SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

ROBIN HUDLER,

Plaintiff(s),

- against -

DEVI REDDY, MD, LONG BEACH MEDICAL CENTER and MERCY MEDICAL CENTER,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 9587/07

MOTION SEQUENCE NO. 13 & 14

MOTION SUBMISSION DATE: May 14, 2012

The following papers read on this motion:

Notice of Motion	**X**
Notice of Cross Motion	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers the motion by the defendant Mercy Medical Center for an Order compelling plaintiff to provide "Arons" authorizations enabling defendant to conduct ex parte interviews of Ashitbhar Kothari, MD, Ashok Bhatt, MD and Chitra Shenoy, MD; for costs and sanctions pursuant to 22 NYCRR 130-1.1 and the cross motion by the defendant Long Beach Medical Center for an Order compelling plaintiff to provide "Arons" authorizations enabling defendant to conduct ex parte interviews of Ashitbhar Kothari, MD, Ashok Bhatt, MD and Chitra Shenoy, MD, are both determined as hereinafter provided:

The Court initially observes that the plaintiff filed a note of issue on October 21, 2011 and that the trial of this action has been stayed by Order of this Court.

The respective moving defendants seek the respective requested relief in relation to the objection of the plaintiff to provide "Arons" authorizations pursuant to the holding of the Court in **Arons v Jutkowitz**, 9 NY3d 393, 850 NYS2d 345, 880 NE2d 831. Often referenced, the Court therein set forth:

> "We see no reason why a nonparty treating physician should be less available for an off-the-record interview than the corporate employees in *Niesig* or the former corporate executive in *Siebert*. As an initial matter, a litigant is "deemed to have waived the [physician-patient] privilege when, in bringing or defendant a personal injury action, that person has affirmatively placed his

or her mental or physical condition in issue" (*Dillenbeck v Hess, 73 NY2d 278, 287 [189], citing Koump v Smith, 25 NY2d 287, 294 [1969]; see also Hoenig v Westphal, 52 NY2d 605 [1981] [physician-patient privilege waived by commencement of personal injury lawsuit)].* This waiver is called for as a matter of basic fairness: "[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defendant against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim: (*Dillenbeck at 287).*

Plaintiffs counter that informal interviews of treating physicians are nonetheless impermissible because article 31 of the CPLR and part 202 of the Uniform Rules do not identify them as a disclosure tool. But there are no statutes and no rules expressly authorizing-or forbidding-ex parte discussions with any nonparty, including the corporate employees in *Niesig* and the former corporate executive in *Siebert.* Attorneys have always sought to talk with nonparties who are potential witness as part of their trial preparation. Article 31 does not 'close off" these "avenues of informal discovery", and relegate litigants to the costlier and more cumbersome formal discovery devices (*Niesig, 76 NY2d at 372).* As the dissenting Justices pointed out in *Kish,* choking off informal contacts between attorneys and treating physicians invites the further unwelcome consequence of "significantly interfering with the practice of medicine": "[i]nstead of communicating with an attorney during a 10-minute telephone call, a physician could be required to attend a four-hour deposition or to provide a time-consuming response to detailed and lengthy interrogatories" (*Kish v Graham, 40 AD3d 118, 129 [4th Dept., 2007, Pine, J., dissenting]).*

Plaintiff also complain that in a more casual setting and without opposing counsel present, a physician might unwittingly divulge medical information as to which the privilege had not been waived, or might be gulled into making an improper disclosure. This is the same 'danger of overreaching" that we rejected explicitly in *Niesig* and implicitly in *Siebert*, finding it to afford no basis for relinquishing the considerable advantages of informal discovery.

Again, we "assume that attorneys would make their identify and interest). known to interviewees and comport themselves ethically" (*Niesig, 76 NY2d at 376*). In *Siebert*, where the executive was privy to information for which the attorney-client privilege had not been waived, we considered the risk of improper disclosure adequately addressed where the attorney conducting the interview prefaced his questioning with admonitions designed to prevent this from happening, and there was no reason to believe that privileged information had, in fact, been disclosed. Here, the danger that the questioning might encroach upon privileged matter is surely no greater than was the case in *Siebert* since the subject matter of the interview or discussion - a patient's contested medical condition - will be readily definable and understood by a physician or other health care professional. In sum, an attorney who approaches a nonparty treating physician (or other health care professional) must simply reveal the client's identify and interest, and make clear that any discussion with counsel is entirely voluntary and limited in

scope to the particular medical condition at issue in the litigation.

Finally, we understand that, in fact, for many years trial attorneys in New York have engaged in the practice of interviewing an adverse party's treating physicians ex parte, particularly in malpractice actions, although only after a note of issue was filed (*see Anker v Broadnitz, 98 Misc2d 148[1979], affd on op below 73 AD2d 589 [2d Dept. 1979], lv dismissed 51 NY2d 703, 743 [1980]; see also Vogel v Jewish Hosp. & Med. Ctr. of Brooklyn, 73 AD2d 601 [2d Dept 1979]; Brevetti v Roth, 114 AD2d 877 [2d Dept 1985]; Stoller v Moo Young Jun, 118 AD2d 637 [2d Dept 1986]; Reid v Health Ins. Plan of Greater NY, 80 AD2d 830 [2d Dept 1981]; Breen v Leonard Hosp., 82 1000 [3d Dept 1981]; Feretich v Parsons Hosp., 88 AD2d 903 [2d Dept 1982]; Zimmerman v Jamaica Hosp., 143 AD2d 86 [2d Dept 1988]; Levande v Dines, 153 AD2d 671 [2d Dept 1989]; Tiborsky v Martorella, 188 AD2d 795 [3d Dept 1992]; Fraylich v Maimonides Hosp., 251 AD2d 251 [1st Dept 1998]; Luce v State of New York, 266 AD2d 877 [4th Dept 1999]; Klapper, Outside Counsel, Chipping Away at "Anker" Doctrine, NYLJ, Sept. 18, 1996, at I, col I [discussing cases]; Connors, New York Practice, Appellate Division is Confronted with HIPAA, NYLJ, Jan 17, 2007, at 3, col 1 [same]).* As described by practitioners, :defense counsel would usually serve the doctor with a trial subpoena or an authorization for medical records, attempt to speak with the doctor, and hope that the doctor would cooperate", although "treating doctors have generally been disinclined to cooperate with attorneys for either side in malpractice actions" (*Moore and Gaier, Medical Malpractice, Recent Cases on Ex Parte Interviews with Treating Physicians, NYLJ, October 4, 2005, at 3, col 1).* The effort was seen as worth making because pretrial interviews are "essential in procuring the doctors' assistance at trial" (*Moore and Gaier, Medical Malpractice, Liability for Breach of Confidentiality - Part 2, NYLJ, Dec. 5, 2006, at 3, col 1).*

We mention this long-standing practice for several reasons. First, the prohibition of interviews in lieu of article 31 discovery devices originated in the trial court's decision in *Anker,* a medical malpractice action handed down before - and at decided odds with our reasoning in - *Dillenbeck, Hoenig, Niesig and Siebert.* Second, it bears emphasizing that the filing of a note of issue denotes the completion of discovery, not the occasion to launch another phase of it. While interviews may still take place post note of issue, at that juncture in the litigation there is no longer any basis for judicial intervention to allow further pretrial proceedings absent "unusual or unanticipated circumstances" and :substantial prejudice" (*22 NYCRR 202.21[d]).* As a result, if a treating physician refuses to talk with an attorney and the note of issue has already been filed, it would normally be too late to seek the physician's deposition or interrogatories as an alternative. Finally, as one commentator put it and as these appeals illustrate, the prevailing "state of affairs" in New York was thrown into considerable confusion "when the 800-pound gorilla, also known as HIPAA . . . entered the arena" (*Connors, supra),* We now turn our attention to this statute.

. . .

