Rehabilitation;
- 9) Authorizations requested in the Demand for Authorizations dated November 16, 2015 including: [a] an authorization for Ace Property and Casualty Company to obtain plaintiff's Worker's Compensation file for her September 13, 2012 accident;
- 10) An authorization for plaintiff's chiropractor;
- 11) An authorization for State Farm Insurance and its subsidiaries/affiliates, MVAIC and American Transit in relation to plaintiff's March 13, 2014 accident;
- 12) Authorizations requested in the Demand for Authorizations dated December 23, 2015;
- 13) A new authorization for Harlem Hospital Center;

- 14) In connection with plaintiff's subsequent September 24, 2015 accident, new authorizations for plaintiff's medical providers;
- 15) a Supplemental Verified Bill of Particulars as to injuries/conditions that were aggravated and/or exacerbated by the March 19, 2014 accident and relevant records/reports;
- and 16) A sworn affidavit by plaintiff attesting to the matters which she does not recollect concerning any prior accident, including her accidents on February 19, 2013, August 15, 2005, January 6, 2008, September 13, 2012, March 13, 2014 and September 24, 2015. This affidavit must address the extent to which plaintiff recalls, if at all, collateral sources, medical and pharmacy providers and Worker's Compensation case information;

Otherwise, to the extent plaintiff can recall, plaintiff is directed to provide the following:

- a) With respect to the February 19, 2003 and August 15, 2005 accidents, authorizations for information concerning collateral sources, authorizations for the Worker's Compensation Carriers and the Worker's Compensation Board which handled plaintiff's Worker's Compensation Case with respect to each accident, and authorizations for all medical providers, hospitals, diagnostic facilities;
- b) In connection with plaintiff's January 8, 2008 accident: [i] new authorizations for plaintiff's medical providers, and [ii] the identity of the facility where radiological studies were performed and an authorization for said facility.

Turning to NYCTA's motion with respect to the City, the City has already provided the sprint reports. Therefore, the only demand that remains outstanding is audio records for calls involving Ra Jassir for the twenty minutes after the accident. NYCTA argues that the records are discoverable because they involve statements made by Mr. Jassir, a City employee. The City has agreed to provide audio records for fifteen minutes prior to the accident, but not for the twenty minutes after, arguing that these records concern post-accident remedial measures. The City's argument is rejected, since the issue of the admissibility of evidence at trial is not ordinarily a matter of concern with regards to the scope of discovery where the subject materials are material and necessary to a claim or defense in the underlying litigation. Accordingly, NYCTA's motion with regards to the City is granted to the extent that the City is directed to provide audio records for calls involving Ra Jassir for the twenty minutes after the accident.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion is granted to the following extent:

Plaintiff is directed to provide to the defendants the following, to the extent not already provided in plaintiff's letter dated September 21, 2016 (Note: all authorizations, unless otherwise indicated, should permit defendants to obtain plaintiff's entire medical record):

- 1) A supplemental verified Bill of Particulars as to injuries/conditions that were aggravated and/or exacerbated by the March 19, 2014 accident and relevant records/reports;
- 2) A supplemental Verified Bill of Particulars for Paragraph Nos. 11(A), 15, 16 and 16(A);
- 3) an authorization for the City for plaintiff's medical expenses paid by the City;

- 4) Item Nos. 1-8 and 11-12 of the Demand for Authorizations dated October 21, 2015;
- 5) Authorizations for plaintiff's employment records concerning the February 19, 2003 and August 15, 2005 accidents;
- 6) a privilege log concerning the privileged portions of plaintiff's legal files, to the extent that they exist, in connection with her accidents on February 19, 2013, August 15, 2005, January 6, 2008, September 13, 2012, March 13, 2014 and September 24, 2015. If a legal file does not exist with respect to any of these accidents, plaintiff's counsel must provide an affidavit attesting to such non-existence;
- 7) In connection with plaintiff's September 13, 2012 accident: [a] a new authorization for Indemnity Insurance of North America or the proper Worker's Compensation Carrier, and [b] a new authorization for plaintiff's entire medical record from Dr. Struhl;
- 8) In connection with plaintiff's March 13, 2014 accident: [a] authorizations for Dr. Drukman and Grand Central Physical Medicine & Rehabilitation;
- 9) Authorizations requested in the Demand for Authorizations dated November 16, 2015 including: [a] an authorization for Ace Property and Casualty Company to obtain plaintiff's Worker's Compensation file for her September 13, 2012 accident;
- 10) An authorization for plaintiff's chiropractor;
- 11) An authorization for State Farm Insurance and its subsidiaries/affiliates, MVAIC and American Transit in relation to plaintiff's March 13, 2014 accident;
- 12) Authorizations requested in the Demand for Authorizations dated December 23, 2015;
- 13) A new authorization for Harlem Hospital Center;
- 14) In connection with plaintiff's subsequent September 24, 2015 accident, new authorizations for plaintiff's medical providers;
- 15) a Supplemental Verified Bill of Particulars as to injuries/conditions that were aggravated and/or exacerbated by the March 19, 2014 accident and relevant records/reports; and
- 16) A sworn affidavit by plaintiff attesting to the matters which she does not recollect concerning any prior accident, including her accidents on February 19, 2013, August 15, 2005, January 6, 2008, September 13, 2012, March 13, 2014 and September 24, 2015. This affidavit must address the extent to which plaintiff recalls, if at all, collateral sources, medical and pharmacy providers and Worker's Compensation case information;

Otherwise, to the extent plaintiff can recall, plaintiff is directed to provide the following:

- a) With respect to the February 19, 2003 and August 15, 2005 accidents, authorizations for information concerning collateral sources, authorizations for the Worker's Compensation Carriers and the Worker's Compensation Board which

handled plaintiff's Worker's Compensation Case with respect to each accident, and authorizations for all medical providers, hospitals, diagnostic facilities;

b) In connection with plaintiff's January 8, 2008 accident: [i] new authorizations for plaintiff's medical providers, and [ii] the identity of the facility where radiological studies were performed and an authorization for said facility.

And the City is directed to provide to NYCTA and plaintiff audio records for calls involving Ra Jasir for the twenty minutes after the accident.

NYCTA's motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion for a protective order is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated:

4/17/17
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.