

DiLorenzo v Toledano
2019 NY Slip Op 33941(U)
March 11, 2019
Supreme Court, Nassau County
Docket Number: 605949/17
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JOSEPH DILORENZO,

Plaintiff,

- against -

BARUCH TOLEDANO, M.D., BARUCH TOLEDANO,
M.D., P.C., ORTHOPAEDIC ASSOCIATES OF GREAT
NECK, LLP, NORTHWELL HEALTH PHYSICIAN
PARTNERS, NORTHWELL HEALTHCARE, INC. and
NORTHWELL HEALTH, INC.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 605949/17
Motion Seq. Nos.: 03, 04
Motion Dates: 11/15/18
01/04/19

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 03), Affirmations and Exhibits	1
Notice of Cross-Motion (Seq. No. 04), Affirmation and Exhibits	2
Affirmation in Reply to Motion (Seq. No. 03) and in Opposition to Cross-Motion (Seq. No. 04)	3
Affirmation in Reply to Cross-Motion (Seq. No. 04) and Exhibit	4

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Baruch Toledano, M.D. ("Dr. Toledano") moves (Seq. No. 03), pursuant to CPLR § 3124, for an order compelling plaintiff to produce an authorization to obtain the records from plaintiff's psychiatrist, Dr. Raymond Behr; or, in the alternative, moves, pursuant to CPLR § 3126, for an order precluding plaintiff from offering supportive evidence at trial on the issue of loss of enjoyment of life and his mental health.

Plaintiff opposes the motion and cross-moves (Seq. No. 04), pursuant to CPLR § 3103(a), for a protective order preventing defendants from obtaining plaintiff's mental health records, including his psychiatric records. Defendant Dr. Toledano opposes the cross-motion.

In support of the motion (Seq. No. 03), counsel for defendant Dr. Toledano submits, in pertinent part, "[t]his is a medical malpractice action involving allegations that orthopedic surgeon, Dr. Baruch Toledano, failed to properly treat the plaintiff's calcaneus fracture from December 2015 to May 2016, resulting in a multitude of alleged injuries including: calcaneus malunion; subtalar arthritis; difficulty walking; right ankle pain; impaired gait; inability to tolerate activities of daily living; inability to tolerate light recreation; loss of independence; and **loss of enjoyment of life**. The defendants are entitled to the records of psychiatrist, Dr. Raymond Behr, who plaintiff has treated with for the past five years for his longstanding history of anxiety and depression, as plaintiff has placed his entire medical and psychiatric history in controversy by virtue of commencing the instant lawsuit. This is especially true in this case where the plaintiff testified that he discussed with Dr. Behr the affect the calcaneus fracture had on his life. Additionally, the scope and severity of plaintiff's prior psychiatric condition impacts the damages, if any, recoverable for a claim of loss of enjoyment of life."

Counsel for defendant Dr. Toledano asserts, in pertinent part, that, "[a]t his deposition, the plaintiff testified that he was diagnosed with anxiety (which goes 'hand-in-hand' with his depression) when he was 10 or 11 years of age, for which he currently takes Clomipramine and treats with psychiatrist, Dr. Raymond Behr.... When specifically asked if he discussed the alleged injuries in this case with Dr. Behr plaintiff testified: Q. Not in terms of the actual management of your heel fracture, but in terms of your ongoing issues that you have in regard to say loss of

enjoyment of life or further anxiety or further depression? A. Yes. Q. Have you spoken with Dr. Behr in regard to those issues? A. Yes, actually. You know, definitely the whole, you know, depression, and my weight is a big issue of him and me, but since, I mean, I was 160 pounds, you know. I exercised. I was fine. Once this happened, I just, you know, I wasn't - I'm really not physically able to exercise or do much moving.... Following the plaintiff's deposition, on April 2, 2018, the defendants served a demand for authorizations including one for Dr. Behr. The defendants subsequently sent several follow-up letters regarding this authorization and plaintiff responded by objection to its production." See Defendant Dr. Toledano's Affirmation in Support Exhibits F and G.

