Short Order Form

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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AMY TUCKER,

Plaintiff,

-against-

BUDGET RENT A CAR SYSTEM, INC., and
ANNE MARIE MARTINO,

Defendants.

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Index No: 20918/06
Motion Date: 8/1/07
Motion Cal. No: 26
Motion Seq. No: 2

The following papers numbered 1 to 14 read on this motion by defendants for an order, pursuant to CPLR § 3124 and/or 3126, compelling disclosure of the information sought in defendants' First Request for Production of Documents Nos. 49, 58 and 59, defendants' First Set of Interrogatories No. 13, and defendants' Second Request for Production of Documents Nos. 1 and 2, or in the alternative, dismissing or striking out plaintiff's request for compensatory damages and precluding plaintiff from relying upon, at trial or in any moving papers, any testimony, documents or evidence of emotional distress sought by defendants in its discovery demands but not produced by plaintiff; and on this cross motion by plaintiff for a protective order, pursuant to CPLR §3103, against the disclosure of certain information requested by defendants' First and Second Requests for Production of Documents and defendants' First Set of Interrogatories.

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Upon the foregoing papers, it is ordered that the motion and cross motion are disposed of as follows:

Plaintiff commenced this employment discrimination action, pursuant to Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §2000, *et. seq.* ("Title VII") and New York City Administrative Code § 8-102, *et seq.* ("the City Human Rights Law"), seeking, inter alia, an award of back pay, front pay, compensatory damages, punitive damages and attorneys' fees, against defendant Budget Rent A Car System, Inc. ("Budget"), plaintiff's former employer, and Anne Marie Martino ("Martino"), plaintiff's former supervisor. Plaintiff seeks, inter alia, $5,000,000.00 in compensatory damages for "feelings of humiliation, embarrassment, depression, mistreatment, and degradation" arising from defendants' alleged discriminatory and retaliatory treatment of plaintiff. Defendants move for an order compelling discovery, or, in the alternative, striking plaintiff's compensatory damage claim. Plaintiff cross moves for a protective order with respect to defendants' attempt to discover plaintiff's physical and mental health records, as well as information pertaining to any involvement she may have had in prior litigation.

On this first discover motion, defendants allege that plaintiff "failed to respond adequately to the First Document Request Nos. 40, 58 and 59, and Interrogatory No.13 and to provide the medical authorizations requested in the First Document Request Nos. 58 and 59 and mandated by the PC Order." Interrogatory No. 13 elicited information concerning plaintiff's claim for compensatory damages, asking that she "identify [and provide specific information pertaining to] all health-care practitioners, doctors, psychologist, therapists or other persons with whom plaintiff has consulted since 2001."[1] The First Document Request No. 58 requested documents related to medical treatment received by plaintiff from July 2005 to the present; Document Request No. 59 requested documents relating to psychiatric, psychological or counseling treatment for that same time period; Document Request No. 40 requested documents relating to any prior litigation, civil and criminal, in which plaintiff was a party or witness; Second Document Request No. 1 requested documents related to medical treatment received by plaintiff from 2000 to the present; Second Document Request No. 2 requested documents relating to psychiatric psychological or counseling treatment from January 2000 to the present. Plaintiff objected to responding to the interrogatory and document requests on the grounds, inter alia, that the requests were "overly broad and not reasonably calculated to lead to the discovery of admissible evidence," or "overly broad and ambiguous," or that she did not possess "any such responsive documents."

"CPLR § 3101 defines the scope of disclosure and provides that '[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof' (CPLR § 3101, subd. [a]). This provision has been liberally construed to require disclosure where the matter sought will 'assist preparation for trial by sharpening the issues and reducing delay and prolixity' (Allen v. Crowell-Collier Pub. Co., 21

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[1]Pursuant to the August 1, 2007 stipulation of the parties, that agreed "that defendants will serve an interrogatory requesting information whether plaintiff every communicated with a psychiatrist, psychologist, counselor or other medical professional about the injuries for which she seeks compensatory damages, plaintiff agrees to respond to same, however, plaintiff continues to object to disclosure of same to the extent that such information is protected by privilege.

N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430). Thus, restricted only by a test for materiality 'of usefulness and reason' (id.), pretrial discovery is to be encouraged." Hoenig v. Westphal, 52 N.Y.2d 605, 608 (1981); see, Parise v. Good Samaritan Hosp., 36 A.D.3d 678 (2nd Dept. 2007); Andon ex rel. Andon v. 302-304 Mott Street Associates, 94 N.Y.2d 740, 746 (2000). The bottom line is that discovery should be allowed if the information sought "'is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' (citation omitted)." Matter of Beryl, 118 A.D.2d 705, 706 (2nd Dept. 1986). However, notwithstanding the liberality accorded the disclosure provisions of the CPLR, "the scope of permissible discovery is not entirely unlimited and the trial court is invested with broad discretion to supervise discovery and to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a) (citations omitted)." Auerbach v. Klein, 30 A.D.3d 451 (2nd Dept. 2006); Palermo Mason Const., Inc. v. Aark Holding Corp., 300 A.D.2d 460 (2nd Dept. 2002). The burden is upon the party seeking disclosure 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. See, Beckles v. Kingsbrook Jewish Medical Center, 36 A.D.3d 733 (2nd Dept. 2007); Vyas v. Campbell, 4 A.D.3d 417 (2nd Dept. 2004); Crazytown Furniture, Inc. v. Brooklyn Union Gas Co., 150 A.D.2d 420 (2nd Dept. 1989).

