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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

**DENETRICE WITHERSPOON-ALLSTON,
Plaintiff,**

**Motion Sequence #1, #2
Submitted January 29, 2009**

-against-

INDEX NO: 17131/07

**TREELINE MINEOLA, LLC and COMMERCIAL
BUILDING MAINTENANCE CORP.,
Defendants.**

The following papers were read on these motions:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Reply Affirmation and in Opposition to Cross-Motion.....	3
Reply Affirmation.....	4

Defendants, TREELINE MINEOLA, LLC (hereinafter referred to as "TREELINE"), and COMMERCIAL BUILDING MAINTENANCE CORP. (hereinafter referred to as "COMMERCIAL"), move for an order compelling plaintiff to provide proper authorizations for the release of her medical and hospital records, or, in the alternative, for an order of preclusion due to plaintiff's non-compliance. Plaintiff, DENETRICE WITHERSPOON-ALLSTON, opposes the motion and cross-moves for an order, compelling defendants to produce for discovery and inspection all slip and fall incident reports from April 12, 2001

through April 12 2008, and to compel TREELINE to appear for a deposition, or for an order of preclusion and/or striking defendant's answer. The motion and cross-motion are determined as follows:

This action arises from an alleged slip and fall accident that occurred on April 12, 2007, when it is alleged that plaintiff fell on a wet floor while walking in an office building located at 1 Old Country Road, Carle Place, New York, where she worked at 1-800-FLOWERS. Plaintiff claims to have suffered injuries to her knee and low back from the fall, and acknowledges that many years before the accident she was treated for knee problems and had a prior cervical disc surgery. Plaintiff alleges an aggravation of pre-existing conditions to her right knee and low back in addition to a new injury to her right knee. Counsel for defendants claims that, based on plaintiff's past medical history, her limited memory of treatment, and the allegations of an "aggravation" of injuries, a number of discovery demands have gone to plaintiff's counsel requesting authorizations for the records of treating doctors found in the files of plaintiff's Workers Compensation carrier, PMA Insurance. It appears that plaintiff's counsel has provided some authorizations and rejected others on the ground that the treatment is not related to the subject accident, but defendants assert that they are entitled to all of the requested records.

In opposition to the motion, counsel for plaintiff states that he has endeavored to provide all pertinent previous medical records and all subsequent medical records, but defendants keep enlarging the scope of their demands and are conducting a "fishing expedition" not designed to produce relevant information. Counsel for plaintiff asserts that numerous medical, employment and insurance authorizations have been provided and, on June 12, 2008, plaintiff was deposed and testified that the doctors she saw for her previous

knee and neck surgery were Dr. Shah and Dr. Shapiro of Orlin and Cohen, as well as Dr. Lattuga, for whom authorizations for complete medical records have been provided. Plaintiff testified that her family doctor was Dr. Cima, for whom an authorization was provided, and that authorizations for the release of her 2004 MRI on her knee at Drucker Genuth Radiology was also provided. It is plaintiff's position that the insurance records that defendants seek are not with reference to this accident but are for a period two (2) years prior to the accident, and contain all of plaintiff's medical bills and records, whether related or unrelated to this event.

As to the cross-motion, counsel for plaintiff claims that, despite his request for a deposition of TREELINE, the owner of the building, his request has been ignored. Moreover, he claims that defendants have failed to appropriately respond to his demands for the records of prior incident reports of slip and fall accidents at the subject building, in that only one (1) prior accident report has been provided. It is TREELINE's position that it has already produced Jose Munoz, the porter responsible for mopping up any spills in the lower level of the lobby, as well as Peter Perez, the head maintenance man who worked at the subject location for eight (8) years prior to the subject accident, and that the Preliminary Conference Order, dated February 25, 2008 specifically limited the production of prior similar accidents to two (2) years prior to the date of the accident. TREELINE claims that it searched for all slip and fall accidents for a three (3) year period prior to the subject accident, and a copy of the report of the one (1) accident uncovered has already been provided.

The nature and degree of the penalty to be imposed for failure to comply with a disclosure order is a matter generally left to the discretion of the Court. *Kingsley v Kantor*,

265 AD2d 529, 697 NYS2d (2nd Dept. 1999). To invoke the drastic remedy of preclusion, the Court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate and continuous conduct or its equivalent. *Patterson v New York City Health & Hospitals Corp.*, 284 AD2d 516, 726 NYS2d 715 (2nd Dept. 2001).

After a careful reading of the submissions herein, it appears to the Court that extensive discovery with respect to the instant litigation has been provided and that neither the plaintiff nor defendants are not entitled to the drastic relief of preclusion. However, defendants are entitled to the full and complete record of plaintiff's medical records relevant to the subject accident and all prior treatments with respect to prior injuries claimed to have been aggravated by the subject accident in order to properly prepare its defense. It is therefore

ORDERED, that the plaintiff shall produce an affidavit stating that she does not recall the doctors named and/or their treatment is unrelated to the instant litigation, and produce another authorization with respect to the radiology films kept by Orlin and Cohen; and it is further


ORDERED, that defendants shall provide an affidavit specifically stating the dates searched for which any records exist as to slip and fall accidents at the subject location; and it is further

ORDERED, that further depositions are unwarranted and are denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: April 10, 2009



WILLIAM R. LaMARCA, J.S.C.

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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