Roshkind v St. Luke's Roosevelt Hosp.
2007 NY Slip Op 34604(U)
June 7, 2007
Supreme Court, New York County
Docket Number: 113158/04
Judge: Sheila Abdus-Salaam
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

* INTERIM ORDER *

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

PRESENT: HON. SHEILA ABDUS-SALAAM PART 13
Justice

INDEX NO. 113158/04

Dorothy Roshkind, as Administrator of the Estate of Melyvn Roshkind

MOTION DATE

- v -

MOTION SEQ. NO.

St. Luke's Roosevelt Hospital and Continuum Health Partners, Inc.

MOTION CAL. NO.

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED
JUN 11 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

It is ordered that plaintiff provide HIPAA compliant authorizations that permit defense counsel to conduct post-note of issue ex parte interviews with plaintiff's treating physicians within 30 days of service of a copy of this order with notice of entry.

This court has previously ruled that such post note interviews are permitted (see Vrettos v. Friedman, March 31, 2005, Index No. 10977/03; Perry v. The Mount Sinai Medical Center, February 16, 2005, Index No. 122908/01). In reaching this conclusion I relied in part upon the Second Department's decisions in Levande v. Dines (153 AD2d 671 [1989] and Zimmerman v. Jamaica Hosp., (143 AD2d 86 [1988], lv denied 73 NY2d 702 [1988]), the Third Department's decision in Tiborsky v. Martorella (188 AD2d 795 [1992]) and the First Department's agreement with those decisions expressed in Fraylich v. Maimonides Hospital, 251 AD2d 251

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

[1998]). In Fraylich, id., the court stated that "[w]e are in accord with the Second and Third Departments that the prohibition against the defendant in a medical malpractice action interviewing the plaintiff's treating physicians without a court order or the plaintiff's consent is limited to the pretrial stage." Implicit in this statement is that such an interview is not part of the discovery stage of the litigation, but is a type of trial preparation done post-note of issue.

In Arons v. Jutkowitz (37 AD3d 94 [2006]), a decision which was issued after my decisions in Vrettos, supra, and Perry, supra, the Second Department retreated from the position taken in Zimmerman, supra and Levande, supra, by holding that Article 31 of the CPLR does not authorize private, ex parte interviews as a disclosure device, and that " . . . compulsion of such unsupervised private and unrecorded interviews plainly exceeds the ambit of article 31. " (37 AD3d p. 100). The Arons court did not outright reject Zimmerman and Levande, but attempted to explain that those decisions do not stand for the proposition for which they are often cited by stating that in those cases, ". . . we did not declare that defense counsel have a right to such informal, post-note of issue interviews, nor did we require plaintiffs to consent to them. Rather, we merely held, under the circumstances, that the treating physician's unique and highly relevant testimony would not be precluded (citations omitted)." (37 AD3d p. 97). But this statement is semantics – if a court declares that a post-note of issue interview is not prohibited, doesn't it stand to reason that the interview is permitted?

It is evident that in those previous decisions, the court did not consider these post-note interviews to be a disclosure device, and thus there was no prohibition, which would have been the case if defendant were attempting to conduct pretrial discovery after the filing of the note of issue without a showing of " " unusual or unanticipated circumstances"

(22 NYCRR § 202.21 [d])." (Arons, supra, p. 100). Yet, in Arons, the Second Department has now reached a different conclusion and declared that these interviews are in the nature of discovery and that there is no provision for this discovery in CPLR Article 31.[1]

In Kish v. Graham (833 NYS2d 313, 2007 NY Slip Op 02376), the majority opinion of the Third Department (in a 3-2 decision) agreed with the Arons court and characterized the interviews as a type of informal disclosure that is not available under Article 31. In contrast, the dissent concluded that " . . . post-note of issue interviews of fact witnesses, whether physicians or lay witnesses, constitute trial preparation rather than discovery" (833 NYS2d p. 320) and held that a plaintiff is obligated to provide defense counsel with authorizations to conduct ex parte post-note of issue interviews with treating physicians. As was aptly noted by the dissent in Kish, supra:

> We agree with the Second Department and the majority in this case that such interviews are not covered under the CPLR article 31 discovery provisions, but we note that CPLR article 31 does not authorize trial preparation interviews with any nonparty witnesses. Thus, the fact that CPLR article 31 does not authorize such interviews is irrelevant to the issue here, i.e., whether interviews of nonparty fact witnesses are permissible in preparation for trial. It is beyond question that a defense attorney may interview an eyewitness to a motor vehicle collision in preparation for trial without resorting to CPLR article 31 discovery devices. While physicians are, indeed, different because of their obligation to protect the confidentiality of their communications with patients, we perceive no basis to treat the witnesses differently from other fact witnesses once the plaintiff waives the physician-patient privilege." [833 NYS2d p. 320]

---

[1] The Arons approach was subsequently followed by the Second Department in Webb v. New York Methodist Hospital (35 AD3d 457 [2006]). The Second Department granted leave to appeal Arons to the Court of Appeals by order dated March 8, 2007 (2007 NY Slip Op 64723 (U)).

