

<b>Greif v Mas</b>
2019 NY Slip Op 32814(U)
September 19, 2019
Supreme Court, New York County
Docket Number: 805294/17
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN PART 11

Justice

LINDA GREIF,

Plaintiff,

INDEX NO. :805294/17  
MOTION SEQ NO. 010

- v -

FRANCIS MAS,

Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [ ] Yes [x] No

In this medical malpractice action arising out of defendant’s psychiatric treatment of plaintiff, defendant moves, by order to show cause, for reargument of that part of the court’s decision and order dated June 13, 2019 (“original decision”) holding that the records of plaintiff’s rheumatologist are not discoverable as the action does not affirmatively place plaintiff’s physical condition in issue. Plaintiff, appearing *pro se*, opposes the motion.

Plaintiff alleges that defendant improperly diagnosed and treated her psychiatric condition and failed to disclose the side effects of certain medications. By order dated May 10, 2019, the court directed that the records of plaintiff’s former psychologists be produced for *in camera* inspection, based on plaintiff’s assertion at a May 9, 2019 discovery conference that plaintiff did not provide an authorization for such records and that such records were not related to the claims asserted in this action. After *in camera* inspection, the court found, in its original decision, that

the records of plaintiff's former treating psychologist, which were produced as the result of an authorization provided by plaintiff for her disability carrier, were relevant to the issues in this action.

The court, however, held that the records from plaintiff's rheumatologist, Dr. Jennifer Nashel, were not subject to discovery. Specifically the court wrote:

As underlying psychiatric malpractice action does not affirmatively place plaintiff's physical condition in issue, that plaintiff did not waive the physician-patient privilege with respect to these records. See Brito v. Gomez, 168 AD3d 1, 5 (1<sup>st</sup> Dept 2018); See also Felix v. Lawrence Hosp. Ctr., 100 A.D.3d 470, 471, 953 N.Y.S.2d 505 (1st Dept. 2012)(holding that plaintiff's subsequent obstetrical treatment was not placed in controversy as her claims relate only to subsequent emotional and psychological injuries ).

Defendant now moves for reargument of this aspect of the original decision, asserting that he did not have opportunity to brief the issue of the relevancy of the rheumatologist's records, which the defense produced *in camera* based on the court's confidentiality order since they were an exhibit to defendant's opposition to plaintiff's motion to seal and for other relief.<sup>1</sup> Defendant also argues that plaintiff has put her physical injuries in issue since she is claiming, *inter alia*, "fatigue drowsiness, speech difficulties, impaired memory, irritability, agitation, impaired cognition and headaches," (See, Defendant's Motion, Exhibit I, Plaintiff's Verified Bill of Particulars).

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<sup>1</sup>Defendant also argues that Dr. Nashel's records were not provided by plaintiff's disability carrier but by the defendant's liability carrier Medical Liability Mutual Insurance, and that plaintiff's authorization for these records was tantamount to providing records for defense counsel. However, as plaintiff argues, under the circumstances here, the providing the authorization to defendant's liability carrier did not waive her rights to claim the records were subject to the physician-patient privilege.

Plaintiff opposes the motion, asserting that she is not claiming physical injuries as she filed a new Bill of Particulars with respect to her Amended Complaint. She argues that as claims of physical injuries have been withdrawn, discovery of the rheumatology records must be denied. She also argues that although she still alleges that she suffers from fatigue, that such allegations are limited to the fatigue caused by defendant's treatment from 2004-2012, and asserts that defendant's records document that her fatigue was first reported in 2004 when defendant changed her treatment. She also asserts that Dr. Nashel's records do not relate to a condition which existed before defendant's treatment since her condition was first diagnosed in 2013, eleven years after she began treatment with defendant, and that she is not claiming she suffered from fatigue after the subject treatment ended in 2012. Plaintiff also argues that defendant's attempt to connect Lupus with depression is unavailing since she suffers from Undifferentiated Connective Tissue Disorder (UCTD) and not Lupus and that, in any event, she is not claiming defendant caused her depression but, instead, improperly treated it.<sup>2</sup>

In reply, defendant submits an expert affidavit from Allan Gibofsky, M.D., who is board certified in internal medicine with a speciality in rheumatology, and reviewed plaintiff's rheumatology records, defendant's medical records, plaintiff's bills of particulars with respect to the amended complaint, the summons and complaint and amended summons and complaint. Dr. Gibofsky opines that plaintiff suffered from UCTD before her treatment by defendant and that fatigue is a symptom of UCTD.

