

Mooney v Gallagher

2024 NY Slip Op 34744(U)

March 15, 2024

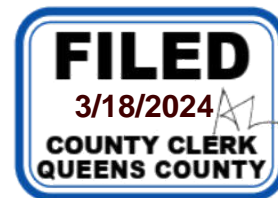
Supreme Court, Queens County

Docket Number: Index No. 720814/2019

Judge: Phillip Hom

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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

PRESENT: HON. PHILLIP HOM PART 14

Justice

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BRIAN J. MOONEY,

Plaintiff,

- v -

DAVID GALLAGHER, STEPHEN GALLAGHER,

Defendants.

-----X

INDEX NO. 720814/2019

MOTION DATE 11/30/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 57, 58, 59, 60, 61, 62, 63, 89, 93

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, it is ordered that ordered that this motion (Seq. No. 1) is determined as follows:

Plaintiff Brian J. Mooney ("Plaintiff") commenced this action for personal injuries allegedly sustained as the result of a slip-and-fall at the subject premises owned by defendants David Gallagher and Stephen Gallagher ("Defendants"), located at 22-14 125th Street, College Point, New York, on or about March 15, 2019 (EF 44, 50). Personal injuries alleged include, among other things, paralysis, head trauma, neck trauma, back trauma, Covid-19, and exacerbation of pre-existing mental health disorders (EF 50, 51).

During discovery in this matter, Plaintiff exchanged HIPAA compliant authorizations to allow Defendants to obtain Plaintiff's medical records (EF 24). These authorizations did not include a date range and allowed access to records for Plaintiff's entire medical history. Additionally, Plaintiff allowed access to records including alcohol/drug treatment, mental health information, and HIV-related information (EF 24). Defendants obtained the records and in response, exchanged an expert report discussing pre-accident medical treatment.

Plaintiff now moves for a protective Order, (1) directing Defendants to return and destroy inadvertently disclosed pre-accident hospital records; (2) directing an affidavit from Defendants stating same; (3) prohibiting Defendants from using any information found in the aforementioned medical records; (4) disqualifying Defendants' counsel; (5) awarding costs, attorneys' fees, and sanctions; and (6) such other and further relief this Court deems just and proper. Defendants opposed the instant motion in its entirety.

The parties have submitted for the Court's review, among other things, a bill of particulars (EF 50), a supplemental bill of particulars (EF 51), medical authorizations (EF 45), a Compliance

Conference Order (EF 28), an expert witness report (EF 29), excerpts from deposition transcripts (EF 58, 60), and unredacted medical records.¹

a. *Disclosure of Unrestricted Medical Authorizations and Records*

Under CPLR 3101, “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof [...]” However, “[a] party is not entitled to unlimited, uncontrolled, unfettered disclosure, and the supervision of discovery is generally left to the trial court’s broad discretion” (*Geffner v Mercy Med. Ctr.*, 83 AD3d 998, 998 [2d Dept 2011]).

“The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103 [a]). A protective order may be issued for “disclosure that is palpably improper in that it seeks irrelevant and/or confidential information, or is overly broad and burdensome” (*Ural v Encompass Ins. Co. of Am.*, 158 AD3d 845, 847 [2d Dept 2018]; *Greenman-Pederson, Inc. v Zurich Am. Ins. Co.*, 54 AD3d 386, 387 [2d Dept 2008]; *Gilman & Ciocia, Inc., v Walsh*, 45 AD3d 531, 531 [2d Dept 2007]).

The test for seeking discovery is “one of usefulness and reason” (*Forman v Henkin*, 30 NY3d 656, 661 [2018]). “A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is ‘material and necessary’—i.e., relevant—regardless of whether discovery is sought from another party (*see* CPLR 3102 [a] [1]) or a nonparty (CPLR 3101 [a] [4] [citation omitted])” (*id.*). However, “[t]he burden of establishing a right to protection under these provisions is with the party asserting it—‘the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity’” (*id.* at 662, quoting *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]).