As for the matter of requiring plaintiffs to consent to the interviews, it is clear to this court from a practical standpoint that given the provisions of HIPAA, physicians will not speak to defense counsel without an authorization from the patient, for fear of violating HIPAA. Thus, if defense counsel are permitted under the law to interview the treating physicians, plaintiffs must be ordered to supply authorizations for this to happen. In Holzle v. Healthcare Services Group, Inc., (7 Misc. 3d 1072 (A) [2005]), Justice Curran of Supreme Court, Niagara County held that post-note of issue interviews are permitted but declined to become involved in the process by requiring plaintiffs to execute an authorization, noting that there is no statute or rule requiring plaintiffs to execute an authorization permitting interviews. But courts are often called upon to rule on issues regarding authorizations for among other things, school records, employment records and tax returns, where defendants are demanding authorizations for records and plaintiffs are resisting, claiming that the demands are overbroad, irrelevant, a fishing expedition, etc. There is no court rule or statute requiring plaintiffs to execute authorizations for these records, and yet, where appropriate, courts order plaintiffs to supply these authorizations as a matter of course because defendants would otherwise be unable to obtain the records.

In Holzle, supra, Justice Curran reasoned that the court must not become involved because physicians should know that New York common law construes a waiver of HIPAA rights where a plaintiff in a personal injury action has put his/her physical condition in issue and that physicians should accordingly understand that they are not breaching confidentiality by talking to defense counsel. But Justice Curran's view that the law should be clear to physicians (or to litigants or their counsel for that matter) and that authorizations just aren't necessary, is belied by the volume of decisional law on the issue of whether plaintiffs can be compelled to execute authorizations so that these ex parte

interviews may be conducted.[2]

I believe that in this circumstance, where defendants cannot obtain an interview without an authorization from plaintiff, directing plaintiff to supply an authorization that includes language informing the physician that the interview is not at the request of plaintiff, but at the request of defendant, and that it is to assist the defendant in defense of the lawsuit, is appropriate court intervention.

Frayfich, supra, is still controlling in this Department because the First Department stated that it was "in accord" with Zimmerman, supra, and we cannot tell at this juncture whether the First Department would follow Arons or adhere to Frayfich and agree with the dissenting opinion in Kish, supra. Given that Frayfich remains the law in this Department and the appeal of Arons is sub judice, it is

ORDERED that any privilege regarding healthcare and treatment for plaintiff's medical condition relating to the treatment and injuries claimed in this case has been waived by putting plaintiff's medical condition at issue in this lawsuit, and since this action is now on the trial calendar, Alexander Chen, M.D., may, IF HE WISHES TO DO SO, discuss plaintiff's medical condition with counsel for defendants with the knowledge and understanding that THE PURPOSE OF THE INFORMATION IS TO ASSIST THE DEFENDANTS IN THE DEFENSE OF A LAWSUIT BROUGHT BY THE PLAINTIFF; and it is further

ORDERED that defense counsel obtain an authorization separate and apart from any other authorization and that the authorization state on its face in BOLD letters that the purpose of the interview is to assist defendants in defense of a lawsuit brought by plaintiff and that this interview is not at the request of plaintiff; and it is further

ORDERED that the authorization must contain the name and address of the person to whom the health care provider or hospital employee may give an

---

[2] See, for example, the lower court decisions mentioned in Arons (37 AD3d p. 99).

interview and identify the persons or entities the interviewer is representing (see 45 CFR § 164.508 [c] [iii] and that the authorization conform to the requirements of 45 CFR § 164.508 [c]; and it is further

ORDERED that the authorization shall not be combined with a subpoena; and it is further

ORDERED that defendants serve a copy of this order together with plaintiff's authorization upon Alexander Chen, M.D.

Finally, I have not ordered that defense counsel provide plaintiff with copies of any written materials, notations or recordings obtained at the interview, as I believe that such material is privileged as attorney work product (see Fraylich, supra).

Dated: 6/7/07

SHEILA ABDUS-SALAAM J.S.C.

Check one: ___ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ___ DO NOT POST ___ REFERENCE