

Mitchell v Port Auth. of N.Y. & N.J.
2021 NY Slip Op 31686(U)
April 26, 2021
Supreme Court, New York County
Docket Number: 150737/2016
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 57

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VANCE MITCHELL,

Plaintiff,

INDEX NO. 150737/2016

MOTION DATE 11/12/2020

- v -

MOTION SEQ. NO. 007

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY, TISHMAN CONSTRUCTION CORPORATION,
TISHMAN CONSTRUCTION CORPORATION OF NEW
YORK, TURNER CONSTRUCTION COMPANY,

**DECISION + ORDER ON
MOTION**

Defendant.

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HON. SHAWN TIMOTHY KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213

VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM
TRIAL CALENDAR

were read on this motion to/for

Upon the foregoing documents, it is

Defendants move for an order pursuant to 22 N.Y.C.R.R. §202.21(e), vacating the Note of Issue and Certificate of Readiness and striking the case from the trial calendar, or in the alternative, granting post Note of Issue discovery and extending the time within which to move for summary judgment. Specifically, Defendants contend that they are entitled to psychological-related treatment records as Plaintiff asserted psychological difficulties in connection with his workers' compensation and Social Security disability benefits claims. Further, Defendants argue that there are several authorizations that Plaintiff has failed to provide.

In opposition, Plaintiff contends that he is not seeking damages for psychological injury in this case. Plaintiff is claiming that he will be limited in his future activities in life, as well as employment, based on permanent disabling physical injuries. Indeed, he is claiming that he will

no longer be able to return to work in the same capacity for the rest of his life, and that he will sustain a \$2.94 million loss in economic damages over his lifetime up to age 75. Further, Plaintiff has asserted a claim for psychological difficulties in connection with his workers' compensation claim based on this incident. He has also included psychological injuries in his claim for Social Security Disability benefits.

Authorizations

Defendants are seeking authorizations for the following providers: The IMA Group; Brightview Radiology, P.C.; Dr. Ira Gould; University Orthopedics; Dr. Alexander Suler; Dr. John Caridi; Interventional PMR Tremont and JSJ Anesthesia.

Plaintiff objects to several of these requests. Specifically, for Industrial Medicine Associates (also known as "IMA Group") Plaintiff argues that the entity is a company that provides physicals through the worker's compensation carrier. Plaintiff also contends that Brightview Radiology did not treat plaintiff for this accident. However, Defendants attach a medical record that shows that Plaintiff did have a right shoulder x-ray through IMA Group that was faxed from Brightview Radiology.

Further, Plaintiff is objecting to providing an authorization for Dr. Ira Gould because Dr. Gould is a cardiologist and plaintiff is not claiming any cardiac injury. However, Defendants allege that Plaintiff is treating with Dr. Gould in connection with his social security disability claims, which are premised upon injuries sustained from the present accident.

May 27, 2017 Post-Accident Records

In connection with Plaintiff's May 27, 2017 accident and subsequent legal case, Defendants seek an authorization for the non-privileged legal file from Plaintiff's counsel and all treatment records – including physical and psychological/psychiatric/mental treatment without

date restriction. In opposition, Plaintiff contends that this case was solely based upon a deprivation of Plaintiff's civil rights. However, the complaint submitted by Plaintiff seeks relief for, "physical, emotional, mental and psychological injuries and damages."

Personal Health Insurance

Defendants seek Plaintiff's records for personal health insurance based on his claims relating to his inability to return to work for the rest of his life. In opposition, Plaintiff contends that Plaintiff's injuries were covered by worker's compensation and that Aetna Insurance and Metropolitan Health were not responsible for any medical provider in this case.

2008 & 2009 Arrest and Incarceration Records

Defendants seek records pertaining to Plaintiff's 2008 and 2009 arrest and incarceration records contending that they relate directly to Plaintiff's psychological condition. In opposition, Plaintiff argues that his incarceration in 2008 and 2009 is completely unrelated to the injuries suffered in this case. Defendants point to Plaintiff's deposition testimony stating that he shot himself in connection with his 2008 arrest, arguing that the fact that "he may have attempted suicide directly relates to the mental and psychological claims." As to the 2009 arrest for driving while under the influence, Defendants claim that those records are necessary "to evaluate Plaintiff's mental status and any treatment he was referred [to]."

Analysis

"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 NY2d 452, 456-457, 470 NYS2d 122 [1983]; *Dillenbeck v Hess*, 73 NY2d 278, 536 NE2d 1126,

539 N.Y.S.2d 707 [1989]; *Koump v Smith*, 25 NY2d 287, 303 NYS2d 858 [1969]). “[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition.” (*Matter of Farrow v Allen*, 194 AD2d 40, 45-46, 608 NYS2d 1 [1st Dept 1993]). For those conditions that plaintiff affirmatively placed at issue, plaintiff “may not insulate from disclosure material necessary to the defense concerning that condition.” (*Hoening v Westphal*, 52 NY2d 605, 610, 439 NYS2d 831 [1981]; *Jobe v Quick Coin Four, Inc.*, No. 157082/2018, 2020 WL 3545688, at *2 [2020]).

In resolving this discovery dispute, the court must balance the competing interests presented and “the need for discovery must be weighed against any special burden to be borne by the opposing party” (*Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954, 705 NE2d 1197, 683 NYS2d 156 [1998] [citations and internal quotation marks omitted]).

Plaintiff’s allegations of loss of enjoyment of life based on injuries sustained in this accident that impact his pre-accident way of life demonstrate that records as to prior treatment are material and necessary to the defense of the action and the damages claimed by Plaintiff (*see Brito v Gomez*, 33 NY3d 1126, 1127 [2019]; *Rom v Eurostruct, Inc.*, 179 AD3d 418 [1st Dept 2020]; *McGlone v Port Auth of NY & New Jersey*, 90 AD3d 479, 480 [1st Dept 2011]; *Rega v Avon Prods., Inc.*, 49 AD3d 329, 330 [1st Dept 2008]).

“By pleading loss of enjoyment of life . . . based on permanent, disabling physical injuries, the plaintiff would be deemed to have waived the physician-patient privilege for his or her entire medical history” (*Mcleod v Metropolitan Transportation Authority*, 47 Misc3d 1219 [A], 17 NYS3d 383 [2015]; *see also, Vanalst v City of New York*, 276 AD2d 789, 715 NYS2d

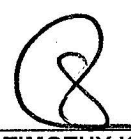
422 [2d Dept 2000] [holding that records of prior treatment or injury to a body part that was not at issue in the lawsuit were discoverable because the plaintiff asserted a claim for loss of enjoyment of life for the injuries at issue]).

Accordingly, Defendants are entitled to the authorizations requested as they pertain to The IMA Group, Brightview Radiology, P.C., Dr. Ira Gould, University Orthopedics; Dr. Alexander Suler, Dr. John Caridi, Interventional PMR Tremont, JSJ Anesthesia, However, Defendants have not met their burden in demonstrating that records from Aetna Insurance and Metropolitan Health, Plaintiff's federal lawsuit, or Plaintiff's 2008 and 2009 arrests are necessary and material to the defense of the present action and as such, are not entitled to receive authorizations or records related to these demands.

It is hereby,

ORDERED that Defendants' motion to strike is granted to the extent that post-Note of Issue discovery as outlined above is granted and the time to file dispositive motions is extended to 90 days from date of entry of this order; and it is further

ORDERED that Plaintiff shall provide the authorizations outlined above to Defendants within 7 days of date of entry of this order.

<u>4/26/2021</u> DATE	 SHAWN TIMOTHY KELLY, J.S.C.				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	<input type="checkbox"/>	FIDUCIARY APPOINTMENT