Comm'n on Human Rights v. Westbeth Corp. HDFC, Inc.

OATH Index No. 1913/15, mem. dec. (Feb. 9, 2016)

Petitioner's motion for interlocutory review found untimely and without merit. Complainant's mental health records discoverable.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
COMMISSION ON HUMAN RIGHTS
Petitioner
- against -
WESTBETH CORP. HDFC INC.
Respondent

MEMORANDUM DECISION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This proceeding was referred by petitioner, City of New York Commission on Human Rights ("Commission"), pursuant to section 1-71 of the Commission's Rules. 47 RCNY § 1-71 (Lexis 2015). Petitioner alleges that respondent, Westbeth Corp. HDFC, Inc. ("Westbeth"), a housing accommodation, engaged in discrimination in violation of sections 8-107(5)(a) and (15)(a) of the Administrative Code of the City of New York ("HRL"). Specifically, petitioner claims that Westbeth denied a request by complainant, who is disabled and relies on a wheelchair for mobility, to build a ramp at the building's entrance on Bethune Street. Petitioner seeks $50,000 in emotional distress damages for complainant as well as a civil penalty of $100,000. In its answer, respondent denied the allegations asserting that alternative entrances with wheelchair access exist at the building and that respondent made efforts to install a ramp as requested.

The instant motion arises out of a discovery dispute regarding complainant's mental health records. Petitioner seeks interlocutory review of an order issued on December 7, 2015, directing production of these records. For the reasons below, the motion is untimely and without merit.

BACKGROUND

It is undisputed that petitioner is seeking emotional distress damages for complainant from September 2011, when complainant requested that a ramp be installed, until January 2016 when Westbeth completed installation of a ramp at the Bethune Street entrance.

It is also undisputed that prior to and during the period of the alleged discrimination, complainant sought psychological counseling at DC-37 Social Services Unit and that the ramp was discussed at her counseling sessions. Complainant was also treated by an orthopedist.

Respondent sought disclosure of complainant's medical and mental health records. During conference calls on December 1 and 4, 2015, petitioner objected to the request without specifying any grounds. The objection was overruled. The scope of the disclosure was discussed and it was determined that written medical records, including psychotherapy notes, would be produced but that x-rays, photographs, and MRI scans need not be included. Respondent was instructed to prepare subpoenas for OATH's signature directing DC-37 Social Services Unit and the orthopedist to produce complainant's records. Petitioner was directed to obtain releases from complainant for the disclosure of these records.

A subpoena was "so ordered" by OATH on December 7, 2015, for Social Services Unit to produce a "complete copy of all medical records, documents and/or materials pertaining to the complainant [ ] from the year 2010 through the present."

On January 21, 2016, respondent e-mailed OATH that it had not received responsive documents from DC-37 Social Services Unit and a conference call was held the next day. Respondent advised that, rather than psychotherapy notes, DC-37 Social Services Unit only provided in-take forms and a letter from complainant's social worker stating that complainant reported anxiety and stress due to her on-going battle with Westbeth about the ramp.

During the call, petitioner advised that complainant refused to produce any notes related to her psychotherapy. Petitioner was directed to contact DC-37 Social Services Unit and to have complainant, who was appearing at petitioner's office that day, authorize release of her medical records, including psychotherapy notes, as ordered by the December 7, 2015 subpoena.

By letter dated January 26, 2016, petitioner advised that it had contacted DC-37 Social Services Unit and was told that it would only produce the records if there was "a court order" or if complainant prepared a release that specified release of her psychotherapy notes. Petitioner

also moved for certification of the order directing DC-37 Social Services Unit to disclose psychotherapy notes for interlocutory review by the Office of the Chair of the Commission. For the first time, petitioner argued that it was only seeking "garden-variety" damages and that under federal case law complainant's medical records were not discoverable. Respondent filed papers in opposition and petitioner replied on February 8, 2016.