Counsel for defendant Dr. Toledano argues, in pertinent part, that, "the Court in Amoroso v. City of New York, [citation omitted], held that 'the defense is entitled to review records showing the nature and severity for the plaintiff's prior medical conditions [which] may have an impact upon the amount of damages, if any, are recoverable for a claim of loss of enjoyment of life.'... In addition, medical records that address the plaintiff's prior existing mental health or psychiatric conditions are likewise subject to disclosure in claims alleging loss of enjoyment of life.... In the instant matter, by virtue of commencing the within action for medical malpractice and claiming loss of enjoyment of life, plaintiff has placed his entire medical condition, which includes his mental health, in issue. Pursuant to the provisions of the CPLR, plaintiff must comply with the liberal rules of discovery by providing an authorization for psychiatrist Dr. Behr, who has treated him for his long-standing anxiety and depression, and most importantly, his mental health as it relates to the effect of the care and treatment at issue. Whether these records are admissible at trial is not dispositive as to whether the records are now discoverable.

Accordingly, the defendants are entitled to obtain copies of these psychiatry records as the plaintiff's anxiety and depression, both before and after the treatment at issue, directly impact the damages in this case and what may or may not be recoverable for a claim for loss of enjoyment of life."

In opposition to the motion (Seq. No. 03) and in support of the cross-motion (Seq. No. 04), counsel for plaintiff submits, in pertinent part, that, "[p]laintiff did not put his mental health in issue, and defendants did not establish that the interests of justice significantly outweigh plaintiff's need for confidentiality. As such, defendants are not entitled to his mental health records. Joseph DiLorenzo ('Mr. Di Lorenzo') was 28 years old when he fell at work and injured his calcaneus (heel) and ankle. He saw defendant, Baruch Toledano, M.D., who incorrectly and negligently determined that Mr. Di Lorenzo did not require surgical intervention, and as a result, Mr. DiLorenzo's calcaneus did not heal properly, and Mr. Di Lorenzo cannot walk distances, run or put excessive weight on his foot, which prevents him from participating in and enjoying many of the normal pursuits of life for a man his age. This medical malpractice lawsuit ensued."

Counsel for plaintiff further asserts, in pertinent part, that, "[o]n March 26, 2018, Mr. DiLorenzo testified as follows regarding his treatment with psychiatrist, Dr. Raymond Behr:

Q. How long have you been treating with Dr. Behr? A. Couple of years. I'm not really sure. Five years maybe. Q. What types of conditions do you treat with Dr. Behr for? A. Just basically the anxiety and depression. **Q. Have you treated with Dr. Behr in regard to the claims in this lawsuit? A. No. Actually – no. No, not really. I'm sorry. No. ...** Q. At any point in time have you ever discussed with Dr. Behr about any of the injuries that you sustained in regard to this lawsuit? A. Not much. No. Q. Well, 'not much' and 'no' are two different answers. A. I'm sure I told him about it. I couldn't go see him for six months so I'm sure I told him about it, but no, he

hasn't done anything, you know, he doesn't treat it or anything like that. Q. When you say 'he doesn't treat it'? A. He does nothing for my heel at all. Q. Not in terms of the actual management of your heel fracture, but in terms of any ongoing issues that you have in regard to say loss of enjoyment of life or *further anxiety or further depression*? A. Yes. Q. Have you spoken with Dr. Behr in regard to those issues? A. Yes, actually. You know, definitely the whole, you know, *depression*, and my weight is a big issue for him and me, but since -- I mean, I was 160 pounds, you know. I exercised. I was fine. Once this happened, I just, you know, I wasn't - I'm really not physically able to exercise or do much moving.... Mr. DiLorenzo did not make any claims for depression or anxiety in this case; he did not treat with Dr. Behr for any injuries he is claiming herein." See Plaintiff's Affirmation in Support of Cross-Motion and in Opposition to Motion Exhibit A.

Counsel for plaintiff argues that, "[t]he physician-patient relationship is a confidential, privileged relationship to facilitate 'uninhibited and candid communication between the patients and medical professionals, the accurate records of confidential information and the protection of the patients' reasonable privacy expectations.' [citation omitted]. That privilege is rooted in both the statutory law and public policy of New York State.... New York has a strong public policy against disturbing the physician-patient privilege afforded by CPLR 4504(a). [citation omitted]. The Court of Appeals held that the waiver of the physician-patient privilege only applies to those conditions *affirmatively placed in controversy* by the plaintiff. [citation omitted].... A plaintiff is not required to provide an authorization for treatment where he does not claim damages for that treatment. [citation omitted]. A motion for an authorization for the release of psychiatric records will be denied and a protective order will be granted where the defendants fail to establish that the records are material and necessary to the defense of the action. [citation omitted]....

Moreover, despite defendants' contention, merely commencing an action does not automatically waive the physician-patient privilege, without evidence that the plaintiff affirmatively placed his or her psychiatric condition in issue. [citation omitted].... The Second Department has dealt with the issue of whether or not to disclose mental health records on many occasions. They have consistently held that where a party has not put his or her mental condition at issue, mental health records are not subject to disclosure. [citations omitted].... In this case, Mr. DiLorenzo did not affirmatively put his mental health in controversy - he did not claim anxiety, depression, or any other mental health condition. All of plaintiff's claimed injuries are physical injuries and the effects those physical injuries have on his ability to engage and participate in the activities and other pursuits of life that he engaged in prior to the malpractice."

Counsel for plaintiff further contends that, "[l]oss of enjoyment of life is encompassed within pain and suffering. [citation omitted]. It has been described by the Court of Appeals as 'the loss of the ability to engage in certain activities,' 'the effect of the injuries on the plaintiff's capacity to lead a normal life,' 'the plaintiff's inability to enjoy life to its fullest,' and 'the frustration and anguish caused by the inability to participate in activities that once brought pleasure.' [citation omitted].... While the Second Department seems to have an overtly expansive view of what 'loss of enjoyment of life' encompasses, the First and Fourth Departments take a much narrower stance.... There cannot be unfettered access to all of a plaintiff's physical and mental health records every time someone claims loss of enjoyment of life. The Second Department has gone askew and took loss of enjoyment of life too far,...."

Counsel for plaintiff adds that, "[t]he Mental Hygiene Law directs that the court must find that 'the interests of justice [need to] significantly outweigh the need for confidentiality' to justify disclosing mental health records. [citations omitted].... Defendants did not establish or

even address how the interests of justice would significantly outweigh Mr. DiLorenzo's right to confidentiality. Defendants' only claims to entitlement to Mr. Di Lorenzo's psychiatric records are: (1) that by instituting this action, he placed his 'entire medical condition, which includes his mental health, in issue,' and (2) that his pre-existing anxiety and depression 'directly impact the damages in this case and what may or may not be recoverable for a claim for loss of enjoyment of life.' Both of these arguments must fail.... Mr. DiLorenzo's psychiatric records contain personal information about his family, personal relationships, and other personal issues completely unrelated to the issues in this lawsuit.... Disclosure of these records would cause him unreasonable annoyance, embarrassment, could cause a rift in his family and other interpersonal relationships, and would be manifestly prejudicial. As such, plaintiff's cross motion for a protective order preventing defendants from obtaining Mr. Di Lorenzo's mental health records should be granted." *See Plaintiff's Affirmation in Opposition Exhibit R.*

In opposition to plaintiff's cross-motion (Seq. No. 04), counsel for defendant Dr. Toledano argues, in pertinent part, that, "[t]he plaintiff has unequivocally testified that psychiatrist Dr. Behr is a physician that he is evaluated by monthly and that he has spoken with regarding his anxiety, depression, and the injuries alleged in this matter. Plaintiff further testified that as a result of the physical injuries alleged, he has not been able to pursue his career, is now limited in his abilities to engage in activities of daily living, that his relationship with his partner has been affected, that he is now taking medication for his anxiety and depression, and that he is no longer able to partake in social recreation that he once enjoyed. The testimony in this regard speaks to the core of the plaintiff's claim for 'loss of enjoyment of life' and the records of Dr. Behr are material and necessary to evaluate the veracity and scope of these purported damages.... The Appellate Division, Second Department, which is without question controlling

authority as to the resolution of this matter, has consistently held that disclosure of mental health records in personal injury claims are discoverable when loss of enjoyment of life is alleged as an element of damages. [citations omitted].... Plaintiff testified that he has treated with psychiatrist Dr. Behr for about five years for anxiety and depression. Plaintiff further testified that he speaks with Dr. Behr about what is going on in his everyday life, including his claims for ‘loss of enjoyment of life.’ Moreover, since the accident in question, Dr. Behr for the first time ordered antidepressants for the plaintiff’s mental health condition.”

Counsel for defendant Dr. Toledano adds that, “[f]urther, despite plaintiff’s counsel’s request for reliance on the holdings of the Appellate Division, First Department, and her vocal disdain for the governing caselaw of the Appellate Division, Second Department, this matter is venued in Nassau County which falls squarely within the confines of the legal interpretations of the Second Department. In that regard, the applicable law in the instant action supports disclosure of these records. Lastly, the defendants are sensitive to the confidential nature of mental health records, just as we are charged with the same responsibility to respect and maintain medical records that contain information that a patient may find embarrassing if unfettered disclosure was permitted. The records are clearly not being sought to cause unreasonable annoyance, embarrassment or a family rift; instead the records are needed to challenge the claims purported by plaintiff. Moreover, whether or not said materials are discoverable herein, does not render them admissible at trial. However, the defendants should at least be afforded the opportunity to explore the records that address this important element of damages.”

CPLR § 3101(1) provides for “full disclosure of all matters material and necessary for the prosecution and defense of an action....” The discovery of any information or material reasonably related to the issues which will assist in preparation for trial by sharpening the issues and

reducing delay and prolixity are encouraged. The test is one of usefulness and reason. *See Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 288 N.Y.S.2d 449 (1968).

Indeed, “the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is ‘material and necessary’ as that phrase is used in CPLR 3101(a).” *Auerbach v. Klein*, 30 A.D.3d 451, 816 N.Y.S.2d 376 (2d Dept. 2006). *See also Ural v. Encompass Ins. Co. of Am.*, 97 A.D.3d 562, 948 N.Y.S.2d 621 (2d Dept. 2012). Ultimately, “[i]t 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.” *Gomez v. State of New York*, 106 A.D.3d 870, 965 N.Y.S.2d 542 (2d Dept. 2013) *quoting Vyas v. Campbell*, 4 A.D.3d 417, 775 N.Y.S.2d 375 (2d Dept. 2004).

Furthermore, pursuant to CPLR § 3124, disclosure provisions are to be liberally construed. Ultimately, a trial court is afforded broad discretion in managing disclosure. *See* CPLR §§ 3124, 3101(a); *Kavanagh v. Ogden Allied Maintenance Corp.*, 92 N.Y.2d 952, 683 N.Y.S.2d 156 (1998).

CPLR § 3126 provides the “[p]enalties for refusal to comply with order or to disclose.” It reads, “[i]f any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party’s control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them: 1. An order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or 2. an order prohibiting

the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.”