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<sup>2</sup>To extent defendant's claims the records are relevant to lost earnings, based on a reference by Dr. Nashel to plaintiff "holding a job," plaintiff asserts that she has withdrawn such claims and replaced in with diminished earnings capacity.

In her sur-reply, plaintiff asserts, *inter alia*, that her diagnosis with UCTD in 2013, is a separate condition, and that she is not claiming that defendant's treatment caused or contributed to the onset of this condition, and that the rheumatology records have no bearing on the limited scope of plaintiff's allegations. Thus, plaintiff argues that she has not waived the privilege with respect to the records relating to this physical condition arising subsequent to her treatment by defendant. In addition, she notes that defendant's records acknowledge that fatigue was caused by his treatment.

A motion for reargument, is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979).

Here, reargument is granted as the defendant did not previously have an opportunity to address the relevancy of the rheumatology records to the claims in this action. Furthermore, upon reargument, the court vacates that part of the original decision holding that the rheumatology records were protected by the physician-patient privilege.

Notwithstanding plaintiff's amended bill of particulars withdrawing claims for physical injuries arising from the alleged malpractice except for fatigue, the records of her rheumatologist, Dr. Nashel, are discoverable subject to the court's confidentiality order. Defendant's expert, Dr. Gibofsky, describes in detail plaintiff's statements to Dr. Nashel regarding her physical condition including fatigue over a period of time relevant to this action. Specifically, Dr. Gibofsky opines that "plaintiff suffered from UCTD which pre-dated her treatment with Dr. Mas in 2002 and that she more likely than not had undiagnosed UCTD since childhood" (Gibofsky Aff. ¶ 11). He

further opines that:

[A]ny fatigue that plaintiff allegedly suffered during the treatment with Dr. Mas from 2002-2015, was a direct cause of an, as yet diagnose, auto-immune condition, UCTD. Fatigue is a well described, fully recognized constitutional symptom of UCTD. Dr. Nashel made references linking plaintiff's fatigue to UCTD. Plaintiff's fatigue was a factor that caused her to be worked up and diagnosed with UCTD. Dr. Nashel's entries in plaintiff's disability claim form state that plaintiff's fatigue is diagnostic of UCTD and has corresponded with symptom development of her UCTD. She noted that Plaquenil she prescribed to treat UCTD was primarily for fatigue and joint pain.

(Id ¶ 12).

Accordingly, Dr. Nashel's records are relevant to the issue of the cause of plaintiff's fatigue which plaintiff asserts was the result of defendant's treatment and are therefore discoverable. See Dillenbeck v. Hess, 73 NY2d 278, 287 (1989)(noting that "[a] litigant will be deemed to have waived the [physician-patient] privilege when, in bringing a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue"). In this connection the court notes that records which are material and necessary to the issues in the case are discoverable, even if they may not be admissible at trial. See Capati v. Crunch Fitness Intern., 295 AD2d 181 (1<sup>st</sup> Dept 2002); Baxter v. Orans, 623 AD2d 875 (1<sup>st</sup> Dept 1978). With respect to admissibility of the Dr. Nashel's records or any parts of such records, this is an issue to be determined by the trial judge.<sup>3</sup> Finally, as indicated above, Dr. Nashel's records are subject to the court's confidentiality order in this matter.

In view of the above, it is

ORDERED that defendant's motion for reargument of the original decision to the extent it found that the records of plaintiff's rheumatologist, Dr. Nashel, are not subject to discovery is

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<sup>3</sup>These issues include plaintiff's objection in this motion based on hearsay.

granted; and it is further

ORDERED that upon reargument, that part of the original decision holding that Dr. Nashel's records were not discoverable as underlying psychiatric malpractice action does not affirmatively place plaintiff's physical condition in issue, is hereby vacated; and it is further

ORDERED that Dr. Nashel's records are discoverable, subject to the court's confidentiality order.

DATED: September 19, 2019



**HON. JOAN A. MADDEN  
J.S.C.**

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION