Fernet v Clements
2014 NY Slip Op 33939(U)
November 25, 2014
Supreme Court, Albany County
Docket Number: A56/2012
Judge: Gerald William Connolly

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

APRIL FERNET and TIMOTHY FERNET,

Plaintiff,

-against-

PHILIP CLEMENTS, M.D., W. BRUCE CLARK, M.D., W. BRUCE CLARK, M.D., P.C., W. BRUCE CLARK, M.D., P.C. d/b/a CLARK CLEMENTS LEIN SAYEDA, ALBANY MEDICAL CENTER HOSPITAL, ALBANY MEDICAL CENTER, ALBANY MEDICAL COLLEGE, JAMIE CHAO, M.D. and ANA MADARIYA, M.D.,

Defendants.

DECISION AND ORDER
Index No. A56/2012

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Cathleen B. Clark, Esq.
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Connolly, J.:

Defendants Philip Clements and W. Bruce Clark in this medical malpractice action have moved herein for an Order pursuant to CPLR §3124 for an order compelling the plaintiff to provide an authorization allowing defendants to obtain the non-party infant daughter of the defendant's medical records from Samaritan Hospital from October, 2009. The remaining defendants, by cross-motion, have joined in such application. Plaintiffs oppose the requested

relief.

Plaintiffs allege in this action that, following the birth of her fifth child, defendants negligently discharged the plaintiff April Fernet from the hospital on October 28, 2009 and failed to diagnose a postpartum infection, which led to Ms. Fernet's subsequent re-admission to the Hospital, later surgery, and attendant damages. Plaintiffs allege, via their bill of particulars, that Ms. Fernet exhibited signs and symptoms of such postpartum infection immediately after the birth of their daughter on October 26, 2009, an allegation denied by the defendants.

Defendants assert that, at his deposition in this matter, plaintiff Timothy Fernet testified that when he brought his ill wife, April, to Samaritan Hospital on October 28, 2009, he also brought his daughter, Aliyah to the same hospital because she was sick and had a fever. Based on such information, defendants have requested the aforementioned Order of the Court. Upon direction of the Court[1], the defendants further submitted an affidavit of Dr. Clements asserting that a culture obtained from April Fernet attendant to her subsequent (re-admission) operation showed colonization of Group A streptococcus bacteria. Dr. Clements opined that the cause of April Fernet's condition on her presentation at Samaritan Hospital was most likely due to a toxic shock syndrome as a result of a Group A streptococcus bacteria infection. Dr. Clement further stated that Group A streptococcus bacteria is the same bacteria which can cause "strep throat", a condition consistent with Aliyah's presentation at Samaritan as described by Timothy Fernet. Dr. Clements further stated that, as strep can be transmitted from one family member to another, "if cultures performed on Alyssa [sic] on October 29, 2009 at Samaritan Hospital demonstrate that the cause of Alyssa's [sic] fever and sore throat was a strep infection, it could help to explain the source of April Fernet's infection." Dr. Clement accordingly requests that the records be

[1]Plaintiffs were permitted to submit further papers in opposition to such submission.

reviewed to determine whether Aliyah was diagnosed with a Group A strep infection.

Plaintiffs oppose the motion, asserting that pursuant to case law and CPLR §4504 [a], the records of non-party Aliyah Fernet are protected by the physician-patient privilege, a privilege which has not been waived, and that the testimony of Mr. Fernet to the effect that his daughter was seen for a fever and sore throat at Samaritan on October 29, in which he also testified that he believed that his daughter did not have strep, did not provide any basis for discovery of these privileged non-party medical records.

Defendants, on reply, have requested an *in camera* review by the Court of the disputed records to determine whether their relevancy to the issues in the case outweigh the privilege.

CPLR §3101 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, in our view, to be 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. CPLR 3101 (subd. [a]) should be construed, as the leading text on practice puts it, to permit discovery of testimony which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable" (*Allen v Crowell-Collier Publishing Company*, 21 NY2d 403 [1968][internal citations omitted]). Where the requested material is subject to the physician-patient privilege, a litigant will be deemed to have waived the privilege by bringing a personal injury action that affirmatively places her physical or mental condition in issue (*see Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]).

