Alkes v F.J. Sciame Constr. Co., Inc.
2019 NY Slip Op 33534(U)
December 2, 2019
Supreme Court, New York County
Docket Number: 159325/2017
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JUSTIN ALKES,

Plaintiff,

-against-

F.J. SCIAME CONSTRUCTION CO., INC.

Defendants.

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Index No. 159325/17
Motion Sequence 01

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this Labor Law personal injury action, Plaintiff Justin Alkes (Plaintiff or Mr. Alkes) moves: (1) for an *in limine* order precluding defendant F.J. Sciame Construction Co., Inc. (Defendant) from introducing certain medical records at trial; and (2) for a protective order, pursuant to CPLR 3103 and CPLR 4504, preventing Defendant from seeking medical records or conducting an independent medical examination except as they pertain to Plaintiff's left bicep injury. Defendant opposes Plaintiff's motion in its entirety and cross-moves pursuant to CPLR 3216 for an order: (1) dismissing this case for not complying with discovery obligations; (2) compelling Plaintiff to produce HIPAA-compliant *Arons*[1] authorizations for Plaintiff's prior right bicep injury; and (3) compelling Plaintiff to appear for supplemental IME's and to produce certain records in the possession of one of its experts, Dr. Irving Ojalvo. Plaintiff's *in limine* motion is denied as premature and without prejudice to renew before the trial judge who will be assigned to this case at the close of discovery/substantive motion practice. The remainder of the motion and cross-motion are decided as set forth below.

[1] In *Arons v Jutkowitz*, 9 NY3d 393 (2007), the Court of Appeals held that an attorney "may interview an adverse party's treating physician privately when the adverse party has affirmatively placed his or her medical condition in controversy." *Id.* at 401-02. As noted by the Hon. Joan Lobis, "from the Arons decision evolved a HIPAA-compliant form which, when signed by a patient, permits an interview of treating physician by defense counsel; the form is commonly referred to as an 'Arons Authorization.'" *Peluso v C.R. Board, Inc.*, 2010 NY Misc. LEXIS 4564, *3 (Sup. Ct. NY Co. Sept. 20, 2010).

This case arises from a July 5, 2017 construction accident during which the Plaintiff allegedly fell from a ladder and struck his left arm on a piece of steel. Defendant was the construction manager for the project. After the accident Plaintiff underwent surgery to repair a tear to his left bicep tendon but returned to work shortly thereafter. In a non-work-related incident he reinjured his bicep, underwent a second corrective surgery, and has not returned to work since.

Plaintiff commenced this action on October 19, 2017 and was deposed on January 17, 2019. In a post-deposition notice for discovery and inspection dated January 22, 2019, Defendant demanded the production of all medical records relating to an injury Plaintiff sustained to his *right* arm in or about 2006, more than 10 years prior to his construction accident. The issue of Plaintiff's prior right arm injury was discussed during a compliance conference before me on March 11, 2019. Among other things, the resulting So-Ordered stipulation provides that Plaintiff was to "provide Arons complaint AZs for all medical AZs previously provided within 30 days" and to "provide Arons AZs for all medical records related to Plaintiff's right bicep injury within 30 days."[2] The So-Ordered stipulation is signed by counsel for the Plaintiff and by counsel for the Defendant.

Plaintiff did not immediately object to the March 11, 2019 conference order. In fact, on or about March 15, 2019 Defendant received an authorization to obtain records from Dr. Robert Strauch whom Plaintiff identified as his treating surgeon for his right arm injury.[3] In an email to Plaintiff's counsel dated March 18, 2019, Defendant's counsel noted that the authorization was improperly limited to records from January 1, 2007 since the surgery was believed to have taken place in 2006. In a March 20, 2019 response Plaintiff's counsel wrote that he would be "providing [] revised authorizations for Dr. Strauch and NY Presbyterian for 2006."[4] By letter dated May 1,

[2] NYSCEF Doc. 10.
[3] NYSCEF Doc. 64
[4] NYSCEF Doc. 65.

2019 Plaintiff provided the Defendant with a revised HIPAA authorization and an *Arons* authorization for Dr. Strauch. This revised authorization also appears to have been unnecessarily limited in scope. By email dated June 5, 2019, Defendant inquired whether Dr. Strauch was Plaintiff's only medical provider for his right arm injury. Plaintiff responded, "I believe there may be additional HIPAA authorizations coming your way." By letter dated June 18, 2019, Plaintiff's counsel identified 13 additional medical providers who treated the Plaintiff for his 2006 right arm injury and provided Defendant's counsel with corresponding *Arons* authorizations[5]:

> I am enclosing a copy of the Court's Order dated March 11, 2019, directing that we provide Arons authorizations with respect to Mr. Alkes's prior injury to his right bicep. In compliance with said Order, enclosed herein please find Arons authorizations for medical providers with respect to Mr. Alkes's prior right bicep injury.
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> We hereby object to items "1" through "5" of the Supplemental Notice for Discovery and Inspection dated June 6, 2019, which seek medical authorizations for the release of records regarding prior injury to the right bicep. We will be serving a formal response which notes and preserves our objection, and if need be will be moving for a protective order.

Defendant's counsel asserts that, during a June 21, 2019 phone conversation[6], Plaintiff's counsel advised him that the court's March 11, 2019 order only required the production of *Arons*-compliant authorizations that would allow counsel to speak with Plaintiff's medical providers, but not HIPAA-compliant authorizations for the disclosure of medical records. Plaintiff then filed this motion for a protective order.

DISCUSSION

CPLR 3101(a) mandates that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . . ." As the Court of Appeals has held, the words "material" and "necessary" should be "interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and

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[5] NYCEF Doc. 79.

