Blackwell v Chase Bank
2020 NY Slip Op 30949(U)
April 16, 2020
Supreme Court, New York County
Docket Number: 153115/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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EUNICE BLACKWELL,

Plaintiff,

- v -

CHASE BANK, A/K/A JP MORGAN CHASE AND COMPANY, THE HAMILTON OWNERS CORPORATION,

Defendants.

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INDEX NO. 153115/2016

MOTION DATE

MOTION SEQ. NO. 006, 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 124-134 were read on this motion to strike pleadings.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 135-149 were read on this motion to compel discovery.

By summons and complaint dated March 25, 2016, plaintiff alleges that on May 8, 2013, she slipped and fell on defendants' premises, sustaining injury. (NYSCEF 138).

Plaintiff moves pursuant to CPLR 3126 for an order striking defendant Chase Bank's answer, precluding it from testifying at trial, or compelling it to provide outstanding discovery, and extending the time in which to file the note of issue. Chase Bank opposes. (Motion seq. six).

Chase moves pursuant to CPLR 3124 and 3126 for an order compelling plaintiff to comply with its discovery demands, and imposing sanctions for her noncompliance. Plaintiff opposes. (Motion seq. seven).

I. MOTION SEQ. SIX

Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all matter material and

necessary in the prosecution or defense of an action . . .” What is “material and necessary” is generally left to the court’s sound discretion and may include “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” (*Andon ex rel. Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 746 [2000], quoting *Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). A party may seek an order compelling compliance or a response to any request, notice, interrogatory, demand, question, or order under CPLR article 31. (CPLR 3124).

When making a disclosure-related motion, the movant must submit an affirmation reflecting efforts made in good faith to resolve the issue raised by the motion. (22 NYCRR 202.7). Plaintiff’s counsel’s affirmation is insufficient, as it does not reflect “the time, place, and nature of the consultations that counsel had with [opposing] counsel to try to resolve the issues raised by the motion.” (*Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 [1st Dept 2019]).

In any event, the movant bears the burden of demonstrating a basis for the production sought (*Freidman v Fayenson*, 41 Misc 3d 1236[A] [Sup Ct, NY County 2013], *affd* 138 AD3d 554 [1st Dept 2016]), and here, plaintiff fails to identify which items of discovery she unsuccessfully sought**.** A conclusory contention that Chase did not comply with her discovery demands does not warrant relief.

II. MOTION SEQ. SEVEN

A. Contentions

1. Chase (NYSCEF 135-145)

Chase contends that after receiving plaintiff’s Medicare records, it saw that plaintiff had been treated by two providers that had not been disclosed. On March 11, 2013, just short of two months before the accident in issue here, she was treated for a “low to moderately severe

problem" at Harlem Hospital's emergency room, and on January 27, 2014, underwent a CT and MRI of her brain and head at St. Luke's Roosevelt Hospital.

Chase argues that plaintiff has placed in issue her medical condition by alleging that her injuries continue to affect and impair her well-being, physical condition, and all of her daily activities, and thus, she bears the burden of demonstrating that the records are not related to her claims. Having learned of these treatments after deposing plaintiff, defendant maintains that it could not have inquired into them.

2. Plaintiff (NYSCEF 147)

Plaintiff argues that Chase is not entitled to records concerning the two prior treatments because she sustained no head or brain injury as a result of her accident. While she acknowledges that records relating to prior treatments may be waived when a loss of enjoyment of life is claimed, she claims no such a loss. Rather, she alleges that while she is able to engage in her daily activities, she does so with pain and discomfort caused by the injuries sustained as a result of her accident.

3. Reply (NYSCEF 149)

Chase contends that plaintiff's opposition is untimely, and thus, should not be considered, and that in any event, as plaintiff claims that her injuries continue to affect her adversely and impair her feeling of well-being, the prior treatments are relevant. It observes that plaintiff offers no affidavit detailing why she received the treatments at issue, and to the extent that her counsel provides such an explanation, it should be disregarded as without a basis of personal knowledge.

B. Analysis

While plaintiff's opposition is untimely (CPLR 2214[b]), Chase submits a reply and makes no claim of prejudice. Consequently, the opposition is considered. (*See Narvaez v*

Wadsworth, 165 AD3d 407, 408 [1st Dept 2018] [untimely opposition considered where defendants "were able to submit a reply, and their assertions of prejudice are vague and unpersuasive"]).

A plaintiff waives the physician-patient privilege as to certain conditions when he or she affirmatively places them in controversy. (*Felix v. Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]). As Chase seeks to discover physician-patient privileged materials, it bears the burden of demonstrating that plaintiff "has affirmatively placed his or her mental or physical condition in issue." (*Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]).

It is undisputed that eight months after her accident, plaintiff underwent a CT and MRI of her brain/head, and that in her bill of particulars, she claims to suffer, *inter alia*, post-traumatic headaches and dizziness as a result of the accident. (NYSCEF 140). Such records are discoverable.

Absent any information relating to plaintiff's treatment on March 11, 2013, it cannot be determined whether the treatment is related to the injuries allegedly incurred as a result of the accident in issue here. The temporal proximity of this prior treatment to the instant accident renders the records potentially necessary and material, and thus, an *in camera* review of the records is warranted. (*See Carcana v New York City Hous. Auth.*, 47 AD3d 523, 524 [1st Dept 2008] [ordering *in camera* review of documents where movant demonstrated that they may be necessary and material]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion is denied in its entirety (seq. six); it is further

ORDERED, that defendant Chase Bank's motion (seq. seven) is granted to the extent of

directing that plaintiff provide it, within 60 days of the date of this order, with a HIPAA-compliant authorization permitting the release of all medical records related to plaintiff's January 24, 2014 treatment at St. Luke's Roosevelt Hospital; it is further

ORDERED, that plaintiff execute, within 60 days of the date of this order, a HIPAA-compliant authorization permitting the release of all medical records related to plaintiff's March 11, 2013 treatment at Harlem Hospital, and that such records be submitted to the court for an *in camera* examination; and it is further

ORDERED, that the parties appear for a compliance conference on Wednesday, July 8, 2020, at 2:15 pm in room 341 at 60 Centre Street if the court has reopened by them.

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4/16/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE