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| Rodriguez v Arthur Elliot Aves. |
| 2018 NY Slip Op 34002(U) |
| November 14, 2018 |
| Supreme Court, Bronx County |
| Docket Number: 22999/2017 |
| Judge: George J. Silver |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 11

EVELYN RODRIGUEZ

Index No.: 22999/2017

-against-

Hon. GEORGE J. SILVER

ARTHUR ELLIOT AVENUES

Justice Supreme Court

ORDER

The following papers numbered 1 to 3 were read on this motion to **STRIKE COMPLAINT** (Seq. No. 004):

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|--|--------|---|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | No(s). | 1 |
| Answering Affidavit and Exhibits | No(s). | 2 |
| Replying Affidavit and Exhibits | No(s). | 3 |

In this action, defendants move for an order compelling plaintiff to provide unrestricted medical authorizations for plaintiff's medical history prior to the subject accident. As is relevant here, plaintiff is alleging that she sustained a right ankle fracture that required surgery as a result of defendants' negligence. With the instant motion, defendants seek unrestricted authorizations from the following providers: (1) St. Barnabas Hospital; (2) Montefiore Medical Center; and (3) Sahgal Sumir Prakash, M.D. More specifically, defendants allege that plaintiff's Medicaid records indicate that she treated at St. Barnabas Hospital for an intracerebral hemorrhage on June 11, 1993, a "contusion of face, scalp, neck" on August 19, 1993, and an "open wound of knee, leg, ankle" on November 18, 1994. Defendants further allege that the records also indicate that plaintiff treated at Montefiore Medical Center for an injury of her pelvic girdle and lower limb on December 10, 1994, Hepatitis and "age-related osteoporosis" on November 3, 2000, and drug abuse on December 21, 2000. Finally, defendants allege that the records indicate that plaintiff treated with Dr. Sahgal Sumir Prakash for varicose veins in her lower extremities on August 10, 2009. Defendants contend that all of the above injuries relate to the subject accident insofar as plaintiff has placed her entire medical condition at issue by alleging that her injuries from the subject accident "may limit her activities in her employment and her life."

CPLR §3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'" (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], quoting *Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Mery Med. Ctr.*, 83 AD3d 998, 998 [2d Dept. 2011]; see *Quinones v. 9 E. 69th St., LLC*, 132 AD3d 750, 750 [2d Dept. 2015]). "It is incumbent on the party seeking disclosure to demonstrate that the method of 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]; see *Quinones v. 9 E. 69th St., LLC*, 132 AD3d at 750, *supra*).

Motion is Respectfully Referred to Justice:
Dated:

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 [1989]). In order to properly defend against a plaintiff's claims, defendants require authorizations and records in relation to a plaintiff's injuries as defendants are entitled to discovery of information that is material and necessary to defend against a plaintiff's claims (*Slabakis v. Drizin*, 107 AD2d 45[1st Dept 1985]).

"[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition" (*Matter of Farrow v. Allen*, 194 AD2d 40, 45-46 [1st Dept 1993]). For those conditions that the plaintiff affirmatively placed at issue, the plaintiff "may not insulate from disclosure material necessary to the defense concerning that condition" (*Hoening v. Westphal*, 52 NY2d 605, 610 [1981]),.

However, it is equally well-settled that "[t]he waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illnesses and treatments" (*Barnes v. Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014] [internal quotation marks omitted]; *McLane v. Damiano*, 307 AD2d 338, 338 [2d Dept 2003]; *Iseman v. Delmar Med.-Dental Bldg.*, 113 AD2d 276 [3d Dept 1985]).

Appellate courts have not defined the concept of "relatedness." The Appellate Division, Fourth Department has consistently applied the "material and necessary" standard of CPLR §3101 (*see e.g.* *Donald v. Abern*, 96 AD3d 1608 [4th Dept 2012]; *Boyea v. Benz*, 96 AD3d 1558 [4th Dept 2012]; *Goetchius v. Spavento*, 84 AD3d 1712 [4th Dept 2011]; *Bozek v. Derkatz*, 55 AD3d 1311 [4th Dept 2008]; *Wachtman v. Trocaire Coll.*, 143 AD2d 527 [4th Dept 1988]). Some cases of the Appellate Division, Second Department appear to indicate that "relatedness" is relevance to the physical injuries (*Romance v. Zavala*, 98 AD3d 726 [2d Dept 2012] ["the injured plaintiff waived the physician-patient privilege with respect to his relevant prior medical history concerning those physical conditions"]; *Gill v. Mancino*, 8 AD3d 340 [2d Dept 2004] ["plaintiff Robert Gill waived the physician-patient privilege with respect to his relevant past medical history"]).