In bringing a personal injury action, a party “affirmatively places his or her mental or physical condition in issue” (*Hausman v Smith*, 219 AD3d 955, 957 [2d Dept 2023]; *see also Romance v Zavala*, 98 AD3d 726, 727 [2d Dept 2012]). Parties waive the physician-patient privilege, and must provide medical authorizations, with respect to relevant past medical history for physical or mental conditions in controversy (*see Romance*, 98 AD3d, at 727; *Carboni v New York Med. Coll.*, 290 AD2d 473, 473 [2d Dept 2002]). Where a plaintiff affirmatively places his “entire medical condition in controversy through the broad allegations of physical injury and mental anguish,” either in the complaint, a bill of particulars, or deposition, their medical history is broadly discoverable (*Farrell v E.W. Howell Co., LLC*, 103 AD3d 772, 773 [2d Dept 2013]; *see also Bravo v Vargas*, 113 AD3d 577, 578 [2d Dept 2014]; *Diamond v Ross Orthopedic Group, P.C.*, 41 AD3d 768, 768 [2d Dept 2007]). However, disclosure of unrestricted medical authorizations with no timeframe and for unrelated illnesses or injuries is not reasonable (*see Romance*, 98 AD3d, at 727; *McFarlane v County of Suffolk*, 60 AD3d 918, 918 [2d Dept 2009]);

¹ Due to the sensitive and voluminous nature of the medical records, the parties opted to e-mail the full unredacted medical records directly to the Court, with all parties copied on said e-mails.

Gill v Mancino, 8 AD3d 340, 340 [2d Dept 2004]). In such instances, the Court has the discretion to limit the disclosure period of unrestricted medical authorizations based on the circumstances of the case, such as, among other things, known prior accidents, similar injuries, and the intention to prove exacerbation of preexisting injuries at trial (*see Farrell*, 103 AD3d, at 773; *O'Brien v Village of Babylon*, 153 AD3d 547, 548 [2d Dept 2017]).²

Here, Plaintiff's bill of particulars and supplemental bill of particulars include broad allegations of physical injuries and mental anguish, including, among other things, an exacerbation of prior mental health conditions, loss of enjoyment and quality of life, the need for narcotic medication for pain, and a head injury (EF 50, 51). The pre-accident medical records show prior slip-and-falls resulting in similar injuries, corresponding with a history of substance abuse, as well as a use of medication for pain management, since January 1, 2007. Additionally, the Plaintiff self-reported his history of prior mental health conditions and substance abuse to the New York City Fire Department Emergency Medical Service ("FDNY EMS") on the date of the incident alleged in this matter (EF 59).³ That same report indicated that Plaintiff had alcohol prior to the accident and noted 20 or 30 empty beer cans in the location (EF 59, 60).

The Plaintiff alleges that there was a prior conference where the court (McKetney Butler, J.) ruled that any pre-accident disclosure was limited to a further deposition of Plaintiff regarding an alleged fall two weeks prior to the accident in this matter (EF 22). However, the order of Justice McKetney Butler, dated February 17, 2022, does not state any limitations on pre-accident discovery (EF 28). Further, the argument that no further pre-accident disclosure was brought to the Court's attention and is found without merit.

Given the nature of the accident, injuries alleged, and description in the records of the accident location, Plaintiff's prior medical treatment is material and necessary to this action and authorizations regarding such treatment should have been exchanged during discovery. Therefore, the unrestricted medical authorizations exchanged by Plaintiff were proper, and Defendants did not improperly obtain the medical records in this matter.⁴

The Court finds that the facts of this case warrant unrestricted disclosure of Plaintiff's prior medical records, but should be limited in time to January 1, 2007, up to and including the present. The Court also notes that while the aforementioned medical records are discoverable, the admissibility of such records remains up to the discretion of the Trial Judge.

² While not binding, the Court notes the following decisions discussing disclosure of broad allegations of injuries, disclosure of pre-accident medical records, and the exacerbation of prior conditions: *Joseph v Edun*, 212 AD3d 507, 507-08 (1st Dept 2023); *Reyes v Lexington 79th Corp*, 149 AD3d 508, 508 (1st Dept 2017); and *Kanaly v DeMartino*, 162 AD3d 142, 145 (3d Dept 2018).