[6] While the court did not participate in this call, Plaintiff does not dispute that it took place as reported by Defendant.

reducing delay and prolixity." *Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 (1968). The statute's scope is "generous, broad, and is to be construed liberally," (*Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 [1st Dept 2006]) and it has been interpreted "to give effect to the strong public policy favoring full disclosure to adequately prepare for trial...." *New York State Elec. & Gas Corp. v Lexington Ins. Co.*, 160 AD2d 261, 261 (1st Dept 1990). Moreover, '"[p]retrial disclosure 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 Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1983]). In determining whether disclosure is appropriate, "[t]he test is one of usefulness and reason." *Allen v Crowell-Collier Publishing, Co.*, 21 NY2d at 406.

Medical records protected by the physician-patient privilege are one exception to New York's broad discovery rules. But when the physical condition of a party is "in controversy" - as it is in any personal injury case - CPLR 3121(a) requires that the party submit to a medical examination and provide relevant hospital and medical records. *Dillenbeck v Hess*, 73 NY2d 278, 287 (1989). "Waiver of the protection of the privilege may . . . occur when a party fails to assert the privilege by objecting to the disclosure of privileged information." *Iseman v Delmar Medical-Dental Bldg., Inc.*, 113 AD2d 276, 279 (3d Dept 1985) (citing *Hughson v St. Francis Hospital*, 93 AD2d 491, 500 [2d Dept 1983]). The burden of proving that a party's physical condition is "in controversy" is on the party seeking the information. *Id.*; *see also Budano v Gurdon*, 97 AD3d 497, 498 (1st Dept 2012).

Plaintiff relies heavily on the First Department's decision in *Brito v Gomez*, 168 AD3d 1 (1st Dept 2018), which the Court of Appeals recently overturned (33 NY3d 1126 [2019]). In *Brito*, the First Department held that a plaintiff who brought claims for lost earnings and loss of enjoyment

of life did not waive the physician-patient privilege with respect to prior injuries "not raised in the lawsuit". The Court of Appeals reversed, holding that the plaintiff "affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages." *Id.* at 1126. The Court then held that the plaintiff, under the "particular circumstances" of the case, had to provide authorizations to the defendant pertaining to her knees. As another example, in *Bennett v Gordon,* 99 AD3d 539 (1st Dept 2012), the plaintiff claimed injuries to his left shoulder and head, alleged tremors in his upper extremities, and claimed overall weakness throughout his body. The First Department allowed limited discovery with respect to the plaintiff's prior right shoulder injury, finding that the new injuries "conceivably derived from [plaintiff's] prior accident." *Id* at 539-540.

Here too, Plaintiff is claiming significant lost wages and loss of enjoyment of life. In this regard, Plaintiff's bill of particulars provides that he has not returned to work since November 22, 2017 when he had a second surgery to repair his left bicep tendon. In turn he is claiming upwards of $5,000,000 in past and future economic damages. Defendant should be entitled to review the records from Mr. Alkes' prior right bicep injury to determine the extent to which this prior injury has limited his career potential and life outside of the workplace. In other words, Defendant should be able to explore whether Plaintiff's alleged permanent disability and claimed loss wages 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, 330 [1st Dept 2008]); *see also Moreira v M.K. Travel & Transp., Inc.*, 106 AD3d 965, 967 (2d Dept 2013); *Vanalst v City of New York*, 276 AD2d 789, 789 (2d Dept 2000).

In addition to being discoverable under *Brito* and the cases cited above, I find that there was an implied waiver of the physician-patient privilege such that Plaintiff can no longer object to the disclosure of records pertaining to his right bicep injury. The court is particularly persuaded in this

regard by the March 11, 2019 conference order signed by all counsel, Plaintiff's failure to immediately object thereto, and Plaintiff's disclosure of HIPAA compliant *Arons* authorizations for Dr. Strauch.

In this regard, the court explicitly rejects Plaintiff's contention that the court's order only required Plaintiff to produce *Arons* authorizations, but not HIPPA authorizations. This interpretation is entirely contrary to custom and practice in personal injury cases such as this one. Simply put, medical authorizations should always be HIPAA compliant, and sometimes they are also *Arons* compliant if requested by counsel. It is not the other way around.

In light of the foregoing, it is hereby

ORDERED that Defendant's motion to dismiss the complaint pursuant to CPLR 3126 is denied; and it is further

ORDERED that Plaintiff's motion for a protective order is denied; and it is further

ORDERED that Plaintiff's *in limine* motion is denied without prejudice to renew at trial; and it is further

ORDERED that Defendant's cross-motion is granted to the extent that Plaintiff shall:

(1) Produce HIPAA-compliant *Arons* authorizations for Plaintiff's prior right bicep injury within 20 days of the date of entry of this order;

(2) Produce an authorization for Plaintiff's Workers' Compensation records relating to his prior right bicep injury within 20 days of the date of entry of this order,

(3) Appear for a supplemental IME for both his right and left arm within 30 days of Defendant's counsel receipt of said medical and Workers' Compensation records;

And it is further ORDERED that Defendant's cross-motion for discovery related to Dr. Irving Ojalvo is denied, without prejudice. Notwithstanding, Plaintiff is to be mindful of CPLR 3101(d), and is directed to disclose Dr. Ojalvo's expert report to Defendant's counsel within a

reasonable time before trial should Plaintiff identify Dr. Ojalvo as an expert witness; and it is further

ORDERED that the motion and cross-motion are otherwise denied.

Counsel are directed to appear for a compliance conference in Part 30 (Room 408) on January 13, 2020 at 10:00AM.

This constitutes the decision and order of the court.

DATED: 12-2-19

SHERRY KLEIN HEITLER, J.S.C.