

<b>Hogdahl v Lcor 55 Bank St., LLC</b>
2021 NY Slip Op 32087(U)
March 23, 2021
Supreme Court, Westchester County
Docket Number: 70223/2017
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER - COMPLIANCE PART

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DAVID HOGDAHL,

Plaintiff,

-against-

LCOR 55 BANK STREET, LLC, WHITE PLAINS  
NORTH TOWER, LLC, LRC CONSTRUCTION, LLC,  
and BAKER CONCRETE CONSTRUCTION, INC.,

Defendants.

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BAKER CONCRETE CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

REBAR REINFORCEMENT PLACERS,

Third-Party Defendant.

-----X

LEFKOWITZ, J.

The following papers were read on these motions by third-party defendant Rebar Reinforcement Placers (“RRP”) (sequence 6) for an order compelling plaintiff to testify as to his drug and alcohol use, by defendants LCOR 55 Bank Street, LLC, LRC Construction, LLC, and WP North Tower, LLC s/h/a White Plains North Tower LLC (collectively referred to as “LCOR”)( sequence 7) compelling plaintiff to provide discovery and testimony regarding his drug and alcohol use, and by defendant/third-party plaintiff Baker Concrete Construction, Inc. (“Baker”) (sequence 8), compelling plaintiff to provide testimony regarding his drug and alcohol use and any related criminal or medical issues, the production of documents related to his claim for future lost earnings including the production of all job applications sent or filed since the date of loss and all responses from prospective employers, a copy of plaintiff’s resume submitted to prospective employers and authorizations for plaintiff’s current and prior treating mental health providers, and for such other and further relief as this Honorable Court may deem just and proper:

*Motion Sequence 6:*

Notice of Motion; Affirmation in Support, Exhibits A-I; Affirmation of Good Faith  
Affirmation in Opposition, Exhibit 1  
Affirmation in Reply  
Affidavit of Service

*Motion Sequence 7:*

Notice of Motion; Affirmation in Support, Exhibits A-G; Affirmation of Good Faith  
Affirmation in Opposition, Exhibit 1  
Affirmation in Reply  
Affidavits of Service

*Motion Sequence 8:*

Notice of Motion; Affirmation in Support; Exhibits A-J; Affirmation of Good Faith  
Affirmation in Opposition, Exhibit 1  
Affirmation in Reply  
Affidavits of Service

Upon the foregoing papers, these motions are decided as follows:

Plaintiff commenced this action on December 11, 2017 by the filing of a summons and verified complaint (Ex. A).<sup>1</sup> Plaintiff seeks damages resulting from personal injuries allegedly suffered as the result of a construction site accident occurring on September 9, 2016 where he was working as an ironworker/ lather (Ex. A). Baker and LCOR filed their answers on January 29, 2018 and February 14, 2018, respectively (Exs. B and C, respectively). On or about November 13, 2019 Baker filed a third-party summons and complaint against RRP (Ex. D). RRP served its verified answer on or about February 7, 2020, (Ex. E). Plaintiff's bills of particulars (sequence 6, Ex. F; sequence 7, Ex. D, and sequence 8, Ex. E) claim injuries to his lumbar spine, including a June 2018 lumbar laminectomy, as well as a lacerated liver and that he "has been incapacitated as an ironworker to date." Plaintiff claims, inter alia, that as a result of the accident he cannot return to his prior work as an ironworker/ lather, nor any work in the construction field that requires physical labor. He claims future economic loss in the range of \$7,686,150 and \$9,393,818, including loss of future wages, pension, annuity, and health insurance coverage (plaintiff's Economic Assessment, dated July 9, 2020, Ex. G).

During discovery movants received a preoperative toxicology report dated May 31, 2018 prepared in connection with plaintiff's June 2018 lumbar laminectomy (Ex. H). The toxicology report shows that plaintiff tested positive for cocaine, cannabinoids, and benzodiazepines. Under the "Social & Psychosocial Habits" heading of the report the "Alcohol" subsection indicates that plaintiff drank beer one to two times per week and the subsection for "Substance Abuse" states "Marijuana."

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<sup>1</sup> References to exhibits are to those annexed to sequence 6 unless otherwise stated.

Plaintiff appeared for a deposition conducted by counsel for LCOR and Baker on March 11, 2019. During that deposition, he testified that at the time of the deposition he was considered 75% disabled, was unable to work as an ironworker/lather, and that he had unsuccessfully applied for about a dozen jobs (Deposition transcript, sequence 8, Ex. F).

Plaintiff appeared for a further deposition conducted by counsel for RRP on October 20, 2020. During the deposition plaintiff's counsel objected to and instructed plaintiff not to answer certain questions concerning his drug and alcohol use as follows.

- Q. How often do you presently drink alcohol?  
A. I don't drink anymore.  
Q. Okay, Since when?  
A. Four months ago

Plaintiff's counsel objected to this line of questioning as being palpably irrelevant to plaintiff's claims and directed plaintiff not to answer (Deposition transcript, Ex. I, pp. 49-53). Plaintiff's counsel also directed him not to answer questions about his "illicit" drug use and whether he had a history of drug addiction or substance abuse (*id.* at pp. 53-54). Plaintiff's counsel further objected and directed plaintiff not to answer questions concerning the toxicology report and plaintiff's drug use (*id.* at pp. 82- 85). Plaintiff's counsel directed plaintiff not to answer questions concerning the parts of the toxicology report that reflected plaintiff's alcohol and marijuana use at the time of the report (*id.* at p. 93 ).

During the deposition, plaintiff was shown portions of the surveillance video and was questioned as follows:

- Q. And there at the 20-second mark, what is that you're smoking?  
A. It's a bowl  
Q. What's inside?  
A. Marijuana.

- Q. And this is the same morning at 10:18 a.m., that's you driving, operating your Nissan Ultima, and this is the Samaritan Daytop Village. Do you know what type of facility that is? Daytop Rockland?  
A. It's a rehab facility.  
Q. And how do you know that?  
A. Because I've---

MR DOMAN: We're getting a little far [sic] field here, but you know - - we're getting a little far [sic] field. You're starting to get into areas - -

MR. LEE: You can answer the question.

MR. DOMAN: Go ahead. Answer the question.

- A. What was it again?  
Q. How do you know about Daytop Rockland?  
A. I've heard of it before.  
Q. Okay. Do you know anyone who's ever been in Daytop Rockland?

A. No.

Q. Why were you over in that location on this day on June 17<sup>th</sup>?

A. I could have been having a meeting. I'm not sure.

Q. What kinds of meeting?

A. With a group - - a group meeting.

Q. What kind of group meeting?

MR. DOMAN: That's it.

MR. LEE: Why? It's a group meeting. It's relevant. Why was he at that location?

MR. DOMAN: No. That's it.

MR. LEE: Why? Why? Why? What's the basis of it?

MR. DOMAN: You're getting into drug rehab now and it's going to it and you're not entitled.

(*id.* at pp. 132-135).

At this point plaintiff's counsel directed plaintiff not to answer the question. Plaintiff then testified to having smoked marijuana five days later. Plaintiff's counsel objected and directed plaintiff not to answer when asked how often he smoked marijuana (*id.* at p. 137).

On or about November 10, 2010 Baker served a notice for discovery and inspection seeking, inter alia, plaintiff's resume, copies of plaintiff's indeed.com job applications confirmation emails, and plaintiff's job applications filed since the date of the loss (*id.*).

#### *The Parties' Contentions*

Movants argue that plaintiff's drug and alcohol use is relevant as it impacts plaintiff's health and life expectancy. Movants argue that plaintiff's health is a factor to be considered when assessing the extent of plaintiff's loss of future earning capacity. Movants further contend that since plaintiff's medical records indicate his use of drugs and alcohol days prior to his 2018 lumbar surgery, his drug use is also relevant to his physical recovery from his alleged injuries. Movants state that plaintiff's testimony relating to his drug and alcohol use is relevant and necessary. Baker and LCOR argue that authorizations to obtain records related to treatment pertaining to his drug and/or alcohol abuse are also necessary. Movants contend that without the foregoing discovery they will be unable to adequately defend this lawsuit and will be prejudiced thereby. Baker argues that it is also entitled to records related to plaintiff's efforts to seek alternative employment since the accident and are related to plaintiff's ability to work as a lather or in an alternative field.