Moreover, "[a] party seeking to inspect [] medical records must first demonstrate that the [plaintiff's] physical or mental condition is 'in controversy'[]). Even where this preliminary burden has been satisfied discovery may still be precluded where the information requested is privileged and thus exempted from disclosure[]. Once the privilege is validly asserted, it must be recognized and the information sought may not be disclosed unless it is demonstrated that the privilege has been waived (citations omitted)." Lombardi v. Hall, 5 A.D.3d 739, 740 (2nd Dept.2004); see, Kivlehan v. Waltner, 36 A.D.3d 59 (2nd Dept. 2007); Bongiorno v. Livingston, 20 A.D.3d 379 (2nd Dept.2005). A plaintiff "waives the physician-patient privilege of CPLR § 4504 when, 'in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue' (citation omitted). Otherwise [], a party would be able to use the privilege 'as a sword rather than a shield,' and a party 'should not be permitted to assert a mental or physical condition in seeking damages [] and at the same time assert the privilege in order to prevent the other party from ascertaining the truth' (citation omitted).'" Green v. Montgomery, 95 N.Y.2d 693, 700 (2001); see, Diamond v. Ross Orthopedic Group, P.C., 41 A.D.3d 768 (2nd Dept. 2007). "However, a party does not waive the privilege with respect to unrelated illnesses or treatments []." Carboni v. New York Medical College, 290 A.D.2d 473 (2nd Dept. 2002).

Here, plaintiff affirmatively placed her medical condition in controversy through allegations of injury and emotional anguish based upon her "feelings of humiliation, embarrassment, depression, mistreatment, and degradation,"arising from defendants' alleged discriminatory and retaliatory treatment of plaintiff. See, Diamond v. Ross Orthopedic Group, P.C., 41 A.D.3d 768 (2nd Dept. 2007); Avila v. 106 Corona Realty Corp., 300 A.D.2d 266, 267 (2nd Dept. 2002); Molesi v. Rubenstein, 294 A.D.2d 546 (2nd Dept. 2002); Schager v. Durland, 286 A.D.2d 725 (2nd Dept. 2001); Ellerin v. Bentley's, 266 A.D.2d 259, 260 (2nd Dept. 1999); Holtz v. Wildenstein & Co., Inc., 261 A.D.2d 336 (1st Dept. 1999). This is particularly so in light of plaintiff's post motion "Response

to Second Set of Interrogatories," dated September 14, 2007, whereby plaintiff admits for the first time that she has seen a medical professional regarding the alleged injuries.[2] Consequently, plaintiff cannot assert that the medical history sought by defendants is subject to a physician-patient privilege which has not been waived. Nevertheless, defendants are not entitled to unfettered access into all of plaintiff's medical history, as certain of the challenged items of discovery "are overly broad in that the information sought [is] unreasonably intrusive (citation omitted) and infringe[s] upon personal areas unrelated to the issues in the case (citation omitted)." Garcia v. First Spanish Baptist Church of Islip, 259 A.D.2d 465 (2nd Dept. 1999).

Further, defendants seek a response to the interrogatory which inquires as to "any and all documents, from any time period, relating or pertaining to any lawsuit, complaint, charge, indictment, investigation or arrest or other legal matter in which plaintiff has been involved as a party or a witness, including but not limited to, actions relating to discrimination, criminal acts, personal injuries, automobile accidents, divorce or child custody, breach of contract, medical malpractice and/or landlord-tenant disputes." While defendants seek certain prior litigation documents, defendants' have failed to demonstrate that the subject disclosure is material and necessary, or remotely relevant to the instant action. See, Parise v. Good Samaritan Hosp., 36 A.D.3d 678 (2nd Dept. 2007); Auerbach v. Klein, 30 A.D.3d 451 (2nd Dept. 2006); Palermo Mason Const., Inc. v. Aark Holding Corp., 300 A.D.2d 460 (2nd Dept. 2002); Andon ex rel. Andon v. 302-304 Mott Street Associates, 94 N.Y.2d 740, 746 (2000); compare, Liquore v. Tri-Arc Mfg. Co., 32 A.D.3d 904 (2nd Dept. 2006). Although the discovery provision have been liberally construed, "'unlimited disclosure is not required'(citations omitted), and '[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence' (citations omitted)." Beckles v. Kingsbrook Jewish Medical Center, 36 A.D.3d 733 (2nd Dept. 2007); see, Vyas v. Campbell, 4 A.D.3d 417 (2nd Dept. 2004); Crazytown Furniture, Inc. v. Brooklyn Union Gas Co., 150 A.D.2d 420 (2nd Dept. 1989). As there has been an insufficient demonstration that 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, defendants are not entitled to such disclosure. See, Beckles v. Kingsbrook Jewish Medical Center, 36 A.D.3d 733 (2nd Dept. 2007); Vyas v. Campbell, 4 A.D.3d 417 (2nd Dept. 2004).