It is clear, on the record herein, that the physician-patient privilege of CPLR §4504 [a] and common law applies to the child's records. It also appears, however, that the privilege is being asserted by her parents, the plaintiffs herein, in their role as legal guardians of the child.

Such assertion leaves the plaintiffs in the position of full access to the disputed records while, at the same time, asserting a privilege for their infant non-party daughter to bar the defendants access to same. Moreover, the Court notes that the plaintiffs have provided only conclusory responses to the expert submission of Dr. Clements (a party to the instant action) regarding the relevance of any positive result on a strep test on Aliyah.

Despite the obvious incongruity of a finding of a privilege with regard to records under the two plaintiff's control with regard to information upon which materiality and necessity has been established by the defense, the Court finds itself constrained to deny the instant motion. The case law provided by the parties simply does not allow for the access to privileged records of non-parties, even in circumstances akin to those presented here (*see Ward v County of Oneida*, 19 AD 3d 1108, 1109 [4th Dept., 2005] (motion to compel, in pertinent part, psychological records of parents in action brought for alleged lead paint exposure denied where mother brought action as natural guardian of infant); *Monica W. v. Milevoi,* 252 AD 2d 260, 262-263 [1st Dept 1999]: "The infant plaintiffs, by seeking recovery resulting from their exposure to lead, have necessarily placed their mental and physical conditions in issue and have implicitly waived their privilege against disclosure of their medical records (*Koump v Smith*, 25 NY2d 287, 294; *Kaplowitz v Borden*, Inc., 189 AD2d 90, 92-93). The same cannot be said of their parents and siblings, who are entitled to protection against the release of confidential medical information. In the absence of waiver, this material is privileged, and the nonparties' privilege against disclosure, which is personal to them (*Dillenbeck v Hess*, 73 NY2d 278, 289; *Prink v Rockefeller Ctr.*, 48 NY2d 309, 314), cannot be defeated by defendants' assertion that it is material and necessary to their defense (*Muniz v Preferred Assocs.*, 189 AD2d 738, 739, *citing Sibley v Hayes 73 Corp.*, 126 AD2d 629, 630). As the Court of Appeals noted in *Dillenbeck v Hess* (*supra*, at 289): "it is inherent in the very nature of an evidentiary privilege that it presents an obstacle to discovery and

it is precisely in those situations where confidential information is sought in advancing a legal claim that such privilege is intended to operate. Were we to carve out an exception to the privilege whenever it inhibited the fact-finding process, it would quickly become eviscerated.").

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Based upon the foregoing, it is hereby

ORDERED that defendants' motion and cross-motion to compel plaintiffs to provide medical authorizations for Aliyah Fernet's medical records from Samaritan Hospital from October 2009 are denied in their entirety.

This memorandum constitutes the Decision and Order of the Court. The original Decision and Order is being returned to counsel for the plaintiffs. A copy of this Decision and Order together with all other papers are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order and delivery of the copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the original Decision and Order.

SO ORDERED.
ENTER.

Dated: November 25, 2014
Albany, New York

12/15/14

Gerald W. Connolly
Acting Supreme Court Justice

Papers considered:

1. Notice of Motion dated June 26, 2014; Affidavit of Cathleen B. Clark, Esq. dated June 26, 2014 with accompanying exhibits A-D;
2. Notice of Cross-Motion dated July 9, 2014; Attorney Affidavit in Support of Cross-Motion of E. Tobin, Jr. dated July 9, 2014;
3. Attorney Affirmation in Opposition of L. Jordan, Esq. dated July 22, 2014;
4. Reply Affidavit of J. Maloney, Esq. dated July 28, 2014;
5. Affidavit of P. Clements, M.D. dated September 18, 2014;
6. Attorney Affidavit in Support of E. Tobin, Jr., dated September 30, 2014;
7. Attorney Affirmation in Opposition of Adam P. Powers, Esq. dated October 3, 2014; accompanying exhibits A-B.