In opposition plaintiff argues that movants seek authorizations and testimony for conditions not placed in controversy and which are protected by the physician-patient privilege. Plaintiff relies on *Brito v Gomez*, 33 NY3d 1126 [2019] for the proposition that a litigant in a personal injury action claiming lost earnings and loss of enjoyment of life does not waive the physician-patient privilege with respect to injuries not claimed in the bill of particulars, unless those injuries directly impact upon the injuries claimed by the litigant. With respect to Baker's motion which seeks production of job applications responses from respective employers and

plaintiff's resume, plaintiff refers to his November 23, 2020 response providing authorizations for those records (Plaintiff's Ex. 1).

In reply, RRP argues that by claiming future earning capacity and benefits plaintiff has placed his general health into controversy. RRP contends that plaintiff's reliance on *Brito v Gomez* is misplaced because that court allowed defendants in that case to obtain records for conditions that were not affirmatively placed in controversy because they were relevant to plaintiff's claims for lost earnings and loss of enjoyment of life. RRP argues that plaintiff's history of drug and alcohol use directly relates to the plaintiff's damages claims.

In reply, LCOR also argues that plaintiff's reliance on *Brito* is misplaced as defendants were allowed to obtain records for injuries not affirmatively placed in controversy to allow defendants to defend against plaintiff's future damages claims. LCOR argues that here plaintiff has by his testimony, medical records and economic assessment placed these conditions in controversy as they may impact on his life expectancy, health and ability to work. Movants note that plaintiff does not deny a history of substance abuse.

In reply, Baker argues that plaintiff has put these issues into controversy and the jury in assessing plaintiff's future lost earning capacity is entitled to consider plaintiff's age, health condition and other factors predating the injury.

#### ANALYSIS

The issue here is whether plaintiff's history of drug and alcohol use is relevant to his claims for lost earnings and other future economic damages. Pursuant to CPLR 3101(a), a party is entitled to "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968] [internal quotation marks omitted]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden 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 (*Foster*, 74 AD3d at 1140). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

It is well settled that a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue (*Fox v Marshall*, 91 AD3d 710 [2d Dept 2012]; *Lombardi v Hall*, 5 AD3d 739, 740 [2d Dept 2004]). However, a party does not waive the privilege with respect to unrelated physical or mental conditions or treatment (*McLane v Damiano*, 307 AD2d 338 [2d Dept 2003]; *Cottrell v Weinstein*, 270 AD2d 449 [2d Dept 2000]; *Kohn v Fisch*, 262 AD2d 535 [2d Dept 1999]). "[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 [citation omitted] 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 [1983]; see CPLR 3121 [a]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 79 AD3d 1092 [2d Dept 2010]).

In *Coddington v Lisk* (249 AD2d 817 [3d Dept 1998]), the court held that plaintiff’s drug addiction records may lead to evidence bearing on plaintiff’s claim for personal injuries allegedly sustained in an automobile accident and should be disclosed in view of plaintiff’s allegations of “permanent weakness and instability,” “permanent effect of pain,” and “loss of enjoyment of life.” In *Steward v New York City Housing Authority* (302 AD2d 449 [2d Dept 2003]), the court held that plaintiff’s alcohol and substance abuse records should be disclosed as they may be useful in preparation for trial and lead to relevant evidence bearing on the plaintiff’s claim for damages for personal injuries.

More recently, in *Brito v Gomez* (33 NY3d 1126 [2019]) the Court of Appeals found that although she had not claimed injuries to her knees, plaintiff’s claims for lost earnings and loss of enjoyment of life affirmatively placed her prior knee treatment into controversy. “By seeking future lost earnings, the plaintiff affirmatively places at issue the plaintiff’s health and ability to work, and the plaintiff’s work life expectancy had the accident not occurred (*McLeod v Metro. Transp. Auth.*, 47 Misc3d 1219(A) [Sup Ct, New York County 2015]). “[I]n assessing the extent of a plaintiff’s loss of earning capacity in the future, the jury was entitled to consider plaintiff’s age, health condition and other factors predating the subject injury (*Melito v Genesee Hosp.*, 167 AD2d 842, 842 [4th Dept 1990]; see *Schneider v. Memorial Hosp. for Cancer and Allied Diseases*, 100 A.D.2d 583, 584 [2d Dept 1984]; PJI 2:290).

