

Spadaro v Best Mkt. of W. Babylon 2, Inc.

2019 NY Slip Op 34238(U)

March 20, 2019

Supreme Court, Suffolk County

Docket Number: 609070/2017

Judge: Joseph A. Santorelli

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

SHORT FORM ORDER

INDEX No. 609070/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-15-19
SUBMIT DATE 3-14-19
Mot. Seq. # 01- Mot D

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ANNA SPADARO and ANTHONY SPADARO,

Plaintiff(s),

-against-

BEST MARKET OF WEST BABYLON 2, INC.
and BASSER KAUFMAN 228, LLC,

Defendant(s).

**LAW OFFICES OF IRA M. PERLMAN, P.C.
and ROBERT D. ROSEN, P.C.**

Attys. for Plaintiff
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Upon the following papers numbered 1 to 22 read on this motion to ~~dismiss~~/preclude; Notice of Motion #1/ Order to Show Cause and supporting papers 1 - 10; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 11 - 16; Replying Affidavits and supporting papers 17 - 22; ~~Other~~; (and after hearing counsel in support and opposed to the motion) it is,

In this action to recover damages for personal injuries allegedly sustained as a result of a trip and fall accident defendant, Best Market of West Babylon 2, Inc., moves for an order pursuant to CPLR 3126 dismissing the complaint for failure of the plaintiff to respond to discovery; or in the alternative for an order pursuant to CPLR 3126 prohibiting plaintiff from producing or introducing evidence or testimony in support of her position at trial; or in the alternative for an order pursuant to CPLR 3124 compelling the plaintiff to provide the requested discovery by a date certain. Plaintiff opposes this application in all respects.

In support of the instant application defendant claims that on or about December 11, 2018 a post-EBT discovery demand was served upon the plaintiff seeking: (1) a duly executed authorization to obtain Dr. Balot's medical records in connection with Dr. Balot's treatment of the plaintiff, and (2) all pleadings, deposition transcripts, medical records and all non-privileged documents in connection with three prior lawsuits commenced by the plaintiff. The three prior lawsuits were: (1) *Anna Spadaro*

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and Anthony Spadaro v. The Diocese of Rockville Centre, St. John the Baptist Diocesan H.S. and R.C. School of Dance, under index number 26100/1993; (2) Anna Spadaro v. Angelo G. Ferlito, P.C., under index number 27645/2013; and (3) Anna Spadaro v. Stop & Shop, under index number 9138/2014. On January 2, 2019 the plaintiffs' attorney sent a letter objecting to the defendants' post-EBT demands because plaintiff Anna Spadaro did not suffer a shoulder injury in the prior accidents that led to lawsuits and Dr. Balot did not treat her for injuries sustained in this accident. The plaintiffs indicate that the requests are "palpably improper". In response the defendants' attorney sent a letter dated January 23, 2019 indicating that the documents are discoverable under CPLR 3010(a) because the plaintiff has alleged "loss of enjoyment of life" in their Bill of Particulars.

The Court in *Vanalst v City of NY*, 276 AD2d 789, 789 [2d Dept 2000], held that

The plaintiff alleges that he sustained an injury to his left knee when he tripped and fell in a roadway on September 28, 1991. During the course of discovery, it was learned that the plaintiff has a history of lower back pain as the result of an automobile accident in 1986 and a work-related accident in 1989. The defendant Brooklyn Union Gas Company sought discovery pertaining to those injuries, contending that since the plaintiff is seeking damages for loss of the enjoyment of life as a result of the accident on September 28, 1991, the nature and extent of the prior injuries may be relevant on the issue of damages.

It is well settled that a party waives the physician-patient privilege by affirmatively placing his or her physical condition in issue (see, *Dillenbeck v Hess*, 73 NY2d 278; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452), and that CPLR 3101 (a) requires full disclosure of all evidence material and necessary to the prosecution or defense of an action, regardless of the burden of proof (see, *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403).

Here, the nature and severity of the plaintiff's previous back injuries may have an impact upon the amount of damages, if any, recoverable for a claimed loss of enjoyment of life because of his current knee injury. Therefore, the requested records and reports are material and necessary to the defense, and the Supreme Court erred in denying that branch of the appellant's cross motion which was for disclosure (see, CPLR 3101 [a]; *Dillenbeck v Hess*, *supra*; *Allen v Crowell-Collier Publ. Co.*, *supra*).

In *M.C. v Sylvia Marsh Equities, Inc.*, 103 AD3d 676, 679 [2d Dept 2013], the Court held that

In order to comply with "the liberal discovery provisions of the CPLR," a party who affirmatively places his or her medical condition into issue "must provide duly executed and acknowledged written authorizations for the release of pertinent medical records" (*DeLouise v S.K.I. Wholesale Beer*

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Corp., 79 AD3d 1092, 1093, 913 NYS2d 774 [2010] [internal quotation marks omitted]; see *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d 768, 769, 839 NYS2d 211 [2007]; *Vanalst v City of New York*, 276 AD2d 789, 715 NYS2d 422 [2000]). Moreover, the defense 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" (*Amoroso v City of New York*, 66 AD3d 618, 618, 887 NYS2d 163 [2009]).

Here, in light of the plaintiff's allegations that her neck, back, and right knee were injured, the plaintiff's medical records are material since she has affirmatively placed her medical condition in controversy (see *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d at 768). Specifically, the plaintiff's records reflecting her medical history, preexisting physical conditions, and the records maintained by the Witness Security Office reflecting her physical condition, are material and necessary to the issue of damages (see *DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d at 1093; *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d at 769; *Vanalst v City of New York*, 276 AD2d 789, 715 NYS2d 422 [2000]). Further, due to the plaintiff's allegation that her physical injuries caused a loss of enjoyment of life, medical records which reflect the plaintiff's mental condition prior to the date that she allegedly sustained the injuries which are the subject of this action are material and necessary to the issue of damages recoverable on that claim (see *Rothstein v Huh*, 60 AD3d 839, 839-840, 875 NYS2d 250 [2009]).

A review of the Bill of Particulars evinces that the injured plaintiff placed her entire medical condition in controversy with broad allegations of physical injury and loss of enjoyment of life. The injured plaintiff alleges that she still suffers from "pain, swelling, tenderness and limitation of motion and impairment of functions involving the skin, bones, muscles, cartilage, ligaments, tendons, joints, blood vessels, lymphatic system, nerves and each and every tissue of the aforementioned affected and surrounding areas"; as well as the necessity of pain medication; the necessity of anti-inflammatory medication; undergoing "harmful x-ray and radiological testing"; and the inability to enjoy activities she participated in prior to this accident. The plaintiff claims that "the quality of Plaintiff's life and her ability to enjoy all aspects of her life have been diminished due to the effects of the aforementioned injuries". Therefore, the defendants' demands with respect to the plaintiff's medical history are not patently overbroad or burdensome (*Schiavone v Keyspan Energy Delivery NYC*, 89 AD3d 916, 933 NYS2d 310 [2d Dept 2011]). Plaintiff Anna Spadaro having affirmatively placed her entire physical condition in controversy by the claims in her Bill of Particulars has entitled the defendants to disclosure of the subject medical records (see *Rothstein v Chihee Huh*, 60 AD3d 839, 875 NYS2d 250 [2d Dept 2009]; see also *Diamond v Ross Orthopedic Grp.*, 41 AD3d 768, 839 NYS2d 211 [2d Dept 2007]; *Ellerin v Bentley's*, 266 AD2d 259, 698 NYS2d 263 [2d Dept 1999]; *Daniele v Long Island Jewish-Hillside Med. Cntr.*, 74 AD2d 814, 425 NYS2d 363 [2d Dept 1980]).

