

<b>Van Vlack v Handlers</b>
2017 NY Slip Op 32852(U)
April 27, 2017
Supreme Court, Dutchess County
Docket Number: 2016 -50064
Judge: Peter M. Forman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
ROBERT VAN VLACK,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No. 2016-50064

RISHA HANDLERS,

Defendant.

-----X  
FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents upon  
this application:

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This personal injury action arises out of a December 9, 2014 trip-and-fall accident that allegedly occurred at 111 Spring Street in the Village of Catskill (the "Premises").

Defendant has moved for an Order compelling disclosure of Plaintiff's mental health and substance abuse records from December 9, 2009 to the present. For the reasons stated herein, that motion is denied.

## BACKGROUND

Defendant is a licensed clinical social worker. Defendant lives at the Premises, and also operates a professional office from a portion of the Premises. Plaintiff received counseling services from Defendant at the Premises.

In December of 2014, Defendant was in the process of selling her house. Knowing that Plaintiff is a licensed professional engineer, Defendant asked Plaintiff to evaluate two temporary jacks that were supporting a span in the basement of the Premises. Plaintiff agreed to conduct that inspection before his regularly scheduled counseling appointment on December 9, 2014.

Consistent with that agreement, Plaintiff inspected the jacks in the basement at approximately 5:00 pm on December 9. He then went outside to inspect the roof line and the portions of the house that were being supported by the span. During that inspection, Plaintiff allegedly tripped and fell on a landscape bed in the vicinity of the front walkway to the Premises.

Plaintiff alleges that Defendant failed to properly maintain the shrubbery and foliage in the landscape bed, and that this negligence was the proximate cause of his accident. Plaintiff also alleges that he underwent four operations to his left knee over the next eight months, and that he has suffered permanent personal injuries as a result of this accident.

During the course of pretrial disclosure, Defendant obtained medical records indicating that Plaintiff has suffered a number of other orthopedic injuries, often due to his participation in

motocross sports. Those medical records also indicate that Plaintiff has been prescribed pain medicine in connection with those injuries, and that on more than one occasion he has requested stronger doses or different types of pain medicine from his health care providers.

One medical record, which was prepared approximately one year after the accident, includes a note that Plaintiff had been addicted to narcotics since 2014. Another medical record, which was prepared approximately 17 months after the accident, includes a note indicating that Plaintiff had received substance abuse treatment services in October of 2015.

The Verified Complaint alleges that Plaintiff suffered both physical and psychological injuries as a result of the accident. The Verified Bill of Particulars provides additional details regarding these alleged physical and psychological injuries.

By letter dated September 1, 2016, Plaintiff's counsel notified Defendant's counsel that the psychological injury claims are withdrawn. Specifically, that letter states that Plaintiff has withdrawn all of his claims for anxiety, mental anguish, loss of enjoyment of life, and shock to the nervous system.

#### DISCUSSION

CPLR 3101(a) authorizes "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." This statutory right "extends not only to admissible proof but also to testimony or

documents which may lead to the disclosure of admissible proof,' including material which might be used in cross-examination." [Polygram Holding, Inc. v. Cafaro, 42 AD3d 339, 341 (1st Dept. 2007)], quoting Fell v. Presbyterian Hospital in City of New York at Columbia Presbyterian Medical Center, 98 AD2d 624, 625 (1st Dept. 1983)]. However, "a party is not entitled to unlimited, uncontrolled, unfettered disclosure." [AALCO Transportation & Storage, Inc., v. DeGuara, 140 AD3d 807, 807 (2d Dept. 2016), quoting Geffner v Mercy Medical Center, 83 AD3d 998, 998 (2d Dept. 2011)]. Therefore, a court will deny, modify or regulate disclosure to the extent necessary to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court." [County of Suffolk v. Long Island Power Authority, 100 AD3d 944, 946 (2d Dept. 2012), quoting CPLR 3103(a)].

A court will only order the disclosure of confidential mental health and substance abuse treatment records upon a finding that the interests of justice substantially outweigh the need for confidentiality. [Mental Hygiene Law §22.05; §33.13(c)]. That burden will typically be met when a plaintiff seeks damages for emotional or psychological injury, such as anxiety, mental anguish, and loss of the enjoyment of life. [see e.g., Rothstein v. Chihee Huh, 60 AD3d 839 (2d Dept. 2009); Roca v. Perel, 51 AD3d 757 (2d Dept. 2008); Velez v. Daar, 41 AD3d 164 (1st Dept 2007)]. Conversely, when a plaintiff does not seek damages for

emotional or psychological injuries, the interests of justice to be served by disclosure will rarely outweigh the confidentiality of these records. [see e.g. Quinones v. 9 East 69<sup>th</sup> Street, LLC, 132 AD3d 750 (2d Dept. 2015); Wojtusiak v. Elardo, 43 AD3d 436 (2d Dept. 2006); Cottrell v. Weinstein, 270 AD2d 449 (2d Dept 2000)].

Here, although Plaintiff originally sought damages for emotional and psychological injuries, Plaintiff unequivocally abandoned those claims on September 1, 2016. Therefore, Plaintiff will not be compelled to disclose his confidential mental health and substance abuse records. [Salazar v. 521-533 West 57th Street Condominium, 84 AD3d 927 (2d Dept. 2011) ("records relating to [plaintiff's] mental health and substance abuse treatment were not discoverable inasmuch as they were privileged under CPLR 4504 and 4507, and [plaintiff] withdrew any claims for injuries relating to those conditions"). See also James v. 1620 Westchester Avenue, LLC, 147 AD3d 575 (1st Dept. 2017); Tomei v. Town of Riverhead, 147 AD3d 1102 (2d Dept. 2017); Alford v. City of New York, 116 AD3d 483 (1st Dept. 2014) *cf.* Corbey v Allen, 58 AD3d 667 (2d Dept. 2009) (disclosure required where plaintiff "did not unequivocally abandon her claims of psychological injury")].

There is no merit to Defendant's argument that Plaintiff has waived any objection to the disclosure of his mental health and substance abuse records. It is well-settled that the statutory privilege that normally attaches to medical records may be waived by parties who affirmatively place their physical or mental

condition in issue. [Zimmer v. Cathedral School of St. Mary and St. Paul, 204 AD2d 538 (2d Dept. 1994)]. However, it is equally well-settled that this type of waiver "does not permit wholesale discovery of information regarding plaintiff's physical and mental condition... [and] does not permit discovery of information involving unrelated illnesses and treatments" [Tirado v. Koritz, 77 AD3d 1368, 1369 (4th Dept. 2010)]. Since Plaintiff has withdrawn his psychological injury claims, he will not be deemed to have waived his statutory privilege with respect to his unrelated mental health and substance abuse records.

There is also no merit to Defendant's argument that Plaintiff waived his privilege by answering questions during pretrial depositions regarding the number of times that he had visited the Premises, and his general purpose in visiting the Premises. These are standard questions in a trip-and-fall accident that are designed to explore a witness's familiarity with the Premises. These questions did not delve into the substance of any counseling sessions that Plaintiff may have had with Defendant, and therefore did not waive the statutory privilege that applies to his medical records. Likewise, none of the questions that Plaintiff's counsel attempted to ask Defendant regarding these same topics implicated a waiver of the statutory privilege.

There is also no merit to Defendant's argument that Plaintiff waived his privilege to his mental health and substance

abuse records when he signed a waiver authorizing Mount Kisco Medical Group (MKMG) to release his entire medical record. Under the express terms of that waiver, the release of substance abuse and mental health records is only authorized if Plaintiff separately initials the appropriate lines appearing in section 9(a) of that waiver. It is undisputed that Plaintiff did not initial that section of the waiver. To the extent that the medical history information contained in the MKMG medical records includes passing references to prior mental health and substance abuse treatment, the interests of justice that would be served by disclosure of those records is outweighed by the deeply-rooted public policy considerations favoring the preservation of their confidentiality [see Matter of Jonathan C., 51 Misc3d 469 (Bronx County Family Ct. 2015) ("by preventing a psychiatrist, social worker or psychologist from making public any information which would result in humiliation, embarrassment or disgrace to the client, the therapist-patient privilege is designed to promote effective treatment and to insulate the client's private thoughts from public disclosure")].

Finally, Defendant seeks disclosure of Plaintiff's mental health and substance abuse records on the grounds that the medical records that have been disclosed demonstrate that Plaintiff was suffering from insomnia and orthopedic pain prior to his accident. Therefore, Defendant argues that the disclosure of Plaintiff's mental health and substance abuse records is

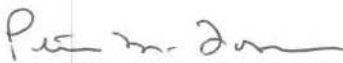
necessary to explore his claims of pain and sleeplessness in this action. However, the medical records that have already been disclosed to Defendant provide sufficient information regarding Plaintiff's history of pain and sleeplessness, and Defendant has failed to meet her "burden of showing that the interests of justice significantly outweigh the need for confidentiality such to permit discovery of mental health, alcohol abuse, or substance abuse records." [James v. 1620 Westchester Avenue, LLC, 147 AD3d 575 (1st Dept. 2017)]. Based on the foregoing, it is hereby

ORDERED, that Defendant's motion is denied; and it is further.

ORDERED, that counsel for all parties shall appear before the Court for a compliance conference on May 24, 2017 at 10:30 a.m.

The foregoing constitutes the Decision and Order of this court.

Dated: April 27, 2017  
Poughkeepsie, New York

  
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Hon. Peter M. Forman  
Acting Supreme Court Justice

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