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR § 3126 is a matter reserved to the sound discretion of the trial court. *See Dokaj v. Ruxton Tower Ltd. Partnership*, 91 A.D.3d 812, 938 N.Y.S.2d 101 (2d Dept. 2012). To invoke the drastic remedy of preclusion, the Court must determine that the party’s failure to comply with a disclosure order was the result of willful, deliberate and contumacious conduct or its equivalent. *See Arpino v. F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 (2d Dept. 2012); *Zakhidov v. Boulevard Tenants Corp.*, 96 A.D.3d 737, 945 N.Y.S.2d 756 (2d Dept. 2012); *MacKenzie v. City of New York*, 125 A.D.3d 821, 1 N.Y.S.3d 840 (2d Dept. 2015); *6 Harbor Park Drive, LLC v. Town of North Hempstead*, 127 A.D.3d 1065, 5 N.Y.S.3d 887 (2d Dept. 2015); *Crystal Clear Development, LLC v. Devon Architects of New York, P.C.*, 127 A.D.3d 911, 7 N.Y.S.3d 361 (2d Dept. 2015); *De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 5 N.Y.S.3d 227 (2d Dept. 2015); *Assael v. Metropolitan Tr. Auth.*, 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept. 2004). Willful and contumacious conduct can be inferred from repeated non-compliance with court orders, *inter alia*, directing depositions, coupled with either no excuses, or inadequate excuses; or a failure to comply with court ordered discovery over an extended period of time. *See Prappas v. Papadatos*, 38 A.D.3d 871, 833 N.Y.S.2d 156 (2d Dept. 2007).

“It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue.” *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 470 N.Y.S.2d 122 (1983); *Lombardi v. Hall*, 5 A.D.3d 739, 774 N.Y.S.2d 560 (2d Dept. 2004). However, the principle of “full disclosure” does not give a party the right to uncontrolled and unfettered disclosure. *See Farrell v. E.W. Howell Co., LLC*, 103 A.D.3d 772, 959 N.Y.S.2d 735 (2d Dept. 2013).

While physician-patient communications are privileged under the applicable rule, a litigant will be deemed to have waived the privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue. *See O'Brien v. Village of Babylon*, 153 A.D.3d 547, 60 N.Y.S.3d 92 (2d Dept. 2017). The defense in a personal injury action is entitled to review records showing the nature and severity of the plaintiff's prior medical conditions which may have an impact upon the amount of damages, if any, recoverable for a claim of *loss of enjoyment of life* (emphasis added). *See id.* *See also Montalto v. Heckler*, 113 A.D.3d 741, 978 N.Y.S.2d 891 (2d Dept. 2014); *Vodoff v. Mehmood*, 92 A.D.3d 773, 938 N.Y.S.2d 472 (2d Dept. 2012); *Amoroso v. City of New York*, 66 A.D.3d 618, 887 N.Y.S.2d 163 (2d Dept. 2009).

The Court notes that, in the instant matter, the controlling authority is the Second Department. Furthermore, the Court finds that plaintiff, by claiming damages for loss of enjoyment of life, coupled with his testimony concerning his treatment by Dr. Behr, has affirmatively put his mental condition at issue.

Therefore, based upon the above, the branch of defendant Dr. Toledano's motion (Seq. No. 03), pursuant to CPLR § 3124, for an order compelling plaintiff to produce an authorization to obtain the records from plaintiff's psychiatrist, Dr. Raymond Behr, is hereby **GRANTED**.

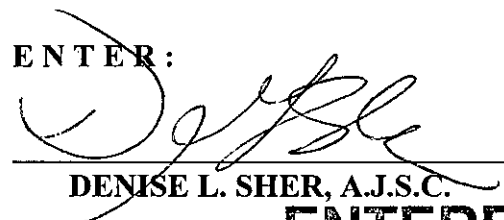
The branch of defendant Dr. Toledano's motion, pursuant to CPLR § 3126, for an order precluding plaintiff from offering supportive evidence at trial on the issue of loss of enjoyment of life and his mental health, is hereby **DENIED**.

Plaintiff's cross-motion (Seq. No. 04), pursuant to CPLR § 3103(a), for a protective order preventing defendants from obtaining plaintiff's mental health records, including his psychiatric records, is hereby **DENIED**.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on March 19, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

ENTERED

Dated: Mineola, New York
March 11, 2019

MAR 12 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**