³ The Court notes that disclosure regarding substance abuse have been deemed discoverable in similar circumstances (*see Hogdahl v LCOR 55 Bank St., LLC*, 219 AD3d 1317, 1320 [2d Dept 2023]; *Rothstein v Huh*, 60 AD3d 839, 839 [2d Dept 2009]; *Steinberg v Montefiore Med. Ctr.*, 23 AD3d 281, 281-82 [1st Dept 2005]; *Spangler v Benedictine Hosp.*, 286 AD2d 280, 280-81 [1st Dept 2001]).

⁴ The Court notes that although Plaintiff alleges to have inadvertently exchanged an unrestricted medical authorization for Flushing Hospital, several unrestricted authorizations were exchanged, but only one of the authorizations is the subject of this motion.

Furthermore, due to the sensitive nature of these records, the Court will require Defendants to execute a confidentiality agreement that provides the records will only be used for purposes of the defense of this proceeding, and that the records will be kept confidential and be returned to Plaintiff's counsel at the end of this proceeding.

b. *New York State Code of Professional Responsibility and Sanctions*

Under Rule 4.4 (b) of the New York State Code of Professional Responsibility, “[a] lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer’s client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.” This subsection applies to documents, “such as when an email or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted” (Rules of Prof. Con., Rule 4.4 McK. Consol. Laws, Book 29 App., NY ST RPC Rule 4.4).

“The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees, resulting from frivolous conduct []. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart” (22 NYCRR 130-1.1 [a]).

““The decision whether to impose costs or sanctions against a party for frivolous conduct, and the amount of any such costs [plus attorneys’ fees] [and/]or sanctions, is generally entrusted to the court’s sound discretion”” (*Cassgnol v Village of Hempstead*, 214 AD3d 766, 769 [2d Dept 2023], quoting *Strunk v New York State Bd. of Elections*, 126 AD3d 779, 781 [2d Dept 2015]).

Here, the Court finds that Defendants did not violate Rule 4.4. in the present matter. The Plaintiff was directed by the Court to provide medical authorizations to the Defendants (EF 28), the HIPAA compliant medical authorization for Flushing Hospital was signed by Plaintiff, and the authorization was addressed to Defendants’ counsel (EF 24).⁵ As such, the Court is denying the request for sanctions.

In accordance with the foregoing, it is hereby **ORDERED** that the branch of Plaintiff’s motion for a protective Order is granted only to the extent that the unrestricted medical authorization for Flushing Hospital is limited in time from January 1, 2007, up to and including the present; and it is further

ORDERED that Defendants are prohibited from using any medical records from Flushing Hospital prior to January 1, 2007; and it is further

⁵ Although not binding, the present case can be distinguished from *O’Connor v Lewis*, 2013 NY Slip Op 31722(U), [Sup Ct, Suffolk County]. In *O’Connor*, the medical provider inadvertently disclosed notes outside of the date range provided in the medical authorization (*see id.* at 3-4). In contrast, the medical authorization in the present matter was unrestricted and granted authorization for Plaintiff’s entire medical record.

ORDERED that Defendants shall execute a confidentiality agreement stating that the unrestricted medical records will only be used for purposes of the defense of this proceeding, that the records will be kept confidential, and will be returned to Plaintiff's counsel at the end of this proceeding; and it is further


ORDERED that the branch of Plaintiff's motion for a protective Order is otherwise denied; and it is further

ORDERED that the branch of Plaintiff's motion for sanctions and to disqualify Defendants' counsel is denied; and it is further

ORDERED that Defendants shall serve, via NYSCEF, a copy of this Order with Notice of Entry, upon the Plaintiff, within ten (10) days from the date of entry.

This constitutes the Decision and Order of this Court.

Dated: March 15, 2024


PHILLIP HOM, J.S.C.

