

Barcia v Costco Wholesale Corp.

2019 NY Slip Op 31099(U)

April 12, 2019

Supreme Court, New York County

Docket Number: 159881/2015

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART TR-40**

GRACE BARCIA

Index No.: 159881/2015

-against-

Hon. GEORGE J. SILVER

**COSTCO WHOLESALE CORPORATION, and
COSTCO WHOLESALE MEMBERSHIP, INC.**

Justice Supreme Court

ORDER

The following papers numbered 1 to 3 were read on this motion, by Order to Show Cause, to **STRIKE COMPLAINT** (Seq. No. 006):

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

This matter arises out of injuries sustained by plaintiff Grace Barcia ("plaintiff"), who alleges that on July 3, 2015, she was caused to slip and fall on liquid within a Costco Warehouse store located at One Industrial Lane in New Rochelle, New York. Defendants move, by Order to Show Cause, for an order seeking authorizations pertaining to plaintiff's prior injuries to her back, neck and right shoulder.

In support of the instant motion, defendants highlight that when this case was placed on the trial calendar and the parties appeared for an initial trial appearance on October 23, 2017, plaintiff's counsel apprised the court and defendants for the first time that plaintiff had undergone surgical procedures to her cervical spine in July 2017. Subsequently, on or about November 15, 2017, defendants point out that plaintiff propounded a supplemental bill of particulars, alleging that plaintiff had treatment with a new doctor, orthopedic surgeon Joseph Pyun, M.D. The supplemental bill of particulars alleged a C6 to T1 anterior cervical discectomy and fusion with cages and a locking plate, cervical myeloradiculopathy and indicated that future surgery may be required. Following the supplemental bill of particulars, defendants submit that plaintiff failed to provide defendants with necessary medical authorizations to move forward with further medical examinations of plaintiff and a further deposition of plaintiff, and also failed to provide responses to defendants' request for trial authorizations even though the case was already on the trial calendar. Accordingly, defendants filed an Order to Show Cause on February 7, 2018 seeking to vacate the note of issue on the ground that not all pre-trial discovery had been completed, and further seeking to compel defendants to provide authorizations for the newly alleged injuries set forth in plaintiff's supplemental bill of particulars.

The Order to Show Cause was resolved by a signed order issued by Justice Sherry Klein Heitler that provided, in relevant part, that plaintiff would serve defendants with the requested authorizations, including authorizations unlimited in date and time regarding plaintiff's prior neck and right shoulder injuries. Additional authorizations that the court required plaintiff to provide included duly executed HIPPA authorizations for any and all hospitals and doctors that treated plaintiff prior

Motion is Respectfully Referred to Justice:
Dated:

to her accident, including all diagnostic studies, consultations and/or therapy. Additionally, plaintiff was directed to appear for a further deposition and for additional independent medical examinations.

Plaintiff appeared for an additional deposition on June 1, 2018. At her deposition, plaintiff testified that she had sustained prior injuries to the same body parts she injured in this action and is currently receiving Workers' Compensation benefits for those injuries. That testimony conflicted with plaintiff's prior testimony and responses to discovery wherein she testified she never sustained any injuries prior to this incident with the exception of an injury to her back in 1995.

Defendants contend that plaintiff's recent deposition testimony reveals that plaintiff sustained a workplace injury to her back in 2005 while lifting a patient and as a result she is presently receiving Workers' Compensation benefits. As plaintiff has previously denied any benefits other than Social Security, and previously denied sustaining any injuries to her back, defendants state that plaintiff's recent testimony contradicts her testimony at her first deposition. As such, defendants submit that the requested authorizations/records should be produced.

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. Mercy 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*).

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].)

Here, it is axiomatic that the records that defendants are seeking are relevant and related to the injuries claimed in this lawsuit as defendants are seeking authorizations for identical injuries to the same body parts. Under such a scenario, defendants must be afforded an opportunity to investigate plaintiff's claims of injuries to the same body parts by receiving and processing authorizations for the release of medical records related to plaintiff's previous medical treatment. Plaintiff argues that defendants are not entitled to authorizations to obtain medical records pertaining to plaintiff's prior back, neck, and right shoulder injuries, submitting that the same would amount to a "fishing expedition." Discounted in plaintiff's assessment is the notion that plaintiff's own testimony is what gave defendants' occasion to seek additional authorizations. Indeed, plaintiff testified at her second deposition in a manner that was materially different from how she testified at her first deposition with respect to her back. Defendants rightfully should be afforded an opportunity to explore those claims.

While such material discovery is pending, however, this matter cannot remain on the trial calendar. 22 NYCRR §202.21(e) provides, in relevant part, as follows: "Any party to the action...may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness

is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect...After such period...no such motion shall be allowed except for good cause shown. At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

As such, a note of issue and certificate of readiness will be vacated where there is still extensive discovery to be completed or where the certificate of readiness erroneously states that all discovery is complete (*see Carte v. Segall*, 134 AD2d 396 [2d Dept.1987][note of issue vacated where extensive discovery yet to be completed]); *Ortiz v. Arias*, 285 AD2d 390 [1st Dept 2001][vacating note of issue that contained erroneous facts including incorrect statement that discovery had been completed or waived]); *Nielsen v. New York State Dormitory Authority*, 84 AD3d 519 [1st Dept 2011][a note of issue should be vacated where it is based upon a certificate of readiness that incorrectly states that all discovery has been completed]).

Here, plaintiff's note of issue indicated that all discovery known to be necessary at the time had been completed, even though plaintiff subsequently filed a supplemental bill of particulars that necessitated a further deposition of plaintiff and physical examination. In light of plaintiff's supplemental bill of particulars, plaintiff was also directed to provide authorizations. Following plaintiff's appearance for a second deposition, it was unearthed that even more authorizations were necessary in light of plaintiff's testimony that she had suffered a prior back injury and was receiving Worker's Compensation. As plaintiff still has not provided defendants with the authorizations requested, extensive discovery remains, thus warranting the striking of plaintiff's note of issue.

Accordingly, it is hereby

ORDERED plaintiff's note of issue is vacated and the case is stricken from the trial calendar; and it is further

ORDERED that within 10 days from the entry of the this order defendants shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Court who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court; and it is further

ORDERED that the parties shall appear for a conference before the court on Monday June 3, 2019 in Part 30 at 60 Centre Street, Room 408, at 9:30 AM (Hon. Sherry Klein Heitler) to ensure compliance with this order and to facilitate further discovery; and it is further

ORDERED that defendants' motion is granted to the extent that plaintiff is hereby directed to provide defendants with duly executed authorizations for records related to plaintiff's prior injuries to her back, neck and right shoulder not limited to duly executed HIPAA authorizations for any and all hospitals and doctors that treated plaintiff for back, neck and right shoulder injuries prior to this accident, including all diagnostic studies, consultations and/or therapy; and it is further

ORDERED that plaintiff provide said authorizations delineated above to defendants no later than May 15, 2019; and it is further

ORDERED that plaintiff shall not re-file a note of issue until the aforementioned directives of this court have been complied with, and the parties have collectively certified at a conference that "all discovery is complete."

The foregoing constitutes the decision and order of the court.

Dated:

April 12, 2019

Hon. George J. Silver

GEORGE J. SILVER, J.S.C.

GEORGE J. SILVER

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY

CASE STILL ACTIVE

2. MOTION IS.....

GRANTED

DENIED

GRANTED IN PART