Based upon the foregoing and the particular facts of this case, including the preoperative report indicating plaintiff’s use of illegal substances, the surveillance tape showing plaintiff’s use of marijuana on several occasions, and plaintiff’s own testimony concerning his use of marijuana, movants have established that plaintiff has a history of illegal drug use. Insofar as a history of substance and alcohol abuse can affect the user’s general health and life expectancy,<sup>2</sup> movants should have been allowed to question plaintiff concerning his drug and alcohol use.<sup>3</sup> Accordingly, movants are entitled to further question plaintiff concerning his history of drug and alcohol use as it may affect his life expectancy which relates directly to plaintiff’s claim for lost future earnings.

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2 See generally, Massachusetts General Hospital. "Many recovering from addiction have chronic health problems, diminished quality of life: More than a third of those in recovery have health problems related to previous substance use." ScienceDaily, 21 March 2019.

[www.sciencedaily.com/releases/2019/03/190321092201.htm](http://www.sciencedaily.com/releases/2019/03/190321092201.htm);

<https://americanaddictioncenters.org/learn/long-term-effects-drug-abuse/>

<https://www.mayoclinic.org/diseases-conditions/alcohol-use-disorder/symptoms-causes/syc-20369243>;

<https://www.rethinkingdrinking.niaaa.nih.gov/How-much-is-too-much/Whats-the-harm/What-Are-The-Risks.aspx>).

<sup>3</sup> Although movants were unable to query plaintiff concerning his alcohol history, if established, a history of alcohol abuse would also be relevant to the issues of damages for lost future earnings.

Insofar as plaintiff has provided discovery responses with his opposition, and there having been no mention in Baker's reply of any deficiencies therein, it appears that branch of Baker's motion has been rendered moot. The portion of Baker's motion which sought discovery concerning criminal issues related to plaintiff's drug and alcohol history is denied as Baker has failed to demonstrate the relevance of such discovery to the injuries and damages claimed. LCOR and Baker seek authorizations concerning plaintiff's drug and alcohol treatment. Although not raised by plaintiff, the Court notes the safeguards provided by the legislature concerning discovery of chemical dependency services (see Mental Hygiene Law §§22.05 and 33.13) and finds that on the record presently before it that movants have not established that the "the interests of justice" in directing plaintiff to provide authorizations for his chemical dependency treatment "significantly outweigh the need for confidentiality" (*Del Terzo v Hosp. for Special Surgery*, 95 AD3d 551, 553 [1st Dept 2012]). This determination should not be construed as limiting the ability of movants to serve post-deposition demands, as warranted by plaintiff's further deposition testimony, for authorizations for plaintiff's relevant treatment records, or to seek further judicial relief, if necessary, concerning those demands.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

In light of the foregoing it is:

ORDERED that motion sequences 6, 7, and 8 are granted to the extent that on or before April 21, 2021 plaintiff shall appear for a further deposition limited to his drug and alcohol use and any questions flowing natural therefrom; and it is further

ORDERED that the portions of motion sequences 7 and 8 seeking authorizations for plaintiff's alcohol and drug treatment records are denied at this time, with leave to renew, upon proper circumstances consistent with this Order; and it is further

ORDERED that the portion of motion sequence 8 seeking authorizations concerning plaintiff's job applications, responses from respective employers, and plaintiff's resume, is denied as moot; and it is further

ORDERED that all other requests for relief not otherwise specified are denied; and it is further

ORDERED that the parties are directed to appear for the previously scheduled virtual compliance conference with Court Attorney Referee Jeannette Millner via Microsoft Teams, or as the Court shall otherwise direct, in accordance with the Virtual Courtroom Protocol implemented in the Ninth Judicial District, on April 22, 2021 at 11:30 a.m. The parties will be contacted by the Court with further instructions concerning this appearance; and it is further

ORDERED that movants are directed to serve a copy of this Decision and Order, with notice of entry, upon plaintiff within five days of entry, with proof of such service filed to

NYSCEF within three days thereof, or as the Court shall further direct due to the COVID-19 health emergency.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
March 23, 2021

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HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF