

<b>Greene v Knickerbocker Bar &amp; Grill, Inc</b>
2022 NY Slip Op 33563(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 153552/2019
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

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**INDEX NO. 153552/2019**

HILLARY GREENE,

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

KNICKERBOCKER BAR AND GRILL, INC, U 9  
RESTAURANT ASSOCIATES, INC., KNICKERBOCKER  
SALOON, CHARLES H GREENTHAL MANAGEMENT  
CORP, UNIWAY PARTNERS, L.P., EMPIRE STATE  
REALTY TRUST, 9TH STREET POOH LLC, JOHN DOE,  
and JOHN DOE CORPORATION,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISCOVERY.

In this personal injury action commenced by plaintiff Hillary Greene, defendants Charles H. Greenthal Management Corp., Uniway Partners, L.P., and Empire State Realty Trust (collectively "Greenthal") move, in effect, pursuant to CPLR 3124, to compel plaintiff to comply with Greenthal's demand for authorizations for Medicare, Medicaid, and/or any other medical and health insurance records. Defendant U-9 Restaurant Associates, Inc. d/b/a Knickerbocker Saloon ("U-9") supports the motion and plaintiff opposes the same. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the application is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case arises from an incident on January 6, 2018 in which plaintiff allegedly fell on a defective sidewalk and sustained injuries to her wrists. Docs. 1, 43. Plaintiff commenced this

action by filing a summons and complaint on April 5, 2019. Doc. 1. Greenthal joined issue by its answer filed August 21, 2019. Doc. 4. Concomitantly with the service of its answer, Greenthal demanded, inter alia, HIPAA-compliant authorizations for the release of: plaintiff's medical, hospital, and ambulance records relating to the injuries she sustained in the alleged incident; all collateral sources for the 5-year period preceding the accident; and medical and hospital records and reports from health care providers who treated plaintiff for any prior or subsequent injuries "similar to those injuries being alleged in [this action]". Doc. 4.

A preliminary conference was held in this matter on February 1, 2021. Doc. 45. In the preliminary conference order ("PCO"), this Court directed, inter alia, that plaintiff was "[t]o provide authorizations to Greenthal only by 2/8/21." Doc. 35.

In a February 26, 2021 response to Greenthal's discovery demands, plaintiff represented that Greenthal's demand for Medicare information was "inapplicable" and, somewhat mysteriously, stated "2) Demand for Subsequent or Prior Injury – As per Court Order", although no such court order filed on NYSCEF directed plaintiff to provide such information. Doc. 43. Although plaintiff's response referred to "previously exchanged authorizations", no such authorizations are filed on NYSCEF either. Doc. 43.

Greenthal now moves, by order to show cause, to compel plaintiff to provide it "with HIPAA authorizations for the complete records of any and all of plaintiff's medical or health insurance providers including, but not limited to, Medicare, Medicaid, or any form of private or public health insurance", along with such other relief this Court deems proper under the circumstances. Doc. 48. In support of the motion, Greenthal argues that it is entitled to a response to its demand for authorizations for plaintiff's medical insurance records; that plaintiff was ordered at paragraph 3 of the PCO to provide the authorizations demanded by Greenthal and

failed to do so; plaintiff incorrectly asserted at a September 27, 2021 discovery conference that collateral source information is only discoverable pursuant to CPLR 4545 after a liability verdict; and that it is not seeking collateral source information from plaintiff to determine whether there should be an offset from plaintiff's recovery in this action, but rather to determine whether plaintiff was ever treated for injuries similar to those claimed herein.<sup>1</sup> Doc. 41.

Counsel for U-9 submits an affirmation in support of the motion in which he substantially reiterates Greenthal's arguments. Doc. 50.

In opposition to the motion, plaintiff argues that: Greenthal's demand is improper since it fails to specify any time period for which records are demanded and because plaintiff "does not possess a collateral source claim" and represented as much in her response to Greenthal's combined demands (Doc. 4 at par. 15; Doc. 43); Greenthal's claim that the injuries plaintiff sustained in her 2017 accident were identical to those she sustained in the accident which is the subject of this action is completely speculative; and Greenthal has already been provided with medical record authorizations unrestricted as to date and including the injuries alleged herein as well as any prior injuries. Doc. 52.<sup>2</sup>

### LEGAL CONCLUSIONS

CPLR 4545 provides, *inter alia*, that:

In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care . . . . custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any

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<sup>1</sup> Specifically, Greenthal asserts that the "mechanism" of a March 2017 accident in which plaintiff was allegedly injured and, as a result of which, she commenced a 2018 lawsuit under N.Y. Co. Ind. No. 154331/18, was identical to the mechanism of the accident alleged in the captioned action, which "raises the inference that the injuries were identical as well." Thus, urges Greenthal, it is entitled to the bill of particulars from the plaintiff's 2018 action. Doc. 43.

<sup>2</sup> Although plaintiff cites a compliance conference order dated November 16, 2015 and annexed as Exhibit A as proof that the said authorizations were provided, no such order appears to have been filed on NYSCEF. In any event, such an order would not only have predated this action, but the incident giving rise to the same as well.

such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source . . .

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If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits.

Defendant bears the burden of establishing, by clear and convincing evidence, that it is entitled to an offset for any collateral source payment that represents reimbursement for a category of loss corresponding to a category of loss for which damages are awarded in this action (*see* CPLR 4545; *Stolowski v 234 E. 178th St. LLC*, 89 AD3d 549, 549 [1st Dept 2011]) citing *Oden v Chemung County Indus. Dev. Agency*, 87 NY2d 81 [1995]). Therefore, the disclosure of any benefits that were, or will be, received by plaintiff is material and necessary in defense of this action (*see* CPLR 3101; *Stolowski v 234 E. 178th St. LLC*, 89 AD3d at 549). Despite Greenthal's acknowledgement that it seeks collateral source information in an attempt to ascertain whether plaintiff had any prior or subsequent injuries to her wrists which, plaintiff claims, is an improper use of such information, Greenthal demanded the same and is legally entitled to it. Specifically, if a verdict is rendered in plaintiff's favor, Greenthal will have the opportunity to establish that it is entitled to a collateral source setoff and "[p]retrial discovery is available so defendants can acquire information and documents that may later be used to support a motion for a collateral source hearing" (*Stolowski v 234 E. 178th St. LLC*, 89 AD3d at 549 quoting *Firmes v Chase Manhattan Auto. Fin. Corp.*, 50 AD3d 18, 35 [2008], *lv denied* 11 NY3d 705 [2008]).

Despite plaintiff's contention that she does "not maintain a [c]ollateral source [c]laim at this time" (Doc. 52 at par. 4), she alleges that she incurred a litany of expenses as a result of the alleged incident, including medical and hospital costs. Doc. 43 at par. 14. Thus, it is possible that she was reimbursed, in whole or in part, for such expenses by insurance or another source. Therefore, plaintiff is to provide, within 20 days from the entry of this order, a duly executed HIPAA-compliant authorization for any collateral sources which reimbursed her for medical, hospital, or other expenses arising from the incident alleged herein. If plaintiff was not reimbursed by any collateral sources, then she is to provide an affidavit to this effect within the same time frame.

Plaintiff is also required to provide, within 20 days of the entry of this order, a response to Greenthal's demand for duly executed HIPAA-compliant authorizations for any treatment she underwent for prior or subsequent wrist injuries. Since Greenthal requested records concerning treatment for injuries the same as, or similar to, those alleged in this action, its request was "appropriately tailored and reasonably calculated to yield relevant information" (*See Kennedy v Ware*, 201 AD3d 589, 590 [1<sup>st</sup> Dept 2022] [citation omitted]). Although this relief is not specifically demanded in Greenthal's order to show cause or the wherefore clause of the said application, it appears from the motion that this relevant information is the crux of what it is seeking (*see generally Winslow v NY-Presbyt./Weill-Cornell Med. Ctr.*, 203 AD3d 533, 533-534 [1<sup>st</sup> Dept 2022] [citations omitted]). Since this Court is empowered to grant such other relief as it deems just and proper, and there is no indication in the motion papers that plaintiff has provided such authorization(s), it must now provide the same.

This Court also determines that the records sought from plaintiff's health insurance providers are "material and necessary" to the defense of this action (CPLR 3101 [a]) insofar as

they may contain information “reasonably calculated to lead to relevant evidence” (*Milligan v Bifulco*, 153 AD3d 1624, 1624-1625 [4<sup>th</sup> Dept 2017] [citation omitted]). Therefore, plaintiff must provide, within 20 days of entry of this order, HIPAA-compliant authorizations allowing for the release of her health insurance records to this Court, which will conduct an *in camera* inspection to ensure that no irrelevant information is disclosed to defendants (*Milligan v Bifulco*, 153 AD3d at 1625 [citation omitted]).

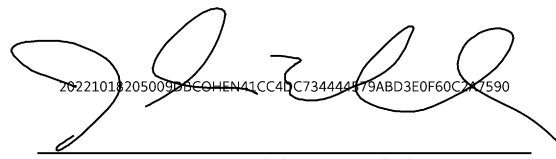
The remainder of the parties’ contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the motion by defendants Charles H. Greenthal Management Corp., Uniway Partners, L.P., and Empire State Realty Trust seeking to compel plaintiff to provide HIPAA-compliant authorizations for the complete records of all medical or health insurance providers including, but not limited to, Medicare, Medicaid, or any form of private or public health insurance, is granted as follows:

- a. Within 20 days of the entry of this order, plaintiff shall provide HIPAA-compliant authorizations allowing for the release of her health insurance records to this Court, which will conduct an *in camera* inspection to determine which, if any, of the records are to be exchanged with defense counsel;
- b. Within 20 days of the entry of this order, plaintiff shall provide a duly executed HIPAA-compliant authorization for any collateral sources which reimbursed her for medical, hospital, or other expenses arising from the incident alleged herein and, if plaintiff was not reimbursed by any collateral sources, then she is to provide an affidavit to this effect within the same time frame; and
- c. Within 20 days of the entry of this order, plaintiff shall provide a duly executed HIPAA-compliant authorization(s) for any treatment she underwent for prior or subsequent wrist injuries; and it is further

ORDERED that the parties shall appear for a compliance conference on January 10, 2023 at 3:30 p.m., at which time they will provide for the exchange of any remaining document discovery and will be required to schedule depositions if such depositions have not been conducted by that time.



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DAVID B. COHEN, J.S.C.

10/17/2022  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	<input type="checkbox"/>