

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:

HON. EDWARD W. MC CARTY, III
Justice

TRIAL/IAS, PART 2
NASSAU COUNTY

JANET SHAVEL,

Plaintiff(s)

INDEX No. 12041/2008

-against-

ROBERT J. ALEXANDER, D.O., MASSAPEQUA
INTERNAL MEDICINE ASSOCIATES, P.C.,
LAURENCE F. MACK, M.D., INFERTILITY
ASSOCIATES OF LONG ISLAND, P.C., RICHARD G.
SHINBROT, D.O., ROBERT H. MASHIOFF, D.O.,
INTEGRATED MEDICAL PROFESSIONALS, PLLC,
LESTER F. GOLDBLUM, D.O., HERBERT
PASTERNAK, D.O and GASTROINTESTINAL CARE
OF LONG ISLAND, P.C.,

MOTION DATE: 9/2/09
MOTION SEQ.# 001-007

Defendant(s)

The following papers read on this motion:

Notice of Motion/Order to Show Cause	XXXXXXXX
Cross-Motion	
Answering Affidavit	XXXXXX
Replying Affidavits	X

Motion (#001) by defendants Mack and Infertility Associates of Long Island, P.C. for an order pursuant to CPLR 3124 and 3126: (1) compelling plaintiff to submit to a further deposition to answer questions which were objected to and blocked by her attorneys; (2) compelling plaintiff to supply authorizations to obtain the medical records of Dr. Edward Sodaro, Jr. and Vivian O'Connor, LCSW, and/or (3) striking plaintiff's complaint for failure to provide responses to defendants' discovery demands; motion (#002) by defendants Alexander and Massapequa Internal Medicine Associates, P.C. for an order: (1) pursuant

to CPLR 3101, 3124 and 3126 dismissing plaintiff's complaint with prejudice for failure to provide responses to defendants' discovery demands and refusing to answer relevant questions at a deposition, and/or; (2) compelling plaintiff to supply authorizations to obtain records of plaintiff's psychiatric and psychological treatment providers, including Dr. Sodaro and LCSW Vivian O'Connor, authorizations to obtain a complete copy of plaintiff's matrimonial proceedings, and compelling plaintiff to submit to a further deposition after receipt of the requested records to answer questions which were objected to and blocked by her attorney; and (3) staying the depositions of all defendants until the discovery is provided and a further deposition of plaintiff held upon receipt of the records; cross motion (#003) by defendants Mashioff and Integrated Medical Professionals, PLLC for an order: (1) pursuant to CPLR 3101, 3124 and 3126 dismissing plaintiff's complaint with prejudice for failure to provide responses to defendants' discovery demands and refusing to answer relevant questions at deposition; and/or (2) compelling plaintiff to supply authorizations to obtain the records of plaintiff's psychiatric and psychological treatment providers including but not limited to Dr. Sodaro and LCSW Vivian O'Connor, and supply authorizations to obtain a complete copy of the plaintiff's matrimonial proceedings; (3) compelling plaintiff to submit to a further deposition after receipt of the requested records to answer questions which were objected to and blocked by her attorneys; (4) staying the depositions of all defendants until the discovery is provided and a further deposition of plaintiff is held upon receipt of said discovery; motion (#004) by defendant Goldblum for an order: (1) pursuant to CPLR 3101, 3124 and 3126 dismissing plaintiff's complaint with prejudice for failure to provide responses to defendants' discovery demands and refusing to answer relevant questions at deposition; and/or (2) compelling plaintiff to supply authorizations to obtain a complete copy of the plaintiff's psychiatric and psychological treatment providers, including Dr. Edward Sodaro and LCSW Vivian O'Connor, compelling plaintiff to supply authorizations to obtain a complete copy of the plaintiff's matrimonial proceedings, and compelling plaintiff to submit to further deposition after receipt of the requested records to answer questions which were objected to and blocked by her attorneys; (3) staying the depositions of all defendants until the discovery is provided and a further deposition of plaintiff held upon receipt of the records; motion (#005) by defendant Shinbrot for an order: (1) pursuant to CPLR 3101, 3124 and 3126 compelling plaintiff to submit for further deposition to answer questions which were objected to and blocked by her attorneys; (2) compelling plaintiff to provide authorizations to obtain medical records of Dr. Vivian O'Connor, Andrew Jacono, M.D. and revisit the *sua sponte* denial of collateral source information pursuant to CPLR 2221 and in the interests of justice, and (3) striking plaintiff's

complaint for failure to provide responses to defendant's discovery demands; motion (#006) by defendants Pasternak and Gastrointestinal Care of Long Island, P.C. for an order: (1) pursuant to CPLR 3101, 3124 and 3126 dismissing plaintiff's complaint with prejudice for failure to provide responses to defendant's discovery demands and refusing to answer relevant questions at a deposition, and/or (2) compelling plaintiff to supply authorizations to obtain the records to plaintiff's psychiatric and psychological treatment providers, including Dr. Sodaro and LCSW Vivian O'Connor, authorizations to obtain a complete copy of plaintiff's matrimonial proceedings and compelling plaintiff to submit to a further deposition at the receipt of the requested records to answer questions which were objected to and blocked by her attorney; and (3) staying the depositions of all defendants until the discovery is provided and a further deposition of the plaintiff held upon receipt of the records; and cross motion (#007) by plaintiff for a protective order pursuant to CPLR 3103: (1) precluding defendants from obtaining authorizations concerning plaintiff's psychiatric, psychological and mental health records; (2) precluding defendants from viewing plaintiff's matrimonial file and/or obtaining an authorization for said file; (3) precluding defendants from inquiring into plaintiff's psychiatric, psychological and mental health treatment; (4) precluding defendants from inquiring into plaintiff's two sons' physical, mental health and substance abuse conditions/issues; (5) precluding defendants from inquiring into plaintiff's matrimonial action; (6) precluding defendants from obtaining an authorization to obtain collateral source records; and (7) precluding defendants from seeking a fourth deposition of plaintiff, are decided as set forth herein.

This is a medical malpractice action arising from defendants' treatment of plaintiff since in or about June 2007. Plaintiff's verified bill of particulars alleges that, *inter alia*, defendants were negligent in failing to diagnose plaintiff with a uterine malignancy and a uterine leiomyosarcoma. Plaintiff's verified bill of particulars further alleges that she suffered the following injuries as a result of defendants' alleged negligence: bilateral metastatic leiomyosarcoma to plaintiff's lungs; severe and extensive pain and suffering; undergoing extensive chemotherapy/radiation; loss of chance for cure; significant progression of plaintiff's uterine malignancy causing same to metastasize bilaterally to plaintiff's lungs; significant loss of chance to provide plaintiff with alternative treatment, and weakness.

Defendants seek discovery of plaintiff's psychiatric and psychological records and seek to continue plaintiff's deposition so that they may question plaintiff with regard to her psychiatric and psychological treatment. Defendants argue that such disclosure is material and necessary in the defense of this action. While such information might indeed be helpful to defendants, such information is privileged and the privilege attaching thereto has not been waived by plaintiff, rendering such information undiscoverable by defendants herein.

While CPLR 3101(a) provides for "full disclosure of all matter material and necessary in the prosecution or defense of an action", CPLR 3101(b) specifies that "[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable."

CPLR 4504 provides, in relevant part, that unless the patient waives the privilege, a physician shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

When a party affirmatively puts his or her physical or mental condition in issue, that party has waived the physician-patient privilege that may attach to the records of that condition. (See, *Corbey v Allam*, 58 AD3d 667.)

While plaintiff herein has clearly put her physical condition in issue by bringing this medical malpractice action against defendants for their alleged failure to diagnose her uterine cancer, a review of the injuries alleged in her verified bill of particulars just as clearly indicates that plaintiff makes no claim for mental, physical or psychological injuries as a result of defendants' alleged malpractice. In the absence of such claims, there has been no waiver, and plaintiff's psychiatric and psychological records remain privileged and are not subject to disclosure. (See, *Kohn v Fisch*, 262 AD2d 535; *Carboni v New York Medical College*, 290 AD2d 473; *Goldberg v Fenig*, 300 AD2d 439; *Napoli v Crovello*, 49 AD3d 699.)

Defendants' argument that plaintiff waived her privilege by raising her mental condition in the context of her matrimonial proceeding is without merit.

Defendants also seek access to the records of plaintiff's matrimonial proceeding. Such records are protected from disclosure by DRL 235(1). In order to overcome this statutory protection, defendants must demonstrate a sufficient nexus between the plaintiff's divorce proceeding and this malpractice action. (See, *Hovagim v Marchand's School of Dance, Inc.*, 225 AD2d 522.) This they have failed to do.

Defendant Shinbrot's request for collateral source information is also without merit. (See, *Carboni v New York Medical College*, 290 AD2d 473, 474.)

Each of the defendants' motions and cross motions (#001 through #006) seeking to dismiss plaintiff's complaint, to compel discovery, and to stay defendants' depositions is denied.

Plaintiff's cross motion (#007) for a protective order is granted in its entirety.

Defendants' depositions are to proceed forthwith.

Date 10/2/09

EDWARD W. McCARTY III

J.S.C.

ENTERED
OCT 05 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE