

Menkes v Mount Sinai Health Sys., Inc.

2025 NY Slip Op 34014(U)

October 14, 2025

Supreme Court, New York County

Docket Number: Index No. 805082/2021

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

SHERYL R. MENKES,

Plaintiff,

- v -

MOUNT SINAI HEALTH SYSTEM, INC., MOUNT SINAI HOSPITAL, MOUNT SINAI MEDICAL CENTER, MOUNT SINAI DOCTORS, MOUNT SINAI FACULTY PRACTICE, DARWIN CHEN, M.D., and MOUNT SINAI PHYSICAL & OCCUPATIONAL THERAPIES,

Defendants.

-----X

INDEX NO. 805082/2021

MOTION DATE 09/25/2025

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 149, 150, 151, 152, 153, 154, 157, 160, 161, 162, 163, 164, 165, 166

were read on this motion to/for PROTECTIVE ORDER.

This is an action to recover damages for medical malpractice. In an order dated December 24, 2024, this court, among other things, prohibited the plaintiff from filing any further discovery motions unless she obtained the express prior written approval of the court (MOT SEQ 004). Without first obtaining court approval, the plaintiff nonetheless now moves pursuant to CPLR 3103 for a protective order preventing the defendants from obtaining several medical authorizations that they had requested. The defendants oppose the motion. The motion is denied, since the plaintiff failed to obtain prior written court approval before making the motion (*see Raghavendra v Brill*, 135 AD3d 531, 532 [1st Dept 2016] [directing “Clerks of [the Appellate Division] and Supreme Court . . . to accept no filings from this plaintiff as to the matters herein without the prior leave of their respective courts”]; *Raghavendra v Stober*, 2017 NY Slip Op 72050[U] [1st Dept., Apr. 27, 2017] [enjoining same plaintiff “from filings of any kind, including but not limited to summonses and complaints, notices of appeal and motion papers, in any state court of the State of New York, involving any of the defendants in this action or any of the prior

actions against these defendants, or any case involving the nucleus of operative facts at issue in this or the prior actions, without the prior, written permission of the Chief Judge, Presiding Justice or Administrative Judge of the Court in which such filing is sought”]; *Raghavendra v Stober*, 2017 NY Slip Op 31809[U], *5, 2017 NY Misc LEXIS 3216, *5-6 [Sup Ct, N.Y. County, Aug. 22, 2017] [denying renewal, reargument, and vacatur motion by same plaintiff because he failed to obtain prior written approval before making motion]).

Even had the court granted the plaintiff prior written approval to make the instant motion, it would be constrained to deny it in any event. CPLR 3101(a) calls for “full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968] [internal quotation marks omitted]). Evidence is material if sought “in good faith for possible use as evidence-in-chief or rebuttal or for cross-examination” (*id.*). The standard for determining whether information or documentation sought during discovery must be disclosed or produced is whether “the request is reasonably calculated to yield information that is ‘material and necessary’—i.e., relevant” (*Forman v Henkin*, 30 NY3d 656, 661 [2018]) or whether such information or documentation “is likely to lead to relevant information” (*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1003, 1006 [2d Dept 2019] [emphasis added]; see *Vargas v Lee*, 170 AD3d 1073, 1077 [2d Dept 2019]; *Milligan v Bifulco*, 153 AD3d 1624, 1625 [4th Dept 2017]; *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 [1st Dept 2007] *Sexter v Kimmelman*, 277 AD2d 186, 187 [1st Dept 2000]; *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983]).

Information obtained by a medical doctor in connection with the treatment of a patient, however, is generally privileged (see CPLR 4504[a]; 3101 [b]; *Dillenbeck v Hess*, 73 NY2d 278, 284 [1989]; *Keith v Forest Labs., Inc.*, 72 AD3d 519, 520 [1st Dept 2010]; *Kaplowitz v Borden, Inc.*, 189 AD2d 90, 92 [1st Dept 1993]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70-71 [2d Dept 1992]). Thus, a litigant seeking discovery of such records has the burden of showing

that the party has waived the privilege by putting his or her condition in controversy (*Budano v Gurdon*, 97 AD3d 497, 498 [1st Dept 2012]; *Keith v Forest Labs., Inc.*, 72 AD3d at 520; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d at 71; *see also Velez v Daar*, 41 AD3d 164, 165 [1st Dept 2007]; *Avila v 106 Corona Realty Corp.*, 300 AD2d 266, 267 [2d Dept 2002]).

