

Strzyz v A.W. & S. Constr. Co. Inc.
2022 NY Slip Op 31636(U)
May 19, 2022
Supreme Court, New York County
Docket Number: Index No. 161113/2019
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

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ARTHUR STRYZ, JANA STRYZ,

Plaintiffs,

- v -

A.W. & S. CONSTRUCTION CO. INC.,
99 HUDSON STREET ASSOCIATES, LLC,
99 HUDSON STREET OWNERS LLC,
OLSHAN PROPERTIES, MALL PROPERTIES, INC.,
99 HUDSON CONDOMINIUMS,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 65-83 were read on this motion for discovery.

Third-party defendants L&L Stone & Tile, LLC and L&L Painting Co., Inc. (movants) move pursuant to CPLR 3124 for an order directing plaintiffs to provide them with certain unrestricted medical authorizations. Plaintiffs oppose.

I. PERTINENT BACKGROUND

This action arises from an accident that occurred on November 1, 2019 at a construction site in Manhattan, at which plaintiff, Arthur Strzyz, then on a job, was injured when he fell from scaffolding. Plaintiffs commenced this action advancing causes of action for negligence, violations of Labor Law §§ 200, 240(1) and 241(6), and violations of Industrial Code §§ 23-1.8, 23-1.15, 23-5.1, 23-5.2, 23-5.3 and 23-5.18. (NYSCEF 85). In their bill of particulars, plaintiffs claim that Arthur sustained the following injuries: “[s]mall to moderate left pleural effusion without pneumothorax, [f]ractures to the 1st, 6th 7th 10th and 11th left [r]ibs, grade 5 multifocal

splenic lacerations with hemoperitoneum, [l]eft transverse process fractures of T6,T7, T8, T9 and T10, small left hemothorax...” (NYSCEF 72).

With the parties’ consent, the records sought by movants, pre-accident treatment records of Adedayo Aderibigebe, MD, were previously submitted to the court for an *in camera* inspection, which yielded the determinations that they contain no indication that Arthur had previously experienced or been treated for back pain, that he had received warnings about suboxone or been advised not to work while taking it, and that he had experienced side effects from suboxone. It was also determined that the records otherwise contain no relevant or discoverable information. (NYSCEF 78). After advising the parties of the outcome of the *in camera* review, movants were granted leave to file the instant motion.

II. CONTENTIONS

Movants allege that Arthur’s post-accident medical records, obtained in the course of discovery, reveal that he had been prescribed suboxone by Dr. Aderibigebe for the treatment of opioid addiction and that Arthur had taken it on the day of his accident. They also observe that video surveillance footage reflects that Arthur had passed out before he fell, and that in testimony given at a 50-h hearing in a related matter, Arthur admitted having taken suboxone both for opioid addiction and for back pain. Movants thus seek authorization for the records which had been subject to the aforementioned *in camera* review, namely, Aderibigebe’s pre-accident records and those of his practice, Crown Family Medical, arguing that they are relevant and that Arthur waived any claim of statutory privilege due to his prior voluntary authorization of post-accident substance abuse treatment records.

In opposition, plaintiffs note that the determination that the records contain no mention of a prior back injury warrant a finding that the interests of justice do not significantly outweigh the

need for confidentiality of Arthur's privileged drug treatment records, as they contain no indication that he had drugs in his system at the time of the accident other than those prescribed to him. They moreover observe that movants offer no expert evidence that would establish a causal connection between plaintiff's alleged chemical dependency and the cause of the accident, his ability to recover from his injuries, or his prognosis for future enjoyment of life, and they deny that the prior release of post-accident medical records waives the physician-patient privilege for records generated by the same medical provider before the date of an accident.

In reply, movants argue that as plaintiffs' opposition is untimely, it should not be considered. If considered, they argue that the records are discoverable as Arthur placed his entire mental health at issue and that the lawful prescription of suboxone does not disprove that it may have caused or contributed to his loss of consciousness at the job site. While they offer no expert evidence, they claim to have submitted sufficient evidence to establish the relevance of the records.

III. DISCUSSION

Absent any demonstrated prejudice, and in light of movants' submission of a reply affirmation addressing plaintiffs' arguments on the merits, the opposition is considered. (*Chrin v Gate of Heaven Cemetery*, 190 AD3d 516, 517 [1st Dept 2021]; *Serradilla v Lords Corp.*, 117 AD3d 648, 649 [1st Dept 2014]).

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." (*Forman v Henkin*, 30 NY3d 656, 661 [2018], 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).

A party waives the physician-patient privilege when it voluntarily and affirmatively inserts into litigation the issue of a physical or mental defect or condition. (*Rega v Avon Products, Inc.*, 49 AD3d 329 [1st Dept 2008]). Such a waiver is limited in scope to the conditions affirmatively placed in controversy. (*Jerez v 2141, LLC*, 191 AD3d 407 [1st Dept 2021]; *Lafata v Verizon Communications Inc.*, 180 AD3d 575 [1st Dept 2020]; *Rohan v Turner Constr. Co.*, 158 AD3d 436 [1st Dept 2018]; *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]). The burden of proving that a party's mental or physical condition is in controversy is on the party seeking disclosure of medical records. (*Koump v Smith*, 25 NY2d 287, 300 [1969]; *Budano v Gurdon*, 97 AD3d 497, 498 [1st Dept 2012]). Additionally, a party seeking discovery of mental health, alcohol abuse or substance abuse records must demonstrate that "the interests of justice significantly outweigh the need for confidentiality." (Mental Hygiene Law §§ 33.13 [c] [1], 22.05 [b]; *James v 1620 Westchester Ave. LLC*, 147 AD3d 575, 576 [1st Dept 2017]).

Notwithstanding the contents of Aderibigebe's post-accident records, given the determination that the pre-accident records that were examined *in camera* contain no information that is material and necessary to movants' claim that Arthur's use of suboxone may be related to the accident or Arthur's claimed injuries, movants fail to meet their burden.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of third-party defendants L&L Stone & Tile, LLC and L&L Painting Co., Inc. to compel discovery is hereby denied; and it is further

ORDERED, that the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before June 22, 2022, or appear for the conference in room 341, 60 Centre Street, New York, New York, on June 22, 2022 at 2:15 pm or virtually if necessary.

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BARBARA JAFFE, J.S.C.

5/19/2022
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: