Brito-Amezquita v 928 Columbus Holdings LLC
2017 NY Slip Op 32514(U)
November 24, 2017
Supreme Court, New York County
Docket Number: 161187/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** 2

Justice

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RAFAEL BRITO-AMEZQUITA,

Plaintiff,

- v -

928 COLUMBUS HOLDINGS LLC,UWS KENSHIKAI, INC.,UPPER WEST SIDE KENSHIKAI KARATE

Defendant.

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INDEX NO. 161187/2015

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for COMPEL DISCOVERY.

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this personal injury action commenced by plaintiff Rafael Brito-Amezquita against defendants 928 Columbus Holdings, LLC ("928 Columbus"), UWS Kenshikai, Inc., and Upper West Side Kenshikai Karate, 928 moves, pursuant to CPLR 3124, to compel plaintiff to comply with its Notice to Produce dated November 22, 2016. After a review of the motion papers, and after examining the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on December 14, 2012 in which plaintiff was allegedly injured when he fell into a trap door in the sidewalk in front of 928 Columbus Avenue, New York,

New York, which was owned, operated and/or managed by defendants. Docs. 28, 30.[1] As a result of the incident, plaintiff was treated at the emergency room at St. Luke's Hospital, where he complained of neck and upper back pain, was found to have an elevated blood alcohol level and was diagnosed with alcohol abuse. Doc. 32.

Plaintiff commenced the captioned action against defendants on October 30, 2015. Doc. 1. In his amended complaint, plaintiff alleged, inter alia, that defendants were negligent in their ownership, operation, and management of the premises. Doc. 28. Defendants thereafter joined issue in this action, denying all substantive allegations of wrongdoing. Docs. 8, 29.

On August 29, 2016, plaintiff served a verified bill of particulars alleging, inter alia, that he was injured due to the negligence of defendants. Doc. 30. He also alleged that, as a result of the incident, he sustained, inter alia, cervical and lumbar spine and right shoulder injuries, bilateral carpal tunnel syndrome, and headaches. Doc. 30. He further alleged that the foregoing injuries were permanent. Id.

By Notice to Produce dated November 22, 2016, 928 Columbus demanded that plaintiff provide "all medical and physical therapy records and such other records, including x-rays and technician's reports, for all healthcare providers who treated plaintiff for alcoholism or intoxication issues for a period of five years prior to the date of plaintiff's alleged accident, December 14, 2012." Doc. 33.

On November 28, 2016, plaintiff objected to the demand, asserting that there was no "factual predicate for the demand"; that plaintiff "has not placed his mental health or prior conditions, if they existed, into controversy"; and that since his loss of enjoyment of life related to

[1] All references are to the documents filed with NYSCEF in connection with this matter.

his physical injuries, the disclosure of his substance abuse and mental health treatment records are not discoverable. Doc. 34.

By correspondence dated December 7, 2016, 928 Columbus made a good faith attempt to obtain "authorizations relating to [plaintiff's] records concerning alcoholism and intoxication treatment." Doc. 35. However, this request did not prompt plaintiff to produce the authorizations demanded.

At a compliance conference on January 10, 2017, the parties discussed the discoverability of authorizations releasing records, if any, relating to plaintiff's treatment for alcoholism predating the alleged accident. Doc. 36. Since the parties could not resolve the dispute, 928 Columbus reserved its right to move to compel the authorizations. Id.

928 Columbus now moves, pursuant to CPLR 3124, to compel plaintiff to provide a response to its November 22, 2016 Notice to Produce seeking authorizations for "all healthcare providers who treated plaintiff for alcoholism or intoxication issues for a period of five years prior to the date of plaintiff's alleged accident."

POSITIONS OF THE PARTIES:

In support of the motion, 928 Columbus argues that records relating to plaintiff's alcohol abuse are relevant to the bodily injuries alleged because the abuse could affect his ability to recover from the injuries and may be relevant to any dimunition of life he is claiming.

As an exhibit to the motion, 928 Columbus submits the affidavit of Dr. John Brick, Ph.D., to whom it refers to as an expert toxicologist. Doc. 37. In his affidavit, Dr. Brick states that the St. Luke's records reflect that plaintiff's blood alcohol level on the day of the accident was

extremely elevated. Id. He further states that records concerning plaintiff's treatment for alcoholism would be relevant to two issues in this matter:

> - First, plaintiff's history of alcohol use disorder would be relevant to his physical and mental condition at the time of the accident and the extent to which his intoxication and history of drinking contributed to the happening of the accident. Next, plaintiff's history of alcoholism and alcoholism treatment would be relevant to any claims he may be making regarding dimunition of the quality of his life and to his ability to recover from the physical injuries alleged in his [b]ill of [p]articulars.

Doc. 37, at par. 6.

In opposition to the motion, plaintiff argues that 928 Columbus is not entitled to the authorizations it demands because he strictly alleges physical injuries and, thus, records regarding his mental condition or alcohol treatment are irrelevant. He further maintains that, since the St. Luke's records reflect his condition as of the time of the incident, which is relevant, there is no need for 928 Columbus to explore his condition prior to that time.

In reply, 928 Columbus argues, inter alia, that the records it seeks "are relevant to both plaintiff's comparative negligence and to his ability to recover from the physical injuries he has alleged." Doc. 47, at par. 2.

LEGAL CONCLUSIONS:

On a motion to compel discovery pursuant to CPLR 3124, the party seeking to compel disclosure bears the burden to "demonstrate that the ... discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 (2d Dept 1989). Although the standard for entitlement to discovery in civil actions is liberal, "a party does not have

the right to uncontrolled and unfettered disclosure." *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 (2d Dept 2010). The trial court has broad discretion to supervise discovery and determine whether information sought is material and necessary in light of the issues in the matter. *See Andon v 302-04 Mott Street Assocs.*, 94 NY2d 740, 747 (2000); *Gumbs v Flushing Town Center III, L.P.*, 114 AD3d 573 (1st Dept 2014).

In *Gumbs*, the First Department held that plaintiff "did not place his entire medical condition in controversy by suing to recover damages for orthopedic injuries." 114 AD3d at 574; *see also Diallo v Yunga*, 148 AD3d 438 (1st Dept 2017); *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 (1st Dept 2012); 44 NY Jur Disclosure § 121 at n 23. Therefore, in the First Department, "[d]isclosure of a plaintiff's pre-existing health condition is limited to reasonable parameters, including relevant parts of the body" (*Gomez v Ivory 1150 Concourse Corp.*, Index No. 305029/2015, 2017 WL 1113433 [Sup Ct, Bronx County, February 15, 2017, Douglas, J.] [internal quotation marks and citations omitted]), and "[a] claim for loss of enjoyment of life by itself does not open the doors to the discovery of medical records unlimited in time, scope and relevance, even in a case alleging a total permanent disability" (*Rohan v Turner Const. Co.*, Index No. 154522/2012, NYSCEF Doc. No. 370, 2017 WL 1422993 [Sup Ct, NY County, April 18, 2017, Coin, J.]; *see also Almonte v 638 West 160 LLC*, Index No. 304912-2011, 2014 WL 3966125 [Sup Ct, Bronx County, August 1, 2014, Douglas, J.]).[2]

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[2] It should be noted, however, that other motion courts have held that, where a "plaintiff claims that she may be limited in her activities in her employment and her life based on permanent disabling physical injuries, she is deemed to have waived the physician-patient privilege of her entire medical history." *Stein v Ten Eighty Apt. Corp.*, Index No. 15648/2014, NYSCEF Doc. No. 67, 2016 WL 3272268 (Sup Ct, NY County 2016); *see McLeod v Metropolitan Transp. Auth.*, 47 Misc 3d 1219(A) (Sup Ct, NY County 2015).

In *Alford v City of New York*, 116 AD3d 483 (1st Dept 2014), plaintiff sued to recover for personal injuries to his knee and back, as well as post-traumatic stress disorder ("PTSD") and mental and psychological injuries.[3] After plaintiff withdrew the claims for PTSD and mental and psychological injuries, defendants moved to compel him to provide records relating to prior substance or alcohol abuse and he moved for a protective order. In affirming the denial of defendants' motion and the granting of plaintiff's motion, the Appellate Division, First Department held that "plaintiff cannot be compelled to disclose confidential records relating to prior treatment for substance abuse or alcohol abuse or his mental condition." 116 AD3d, at 484 (citation omitted). The Appellate Division further held that plaintiff's claim for loss of enjoyment of life "relating solely to his claimed physical injuries [did] not warrant disclosure of substance abuse and mental health treatment information, since its potential relevance has not been shown." 116 AD3d, at 484 (citation omitted). Specifically, the Appellate Division stated that defendants "fail[ed] to offer expert or other evidence establishing a particularized need for inquiry into matters not directly at issue in this action . . ." 116 AD3d, at 484.

Taking all of the foregoing into account, this Court, in its discretion, concludes that 928 Columbus is not entitled to authorizations relating to plaintiff's prior treatment for alcoholism. Although 928 Columbus submits the affidavit of Dr. Brick in an attempt to establish its entitlement to the records sought, his affidavit is insufficient for this purpose.

As noted above, Dr. Brick opines that plaintiff's history of alcoholism would be relevant to "his physical and mental condition at the time of the accident and the extent to which his intoxication and history of drinking contributed to the happening of the accident." Doc. 37, at par.

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[3] Although plaintiff herein specifically pleads neither a loss of enjoyment of life nor mental injuries, loss of enjoyment of life includes not just the physical pain sustained as a result of alleged physical injuries but also "the frustration and anguish caused by the inability to participate in activities that once brought [him or her] pleasure." *McDougald v Garber*, 73 NY2d 246, 257 (1989).

6. He also opines that "plaintiff's history of alcoholism and alcoholism treatment would be relevant to any claims he may be making regarding dimunition of the quality of his life and to his ability to recover from the physical injuries alleged in his [b]ill of [p]articulars." Id.

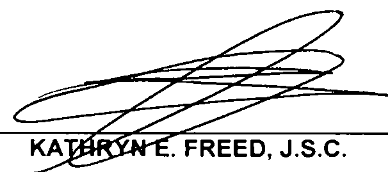
However, Dr. Brick's opinions are conclusory and unsupported by any explanation. *See generally Kagan v BFP One Liberty Plaza*, 62 AD3d 531 (1st Dept 2009). Additionally, although Dr. Brick, a toxicologist, offers an affidavit in support of the motion, he is not a medical expert "attesting to even a potential link between the injuries claimed by [plaintiff] and a history of chronic alcoholism." *Manley v New York City Hous. Auth.*, 190 AD2d 600, 601 ((1st Dept 1993). Even assuming, *arguendo*, that Dr. Brick were qualified to render an opinion regarding medical causation, he does not "make any effort to link [plaintiff's] conditions to plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life." *Budano v Gordon*, 97 AD3d 497, 499 (1st Dept 2012).

Finally, since 928 Columbus has the records of the St. Luke's emergency room reflecting that plaintiff had highly elevated blood alcohol at the time of the alleged incident, its assertion that it needs to obtain records relating to plaintiff's prior treatment for alcoholism to address the issue of comparative negligence is groundless. In any event, the said argument was raised for the first time in 928 Columbus' reply.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion to compel by defendant 928 Columbus Holdings, LLC is denied; and it is further

ORDERED that this constitutes the decision and order of the court.



11/24/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[X] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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