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Accordingly the motion by the defendants for an order compelling plaintiff Anna Spadaro to provide an authorization to obtain medical records from Dr. Balot is granted. Defendant has demonstrated that such disclosure is material and necessary to the defense of the action and demonstrated that access to these medical records would result in the discovery of admissible or relevant evidence (*see Laguna v Mario's Express Serv.*, 63 AD3d 800, 880 NYS2d 511[2d Dept 2009]; *see also Chervin v Macura*, 28 AD3d 600, 813 NYS2d 746 [2d Dept 2006]).

The plaintiff Anna Spadaro shall provide defense counsel with a current, executed HIPAA-compliant authorization to obtain such records, from Dr. Balot, within thirty (30) days from the date of this Order.

The application seeking pleadings, deposition transcripts, medical records and all nonprivileged documents in connection with plaintiff Anna Spadaro's three prior lawsuits is granted to the extent that the plaintiff shall provide the requested documentation related to the actions entitled *Anna Spadaro v. Angelo G. Ferlito, P.C.*, under index number 27645/2013; and *Anna Spadaro v. Stop & Shop*, under index number 9138/2014; and denied as to the action entitled *Anna Spadaro and Anthony Spadaro v. The Diocese of Rockville Centre, St. John the Baptist Diocesan H.S. and R.C. School of Dance*, under index number 26100/1993. The date of incident on the pending action is November 18, 2016. The *Ferlito* case alleged a date of incident of 2009 and was commenced in 2013, which is 7 years from this incident and 3 years from commencement of this action. The *Stop & Shop* case alleged a date of incident of 2011 and was commenced in 2014, which is 5 years from this incident and 2 years from commencement of the pending action. These two prior actions fall within a reasonable temporal scope of the pending action and are relevant to the plaintiff's loss of enjoyment claim. *The Diocese of Rockville Centre* case was commenced in 1993, which is 23 years from commencement of the pending action and outside of a reasonable temporal scope of the pending action and plaintiff's loss of enjoyment claim.

The plaintiff Anna Spadaro shall provide defense counsel with pleadings, deposition transcripts, medical records and all nonprivileged documents in connection to the actions entitled *Anna Spadaro v. Angelo G. Ferlito, P.C.*, under index number 27645/2013; and *Anna Spadaro v. Stop & Shop*, under index number 9138/2014, within thirty (30) days from the date of this Order. It is

ORDERED that the motion by defendants for an order pursuant to CPLR 3126 dismissing the plaintiffs' complaint for her failure to provide discovery is denied; and it is further

ORDERED that the motion by defendants Combs for an order pursuant to CPLR 3126 prohibiting plaintiff from producing or introducing evidence or testimony in support of her position at trial is granted to the extent that plaintiff, Anna Spadaro, is directed to provide the discovery as heretofore indicated within thirty (30) days from the date of this Order. The Court is mindful that preclusion is an extreme remedy, and therefore has not ordered same at this time. This conditional order of preclusion requires the plaintiff to provide the required discovery or be precluded from offering evidence at trial. If the plaintiff fails to provide the discovery then this conditional order becomes

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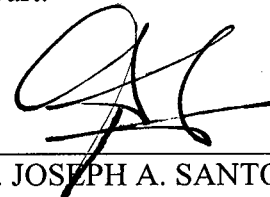
absolute (see *Rothman v Westfield Group*, 101 AD3d 703, 955 NYS2d 204 [2d Dept 2012]); and it is further

ORDERED that counsel for the defendants are directed to serve a copy of this order upon the plaintiffs, as well as their attorneys, and defense counsel by ordinary mail at their last known addresses; and it is further

ORDERED, that the plaintiffs and defendants' attorneys shall appear on **Thursday, April 18, 2019 at 9:30 a.m.** in Courtroom A361 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York, as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in the matter being dismissed or a default being granted.

The foregoing constitutes the decision and Order of this Court.

Dated: March 20, 2019



HON. JOSEPH A. SANTORELLI
J.S.C.