ANALYSIS

Section 2-30(a) of OATH's rules for HRL cases, provides: "Within five days after issuance of any interlocutory order or decision, a party may move for certification by the Administrative Law Judge that such order or decision may be submitted, in whole or in specified part, for review by the chair of the Commission." 48 RCNY § 2-30(a) (Lexis 2015). Section 1-74 of the Commission's rules provides: "The Chair shall entertain an interlocutory challenge to a decision or order of an Administrative Law Judge where the presiding Administrative Law Judge certifies the question for review." 47 RCNY § 1-74 (Lexis 2015).

Here, the order to produce complainant's medical records was signed on December 7, 2015. *See People v. Simplice*, 189 Misc. 2d 588, 591 (Crim. Ct. of City of N.Y. Kings Co. 2001) (so ordered subpoena gave it the full effect of a court order). No additional orders were issued.

Petitioner's January 26, 2016 motion for certification of the December 7, 2015 order for interlocutory review was untimely. The motion was made 49 days after the order was issued, not five days as required by section 2-30 of OATH's rules. *Comm'n on Human Rights v. Coticelli*, OATH Index No. 970/11 at 4 (Aug. 19, 2011), *adopted*, Comm'n Dec. & Order (Nov. 21, 2011) (motion to review order to change venue made eight days later denied as untimely).

To the extent petitioner made subsequent objections or a request for reconsideration, they did not toll the time to seek review. *Cf. Gilbert Frank Corp. v. Federal Insurance Co.*, 70 N.Y.2d 966, 968 (1988) ("Evidence of communications or settlement negotiations . . . either before or after expiration of a limitations period . . . is not, without more, sufficient to prove waiver or estoppel"); *Nationwide Court Services, Inc. v. Dep't of Health & Mental Hygiene*, OATH Index No. 2042/06, mem. dec. at 3-4 (Nov. 3, 2006) (letter denying petitioner's claim started the statutory period, not its subsequent letter reiterating its position).

Even if petitioner's request was timely, it would be denied on the merits. Complainant's mental health records are discoverable under New York State law.

Section 2-29(a) of OATH's rules for HRL cases, concerning discovery, provides: "Although strict compliance with the provisions of Article 31 of the Civil Practice Law and Rules shall not be required, the principles of that article may be applied to ensure orderly and expeditious preparation of cases for trial." 48 RCNY § 2-29(a) (Lexis 2015).

Moreover, pursuant to HRL section 8-123, decisions of the Commission are subject to review in the New York State courts. Admin. Code § 8-123(f) (Lexis 2015) ("the jurisdiction of the Supreme Court shall be exclusive and its judgment and order shall be final, subject to review by the Appellate Division of the Supreme Court and the Court of Appeals . . . ."); *Shahbain v. Comm'n on Human Rights*, 2016 N.Y. Misc. Lexis 270 at 5-6 (Sup. Ct. N.Y. Co. Jan. 22, 2016). Thus, New York State law, not federal case law, applies to this proceeding.

The scope of pre-trial discovery under CPLR 3101(a) is broad. CPLR 3101(a) provides that: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The words "material and necessary" are "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968).

It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of CPLR 3121(a) when a party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue. *See Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 456-457 (1983); *Koump v. Smith,* 25 N.Y.2d, 287, 294 (1969); *Almonte v. Mancuso*, 132 A.D.3d 529 (1st Dep't 2015); *Bravo v. Vargas*, 113 A.D.3d 577, 578 (2d Dep't 2014); *Escobar v. GFC Fifth Ave. Owner, LLC,* 2013 NY Lexis 6029 at 63 (Sup. Ct. N.Y. Co. 2013).