“[A]lthough a plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his [or her] physical or mental condition is affirmatively placed in controversy . . . , the waiver of that privilege does not permit discovery of information involving unrelated illnesses and treatments”

(*Bozek v Derkatz*, 55 AD3d 1311, 1312 [4th Dept 2008] [internal quotation marks omitted]; *see Barnes v Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014]; *Felix v Lawrence Hosp. Ctr.*, 100 AD3d 470, 471 [1st Dept 2012]; *Elmore v 2720 Concourse Assoc., L.P.*, 50 AD3d 493, 493 [1st Dept 2008]). Thus, where a plaintiff commences an action to recover for damages for orthopedic injuries, there is generally no basis to compel the release of *all* of his or her primary care records or records of medical treatments that are completely unrelated to the cause and consequences of the subject claim (*see Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573, 574 [1st Dept 2014]; *see also Rosenberg v Wilson*, 227 AD3d 629, 629-630 [1st Dept 2024]).

Nonetheless, a plaintiff who places his or her physical condition in issue in an action to recover damages for personal injuries waives the physician-patient privilege in connection with treatments and diagnoses that are “sufficiently related to the issues in litigation to make the effort to obtain [them] in preparation for trial reasonable” (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d at 406-407). In other words, “discovery of preexisting conditions is permitted where it is relevant to the injuries to the parts of the body that were placed in controversy” (*Abrew v Triple C Props., LLC*, 178 AD3d 526, 526-527 [1st Dept 2019] [plaintiff must provide authorizations referable to prior hernia surgery where his claim involved a lower back injury, but the surgeries performed to address the lower back “were complicated and protracted by . . . prior hernia surgery”]). The gist of the plaintiff’s claim here is that the defendants departed from good and accepted practice in the manner in which they performed a total right hip replacement procedure

upon her, and that this malpractice caused her to suffer a permanent loss of function of her femoral nerve, with permanent atrophy of her right quadriceps muscle, along with resultant permanent weakness and permanent partial loss of use of her right lower extremity. The defendants established that the medical and related authorizations that they sought here all are relevant to the plaintiff's treatment for related orthopedic and neurological injuries or conditions that had, or may still have, either a direct or indirect bearing on the nature and extent of the weakness, dysfunction, and loss of use of her hip, quadriceps muscles, and right lower extremity that she claims here. Hence, they are relevant to the issue of the extent of damages that she is seeking in this action (*see Romance v Zavala*, 98 AD3d 726, 727 [2d Dept 2012] [records of plaintiff's treatment for polycystic kidney disease were sufficiently related to claims of lower back injury and difficulty urinating]; *Josephs v Oliver*, 48 AD2d 688, 688 [2d Dept 1975] [where plaintiff's malpractice claims was premised upon the defendant's failure to diagnose and treat a cardiac condition and failure to perform an electrocardiogram, records that include results of prior electrocardiogram are discoverable]). Consequently, the plaintiff's motion would have been denied on the merits even had the court permitted the plaintiff to make the motion.

At the oral argument of the motion on September 25, 2025, the court directed the plaintiff to provide the defendants with the disputed authorizations within 15 days, that is, by October 10, 2025, and that her failure to do so would result in the dismissal of the complaint. The court has been informed that the plaintiff has complied with that directive. The court also directed that the plaintiff's deposition was to be conducted on or before January 30, 2026.

In light of the foregoing, it is,

ORDERED that the motion is denied; and it is further,


ORDERED that, on the court's own motion, the deposition of the plaintiff shall be conducted on or before January 30, 2026; and it is further,

ORDERED that, on or before February 19, 2026, the parties shall submit a proposed status conference order to the court, on a form that shall be provided to them by the court, by

emailing it to sfc-part56-clerk@nycourts.gov, pursuant to which the completion of remaining discovery shall be scheduled, and the note of issue filing deadline shall be extended.

This constitutes the Decision and Order of the court.

10/14/2025
DATE


JOHN J. KELLEY, J.S.C.

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