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[2] Pursuant to the August 1, 2007 stipulation, the parties agreed that defendants shall serve an interrogatory requesting information as to whether plaintiff ever communicated with a medical professional regarding the instant injuries, and plaintiff shall "respond to same, however plaintiff continues to object to disclosure of same to the extent that such information is protected by privilege." The aforementioned interrogatory asked plaintiff to, inter alia, "Identify all psychiatrists, psychologists, counselors or other medical professionals with whom plaintiff communicated, from July 2005 to the present, regarding the alleged injuries for which plaintiff seeks compensatory damages, including but not limited to feelings of humiliation, embarrassment, depression, mistreatment, and degradation. In the September 14, 2007 response, plaintiff "objects to this interrogatory on the ground that it is overly broad and ambiguous. Without waiving her objections, plaintiff responds that she has seen Brent Chabus, M.D., 155 East 29th Street, New York, NY 10016."

Accordingly, defendants' motion for an order compelling disclosure of the information sought in defendants' First Request for Production of Documents Nos. 40, 58 and 59, defendants' First Set of Interrogatories No. 13, and defendants' Second Request for Production of Documents Nos. 1 and 2, or in the alternative, dismissing or striking out plaintiff's request for compensatory damages and precluding plaintiff from relying upon, at trial or in any moving papers, any testimony, documents or evidence of emotional distress, is granted to the following extent:

> Plaintiff shall fully respond to defendants' First Request for Production of Documents No. 59, seeking each and every document referring or relating to any psychiatric, psychological or counseling treatment of any nature received by plaintiff from July 2005 to the present; plaintiff shall respond to defendants' First Set of Interrogatories No. 13, seeking the identity of all health care practitioners, doctors, psychologists, therapists or other persons with whom plaintiff has consulted since 2001, and as to each person state (a) the dates on which and the locations at which the treatment or consultation occurred; (b) the nature of the treatment or consultation plaintiff received from each person; (c) the diagnosis and prognosis made by each person; and (d) the medication prescribed, in any, including but not limited to, the name, the dosage and when taken, to the extent that plaintiff shall identify all psychologists, psychiatrist or therapists with whom plaintiff has consulted with from 2004 to the present, and as to each person state (a) the dates on which and the locations at which the treatment or consultation occurred; (b) the nature of the treatment or consultation plaintiff received from each person; (c) the diagnosis and prognosis made by each person; and (d) the medication prescribed, in any, including but not limited to, the name, the dosage and when taken; and plaintiff shall fully respond to defendants' Second Request for Production of Documents Nos. 1 and 2, seeking documentary evidence, to the extent that such discovery is directed to be provided in accordance with the provisions of this order.

The cross motion by plaintiff for a protective order against the disclosure of certain information requested by defendants' First and Second Requests for Production of Documents and defendants' First Set of Interrogatories, is granted to the following extent:

> Plaintiff is granted a protective order with regard to defendants' First Request for Production of Documents No. 40, seeking any and all documents, from any time period, relating or pertaining to any lawsuit, complaint, charge, indictment, investigation or arrest or other legal matter in which plaintiff has been involved as a party or a witness, including but not limited to, actions relating to

discrimination, criminal acts, personal injuries, automobile accidents, divorce or child custody, breach of contract, medical malpractice and/or landlord-tenant disputes; plaintiff is granted a protective order with regard to defendants' First Request for Production of Documents No. 58, seeking each and every document referring or relating to any medical treatment of any nature received by plaintiff from July 2005 to the present; and plaintiff is granted a protective order to that portion of defendants' First Set of Interrogatories No. 13, seeking the identity of all health care practitioners, doctors, or other persons with whom plaintiff has consulted since 2001, and as to each person state (a) the dates on which and the locations at which the treatment or consultation occurred; (b) the nature of the treatment or consultation plaintiff received from each person; (c) the diagnosis and prognosis made by each person; and (d) the medication prescribed, in any, including but not limited to, the name, the dosage and when taken.

Plaintiff is directed to provide responses to the aforementioned interrogatories and document production within forty-five (45) days of service of a copy of this order with notice of entry. Further, defendants' First Request for Production of Documents Nos. 40 and 58, and that portion of defendants' First Set of Interrogatories No. 13 on which a protective order was granted, hereby is stricken.

Dated: October1, 2007

J.S.C.