In *Koump*, the Court of Appeals stated that: "A party should not be permitted to assert a mental . . . condition in seeking damages . . . and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition." *Koump*, 25 N.Y.2d at 294; *see also Hoenig v. Westphal*, 52 N.Y.2d 605,

610 (1981) (defendant's request for plaintiff's medical records granted because plaintiff waived physician-patient privilege by placing her physical condition in controversy); *Robles v. Merrill Lynch/WFC/L, Inc.*, 40 A.D.3d 412 (1st Dep't 2007) (plaintiff waived the social worker-patient privilege by affirmatively placing her mental condition at issue).

New York law has no exception for "garden variety" damages. Moreover, petitioner's argument that respondent "attempted to place" complainant's mental health in controversy by asking questions about it during her deposition makes no sense. Before the deposition, petitioner clearly placed respondent on notice that the only monetary relief it was seeking for complainant was for her emotional distress.

Petitioner fails to consider the CPLR and New York case law as prescribed by its own rules and instead relies only on federal case law. Even if federal law were applicable, petitioner's reliance on *Sims v. Blot*, 534 F.3d 117 (2d Cir. 2008) is misplaced. In reversing an order to produce mental health records, the Second Circuit stressed a number of factors in finding that plaintiff had not forfeited the psychotherapist privilege including that he withdrew any claims for mental injury that may have been discussed in his unrepresented deposition.

Petitioner's reliance on *Greenberg v. Smolka*, 2006 U.S. Dist. LEXIS 24319 (S.D.N.Y Apr. 25, 2006) is also misplaced. There, the district court held that privileged communications between a psychotherapist and patient are not automatically waived when a plaintiff seeks compensation for less acute forms of distress, frequently referred to as "garden variety" emotional distress claims. The court performed a balancing test and found that plaintiff had not waived the privilege under the facts presented. The court acknowledged that federal courts "have not developed a consistent approach to whether and when waiver is properly inferred with . . . others seemingly holding that the mere request for an emotional-distress award waives the privilege." *Id*. at 15; *see also Cohen v. City of New York*, 2007 U.S. Dist. LEXIS 70762 at 11 (S.D.N.Y. Sept. 21, 2007) ("Other courts, however, have characterized this narrow view of waiver as the 'minority view.'") *Cuoco v. U.S. Bureau of Prisons*, 2003 U.S. Dist. LEXIS 4766 at 8 (S.D.N.Y. Mar. 27, 2003) ("[A] minority of courts have found that 'garden-variety' claims for emotional distress are insufficient to trigger waiver of the privilege . . . .").

Even if the predominant view in federal court is that "garden variety" emotional distress claims do not waive the privilege, while instructive, federal law is not binding on HRL cases

where New York law applies. In fact, a federal court hearing this case would order production of complainant's mental health records. The Federal Rules of Evidence require that in civil cases heard in federal court, the "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed Rules Evid R § 501 (Lexis 2016). Thus, in *Chiquelin v. Efunds Corp.*, 2003 U.S. Dist. LEXIS 10687 at 5-6 (S.D.N.Y. June 24, 2003), a diversity case concerning claims of discrimination under the HRL, the district court applied New York State law and held that plaintiff waived the doctor-patient privilege by alleging emotional distress damages. *See also Evanko v. Electronic Systems Assoc., Inc.,* 1993 U.S. Dist. LEXIS 218 at 2-6 (S.D.N.Y. Jan. 8, 1993) (applying New York State law that plaintiff waived doctor-patient privilege by alleging emotional damages).

In sum, petitioner's motion for interlocutory review was untimely. Even if it was timely, petitioner is required to provide the requested mental health records because, under applicable New York law, petitioner waived the doctor-patient privilege by seeking emotional distress damages for complainant. These records may shed light on complainant's credibility and whether there were other factors that caused her mental distress.

Accordingly, complainant should promptly provide an authorization for the release of her mental health records, including all psychotherapy notes, as ordered by the December 7, 2015, subpoena. Failure to do so may result in sanctions at the trial.

Alessandra F. Zorgniotti
Administrative Law Judge

February 9, 2016

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