In the appeals now before us, defendants forwarded to plaintiff HIPAA-

> compliant authorizations permitting their treating physicians to discuss the medical condition at issue in the litigation with defense counsel. After plaintiffs declined to sign these authorizations, defendants asked the trial courts for orders compelling them to do so, and the court granted these requests. This was entirely proper. Plaintiffs waived the physician-patient privilege as to this information when they brought suit, so there was no basis for their refusal to furnish the requested HIPAA-complaint authorizations. The waiver does not depend on the form or medium in which relevant medical information is kept or may be found: information does not fall outside the waiver merely because it is captured n the treating physician's memory rather than on paper (*see generally 65 Fed Reg 82462, 82620 [explaining rationale for treating verbal communications the same as paper and electronically based information]*). Of course, it bears repeating that the treating physician s remain entirely free to decide whether or not to cooperate with defense counsel HIPAA-complaint authorizations and HIPAA court orders cannot force a health care professional to communicate with anyone; they merely signal compliance with HIPAA and the Privacy Rule as is required before any use or disclosure of protected health information may take place.
>
> Finally, the trial court orders in *Arons* and *Webb* included stipulations not required *by* HIPAA and inconsistent with *Niesig* and *Siebert* - specifically a direction for defense counsel to hand over to his adversary copies of all written statements and notations obtained from the physician during the private interviews, any audio or video recordings or transcripts, and interview memoranda or notes (excluding the attorneys' observations, impressions or analyses). Imposition of these conditions was improper."
>
> **see Arons v Jutkowitz, supra at 409-411; 415-416**

The plaintiff premises the plaintiff's objection upon two grounds: that the holding of the Court in **Arons v Jutkowitz**, supra, was "to save the parties and - more importantly - the non-party treating doctors - time and trouble, so as to avoid significantly interfering with the practice of medicine". In this regard, the plaintiff sets forth that the plaintiff served the respective physicians whom the defendants seek "Arons" authorizations for: Ashitbhar Kothari, MD; Ashok Bhatt, MD and Chitra Shenoy, MD with non-party deposition notices; that depositions of the aforementioned physicians were conducted and that counsel for the respective defendants, including the movants herein declined to ask questions thus obviating the need for the "Arons" authorizations since the respective defendants by the non-inquiry at that time in effect waived their Court awarded right to "Arons" authorizations. This Court does not read the referenced sections of Arons v Jutkowitz, supra, in the restricted manner as envisioned by the plaintiff since the Court in Arons v Jutkowitz, supra was addressing the issue of trial preparation by a defendant rather than the concern of the time taken by a non-party to be deposed. If the sole purpose of the Arons v Jutkowitz Court was, as the plaintiff suggests to save the "time and trouble" of the plaintiff's treating physicians, then the Court therein would have circumscribed the non-party deposition or the use of "Arons" authorizations. Clearly in both instances the Court did not do this. The Court further notes that under the circumstances of the instant action the three respective non-party treating physicians are free to reject the interviews allowed by the authorizations.

Plaintiff also premises the plaintiff's opposition upon the contention that Drs. Kothari, Bhatt and Shenoy are not treating physicians of the plaintiff. The Court notes that Drs. Bhatt and Shenoy were the two physicians who signed the "2-P.C." in relation to the plaintiff and that Dr. Kothari prescribed medication

for the plaintiff upon her admission to the defendant Mercy Medical Center. If this Court were to accept the plaintiff's contention then the Court would be at a loss to understand why the plaintiff choose to subpoena these individual physicians for non-party depositions. Clearly by the plaintiff's own reasoning as to the holding of the Court in Arons v Jutkowitz, this would create more "time and trouble" for these health care providers.

Based upon all of the foregoing, that branch of the defendant Mercy Medical Center's application for an Order compelling plaintiff to provide "Arons" authorizations enabling defendant to conduct ex parte interviews of Ashitbhar Kothari, MD, Ashok Bhatt, MD and Chitra Shenoy, MD and that portion of the defendant Long Beach Medical Center's motion which seek an Order compelling plaintiff to provide "Arons" authorizations enabling defendant to conduct ex parte interviews of Ashitbhar Kothari, MD, Ashok Bhatt, MD and Chitra Shenoy, MD, are both **granted**.

The plaintiff shall provide the requested authorizations within 30 days of the date of this Order.

That branch of the defendant Mercy Medical Center's motion which seeks an Order for costs and sanctions pursuant to 22 NYCRR 130-1.1, is **denied**.

SO ORDERED.

DATED: 7/17/2012

.....Ray S. Mahon.....
J.S.C.

ENTERED
JUL 19 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE