

Neuhaus v Concorde Med. Group, PLLC
2005 NY Slip Op 30637(U)
December 2, 2005
Supreme Court, New York County
Docket Number: 114922/04
Judge: Sheila Abdus-Salaam
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: SHEILA ABDUS-SALAAM
Justice

PART 13

Donna Neuhaus

INDEX NO. 114922/04

MOTION DATE 10/27/05

- v -

MOTION SEQ. NO. 001

Concorde Medical Group, PLLC. et al.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by plaintiff to compel defendant Scott Weber, M.D. to produce and make available the original medical chart of decedent Robert Neuhaus for review by a handwriting expert is granted. The cross-motion by Dr. Weber for a protective order against a demand by plaintiff that Dr. Weber produce a copy of his medical chart for plaintiff Donna Neuhaus and forward it directly to plaintiff's attorneys without releasing it to Dr. Weber's attorneys or any other entity is granted only to the extent indicated below.

At issue in this medical malpractice/wrongful death action is whether, as plaintiff contends, Dr. Weber (or any other defendant in this case) recommended that Robert Neuhaus undergo a transesophageal echocardiogram or TEE, which could have diagnosed Mr. Neuhaus's fatal endocarditis and prevented his death. At Dr. Weber's recent deposition, he produced his original medical chart for Robert Neuhaus which contained a

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

[* 2]

note documenting a telephone conversation with Mr. Neuhaus wherein a TEE was recommended. Plaintiff contends that this note is a fabrication and wishes to have the original chart analyzed by a forensic handwriting expert to determine, among other things, whether Dr. Weber used the same pen to write all of the notes in the chart and whether the chart had been altered.

Defendant opposes the motion on the ground that plaintiff has not laid a sufficient foundation for her suspicion that the note is a fabrication. However, such is not a valid objection to production of the original chart during the discovery phase of this action. Nor does defendant claim that it would be burdensome to him or his attorneys to produce the original chart even though a complete copy indisputably has been produced. Here, as in Hawksby v. New York Hospital (162 AD2d 179 [1990]), "there does not appear to be any reason for denying plaintiff access to this [original medical chart which] might be useful to plaintiff, and moreover, providing this item would not seem to impose much difficulty upon defendants¹ or their attorneys" (*id.* at 181). Of course, the original medical chart must be preserved for trial. Thus, any inspection by plaintiff's expert must be nondestructive and may not alter or change the chart in any way.

Regarding plaintiff's own medical chart, which is the subject of the cross-motion for a protective order, plaintiff is entitled to keep her private medical information from being disclosed to defendant's attorneys unless and until plaintiff decides to use it during the trial of this action.

Plaintiff was examined by Dr. Weber, who prescribed medication for her, in February 2003 following her husband's death. She provided a HIPAA² compliant authorization for Dr. Weber's records of this one-time visit, which restricted disclosure of the records to plaintiff's attorneys only.

¹Only one defendant, Dr. Weber, is involved in this motion.

²HIPAA stands for the federal Health Insurance Portability and Accountability Act which protects the privacy of a patient's health information.

Dr. Weber claims that this restriction on disclosure improperly interferes with his right to seek counsel in this action or in any future proceeding plaintiff might initiate against him. In support of this claim, Dr. Weber cites, Rea v. Pardo (132 AD2d 442 [1987]), a case in which the Fourth Department decided that a physician faced with a similar authorization³ to forward a copy of the patient's medical records to the patient's attorney was justified in first disclosing the records to the physician's medical malpractice carrier, and did not thereby violate the physician-patient privilege or breach the patient's right to confidentiality. In reaching its decision, the court found that disclosure of a patient's medical information to an insurer is justified "when the doctor has a reasonable belief that a claim for medical malpractice will be made against him by the patient. The doctor's belief is reasonable only if 'the [patient] knows or suspects that he is the victim of medical malpractice and has expressed an intent to pursue his legal rights' by informing the doctor of his intention to make such claim or by performing some other affirmative act from which the doctor reasonably may infer such intention" (id. at 447, quoting Hammonds v. Aetna Cas. & Sur. Co., 243 F Supp 793, 804-805).

However, the situation here is unlike the situation faced by the court in Rea. Plaintiff's time has expired to file a medical malpractice action for her own treatment by Dr. Weber, and plaintiff has not pointed to any circumstances that might extend the two-year-and-six-months statute of limitations for such actions. Indeed, plaintiff's counsel has represented that plaintiff "has no intention of bringing a medical malpractice action against Defendant Scott Weber, M.D., arising out of his treatment of her" (Affirmation In Opposition and Reply Affirmation, n. 4). Thus, defendant cannot have any "reasonable belief that a claim for medical malpractice will

³Rea is a pre-HIPAA case, but the physician-patient privilege has existed in the state of New York for some time (see Dillenbeck v. Hess, 73 NY2d 278 [1989]; CPLR 4504).

be made against him by the patient." Nor has plaintiff waived her own physician-patient privilege by bringing this action in her representative capacity for the treatment Dr. Weber rendered to her deceased spouse.

It appears that the reason plaintiff wishes to obtain a copy of her own medical chart from Dr. Weber is to have it reviewed by a handwriting expert in connection with her contention that Dr. Weber fabricated the note in her husband's chart about the TEE recommendation. Plaintiff ultimately may not pursue this fabrication theory. If she does pursue it and decides to call as a witness at trial a handwriting expert who will use plaintiff's medical chart as a basis for the expert's opinions, plaintiff must provide a CPLR 3101(d) response for this expert at least 60 days prior to trial (pursuant to Part 13's Pre-Trial Order) accompanied by (1) an authorization to release plaintiff's medical records to Dr. Weber's attorneys and any handwriting expert(s) Dr. Weber chooses, and (2) the original medical chart of Robert Neuhaus. Absent any intention by plaintiff to use her own medical chart in the prosecution of this action as noted above, and there being no apparent viable other action or proceeding plaintiff might be able to initiate against Dr. Weber arising from his treatment of her, permitting Dr. Weber's attorneys to see plaintiff's medical chart at this juncture under the guise of seeking legal advice because plaintiff and Dr. Weber are adversaries in this action is an insufficient reason to breach the confidentiality of plaintiff's private medical information. Thus, the cross-motion for a protective order is granted only to the limited extent indicated above.

Dr. Weber must produce the original medical chart for Robert Neuhaus and comply with the authorization provided by plaintiff for her own medical chart by the January 12, 2005 status conference at 11:00 A. M.

Dated: December 2, 2005

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FILED

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