The Appellate Division, First Department has also applied the standard of relevance "to the mental and physical conditions that plaintiffs placed in controversy" (*Shamicka R. v. City of New York*, 117 AD3d 574, 575 [1st Dept 2014].) However, the Appellate Division, First Department has also stated, "[a] defendant is entitled to discovery to determine the extent, if any, that plaintiff's claimed injuries and damages are attributable to accidents other than the one at issue here" (*McGlone v. Port Auth. of N.Y. & N.J.*, 90 AD3d 479, 480 [1st Dept 2011] *quoting* *Rega v. Avon Prods., Inc.*, 49 AD3d 329 [1st Dept 2008].)

Where the plaintiff asserts claims for loss of enjoyment of life or for lost future earnings due to a permanent disability, the physical or mental conditions that are affirmatively placed at issue are not readily apparent, which complicates the determination as to what would be "related" to the "condition

at issue." A claim for loss of enjoyment of life is not a separate item of recoverable damages, but rather part of the damages recoverable for pain and suffering; it includes not only the suffering from the physical pain caused by injuries, but also encompasses "the frustration and anguish caused by the inability to participate in activities that once brought pleasure" (*McDougald v. Garber*, 73 NY2d 246, 257 [1989]). Thus, a claim for loss of enjoyment of life can place at issue not only a physical condition, such as physical pain or a physical inability to perform daily activities, but also frustration and anguish.

The Appellate Divisions of the various judicial departments have not been consistent on the issue of the scope of the waiver of physician-patient privilege when loss of enjoyment of life is claimed. Recent precedent within the Appellate Division, First Department, however, provides some guidance relevant to reconciling the instant motion. In *Gumbs v. Flushing Town Center III, L.P.*, 114 AD3d 573 (1st Dept 2014), the plaintiff alleged orthopedic injuries, along with a permanent inability to work and permanent or long lasting loss of enjoyment of life. By a 3-2 decision, the Appellate Division, First Department, affirmed the motion court's denial of the defendants' motion to strike the complaint, due to the plaintiff's failure to provide authorizations for the release of medical records. In denying defendants' motion, the trial court had reasoned that defendants had not shown that the records sought were related to the claimed injuries.

In accordance with *Gumbs*, here defendants have not sufficiently shown that records that plaintiff treated at St. Barnabas Hospital for an intracerebral hemorrhage on June 11, 1993, and a "contusion of face, scalp, neck" on August 19, 1993, are sufficiently related to her instant claims of injury to her knee. Similarly, records concerning plaintiff's treatment at Montefiore Medical Center for an injury of her pelvic girdle and lower limb on December 10, 1994, Hepatitis and "age-related osteoporosis" on November 3, 2000, and drug abuse on December 21, 2000 are irrelevant to her instant claimed injuries. Finally, records that indicate that plaintiff treated with Dr. Sahgal Sumir Prakash for varicose veins in her lower extremities on August 10, 2009 are also unrelated to her claimed knee injury.

However, the fact that plaintiff suffered and an "open wound of knee, leg, ankle" on November 18, 1994 while treating at St. Barnabas Hospital does have a sufficient nexus to her presently claimed injuries. Accordingly, the court finds that an authorization limited specifically to records related to plaintiff's "open wound of knee, leg, ankle" on November 18, 1994 at St. Barnabas Hospital is relevant to the instant action, and therefore should be disclosed. The remainder of defendants' requests, however, are denied. Defendants may revisit their denied requests, however, following plaintiff's deposition if testimony is divulged by plaintiff that would give defendants a sufficient basis to argue that plaintiff's prior treatment is in fact related to her presently claimed knee injury.

Accordingly, it is hereby

ORDERED that defendants' motion is granted to the extent that plaintiff is hereby directed to provide defendants with a duly executed authorization for records related to plaintiff's "open wound of knee, leg, ankle" on November 18, 1994 at St. Barnabas Hospital; and it is further

ORDERED that plaintiff provide said authorization delineated above to defendants no later than December 12, 2018; and it is further

ORDERED that the parties are directed to appear for a compliance conference this matter on December 17, 2018 at 9:30 AM at the Bronx County Courthouse, 851 Grand Concourse, Bronx, New York, Part 11, Room 709. **The parties should come to court with proposed dates for depositions.**

The foregoing constitutes the decision and order of the court.

Dated: November 14, 2018

Hon. 
GEORGE J. SILVER, J.S.C.

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY

CASE STILL ACTIVE

2. MOTION IS.....

GRANTED

DENIED

GRANTED IN PART