

**Sackett v Bayer**

2013 NY Slip Op 32847(U)

October 31, 2013

Supreme Court, New York County

Docket Number: 800351/11

Judge: Alice Schlesinger

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
*Justice*

PART IA PART 16

Index Number : 800351/2011  
SACKETT, MERCEDES  
vs.  
BAYER, MICHAEL  
SEQUENCE NUMBER : 001  
COMPEL DISCLOSURE

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *granted to the extent provided in the accompanying memorandum decision.*

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

## FILED

NOV 07 2013

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: OCT 31 2013

*Alice Schlesinger*, J.S.C.  
**ALICE SCHLESINGER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**FILED**

NOV 07 2013

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK-----X  
MERCEDES SACKETT and ROBERT SACKETT,

Plaintiffs,

-against-

MICHAEL BAYER, M.D., PAUL FREUDMAN, M.D.,  
and ANESTHESIA PROVIDER, P.C.,Defendants.  
-----X

SCHLESINGER, J.:

COUNTY CLERK'S OFFICE  
NEW YORKIndex No. 800351/11  
Motion Seq. No. 001

This is a medical malpractice action where counsel for the plaintiff, the moving party here, states that the sole cause of action is lack of informed consent.<sup>1</sup> Plaintiff's counsel is asking here for a direction that the defendant Dr. Michael Bayer execute HIPAA and Arons authorizations for his own medical records and further that he be examined by a neurologist chosen by plaintiff's counsel.

Some background is necessary before the Court determines how much, if any, relief should be given to the movant. Dr. Bayer, a gastroenterologist had been the doctor for plaintiff Mercedes Sackett since 1997. In that capacity, he had performed several colonoscopy procedures without event. However, on July 13, 2011, during a colonoscopy performed by Dr. Bayer on Ms. Sackett, Dr. Bayer perforated Ms. Sackett's colon. This perforation led to emergency surgery and other claimed injuries.

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<sup>1</sup>The claim by the plaintiff is that Dr. Bayer did not obtain informed consent from her to do a colonoscopy because he was obliged to tell her of a tremor that he had before she consented to this invasive procedure. The doctor's defense is that the tremor was long-standing and did not in any way affect his ability to perform this procedure. Therefore, there was no need to include this information before obtaining Ms. Sackett's consent.

Approximately a month after these events, on August 22, 2011, based on certain information that Ms. Sackett had obtained concerning a tremor which she learned Dr. Bayer had, the plaintiff filed a complaint with the New York State Department of Health, Office of Professional Medical Conduct ("OPMC"). That office then conducted an investigation.<sup>2</sup> In the course of that investigation, counsel for Dr. Bayer submitted a letter to OPMC from Harold J. Weinberg, M.D., Clinical Professor Of Neurology at NYU School of Medicine (Motion, Exh A). The letter stated that Dr. Bayer was Dr. Weinberg's patient, and then stated that this patient has a "long-standing, stable tremor that is mild to moderate and does not represent an impediment to his practice as a Gastroenterologist. It is a benign familial tremor and not Parkinson's Disease"

It is this letter from Dr. Weinberg and how it was used that is the ultimate determining factor in this Court's decision. The OPMC closed the case against Dr. Bayer without any further action being taken. (Aff in Opp, Exh H). Following that, on October 16, 2012, the defendant was deposed. (The transcript of the deposition is attached to the opposition papers as Exhibit D). At the commencement of that examination, Dr. Bayer's counsel produced the above-referenced letter dated August 9, 2012, from Dr. Weinberg that had been sent to the OPMC and had it marked as an exhibit.

In the course of the examination, Dr. Bayer testified that whatever tremor he had, had nothing to do with the perforation but rather was caused by Ms. Sackett's pre-existing adhesions. Further, he stated that he had had these tremors for at least 16 years and that,

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<sup>2</sup>Counsel for the plaintiff, motivated perhaps by over-enthusiastic diligence, arranged for a private investigator to pretend to be a patient of Dr. Bayer's and secretly videotaped that individual's physical examination and conversations with the doctor. Arguably, this was done to show that Dr. Bayer hands did shake noticeably. However, the somewhat questionable investigation will not play any part in this motion.

like Dr. Weinberg, he believed the tremors in no way affected his ability to do his work.

Dr. Bayer, who is now 77 years old, added that, while the condition affects his hands, it does not affect his arms or any other part of his body.

The issue here is simply whether by producing this letter from Dr. Weinberg to both OPMC and the plaintiff, Dr. Bayer has waived the physician-patient privilege. After the deposition, counsel for the plaintiff made the same request to Dr. Bayer's counsel as is the subject of this motion. Defense counsel declined to produce these authorizations, relying on the physician-patient privilege which he believed Dr. Bayer had and which further believed had not been waived.

Surprisingly, there are a number of cases on this issue. From these cases it seems clear what the standard is when determining if a waiver has occurred. In *Dillenbeck v Hess*, 73 NY2d 278 (1989), an issue arose in the course of a civil action involving injuries from an automobile collision as to whether the defendant, who had earlier been prosecuted criminally, was obliged to turn over her hospital records containing blood alcohol tests taken after the accident occurred when she was taken to this hospital. Our highest court said, "No". The reason for that decision was that the defendant had not attempted to use her medical information in any kind of affirmative way.

The law on this subject is that if a medical condition has been placed in issue by a defendant in an attempt to explain or justify his conduct, then a waiver of that medical condition has occurred. The converse of that is that if a defendant defending a personal injury action asserts the privilege and has not affirmatively placed his medical condition in issue, then a waiver has not occurred merely by the plaintiff having placed the defendant's physical condition in issue. In other words, it takes some affirmative conduct by the

defendant to cause a waiver of his privilege. For example, in *Neferis v. DeStefano*, 265 AD2d 464 (2<sup>nd</sup> Dep't 1999), a personal injury action based on an automobile action, the defendant testified that she had taken certain prescription medications for "nerves" before the accident. The court found that by giving that information, the defendant had waived the privilege with regard to those medications.

To make it clear, it is not enough for the defendant's condition to be an issue in the action. That is one prong that has to be met. But what has to follow is that the defendant in some way asserts the condition in an affirmative manner, either by asserting a counterclaim or as an excuse for one's conduct. *Doe v. Karpf*, 11 Misc.3d 1093(A) (App. Tm., 1<sup>st</sup> Dep't 2006).

Here I find that a waiver has occurred. The letter from Dr. Weinberg was used by Dr. Bayer both before the OPMC and in the course of discovery in this action at his deposition to explain his medical condition and to attempt to deny any connection between that condition and his ability to perform as a doctor. Therefore, I find that Dr. Bayer has affirmatively placed his medical condition at issue in this case and waived any privilege.

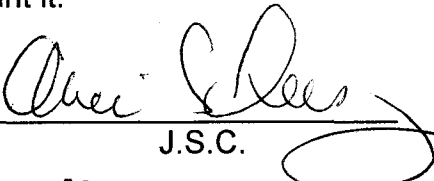
On the basis of this finding, I am directing that Dr. Bayer execute both HIPAA and Arons authorizations for Dr. Weinberg and any other treaters for the tremor condition going back three years before the event here in question and continuing through July 13, 2011. That should be done within ten days of the date of this decision. The request for an examination by a neurologist chosen by plaintiff's counsel is denied. It is now several years after the event in question and an exam would be invasive and not sufficiently probative of the doctor's condition in 2011 so as to warrant it.

Dated: October 31, 2013

**FILED**

OCT 31 2013

NOV 07 2013

  
J.S.C.

COUNTY CLERK'S OFFICE  
NEW YORK

**ALICE SCHLESINGER**