

Vargas v Lee
2015 NY Slip Op 31048(U)
June 5, 2015
Supreme Court, Kings County
Docket Number: 507923/2013
Judge: Gloria M. Dabiri
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of June, 2015.

P R E S E N T:

HON. GLORIA M. DABIRI,
Justice.

----- X

JOSE VARGAS and ELENA VARGAS,

Plaintiffs,

Index No. 507923/13

- against -

A. LEE, CRN, ZACHARY YOUSSEF, VASHUDHA VISWANATHAN, GEROGE BAKSTON, SOUNDER R. ESWAR, P.C., RONALD GUBERMAN, MAHALINGAM SIVAKUMAR, BM VASCULAR SURGERY P.C. and WYCKOFF HEIGHTS MEDICAL CENTER.

Defendants.

-----X

The following papers numbered 1 to 7 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____,
Opposing Affidavits (Affirmations) _____	3-4 _____,
Reply Affidavits (Affirmations) _____	5-6 _____,
Affidavit (Affirmation) _____	_____,
Other Papers _____	_____.

Upon the foregoing papers, plaintiffs Jose Vargas (Vargas) and Elena Vargas seek an order, pursuant to CPLR § 3124, compelling defendant Wyckoff Heights Medical Center (Wyckoff or hospital) to produce the audit trail of plaintiff's electronic medical

record (EMR) [MS #1]. Wyckoff cross-moves for a protective order pursuant to CPLR § 3103 [MS #2].

FACTUAL BACKGROUND

On May 1, 2012 plaintiff underwent surgery at Wyckoff to correct his congenital clubfoot. Post-surgery complications, including swelling and gangrene, resulted in the amputation of plaintiff's left leg from the knee down. Plaintiff alleges that Wyckoff was negligent with respect to proper and timely diagnosis and treatment of his post-surgical condition.

On June 11, 2014 plaintiff served a Notice of Discovery and Inspection requesting disclosure of the hospital's EMR audit trail. On July 9, 2014 co-defendants Richard Lee, Youssef Zachary, Vashuda Viswanathan and George Bakston made a similar request. In a response dated June 27, 2014, Wyckoff denied the request. Thereafter, at a preliminary conference, held on October 14, 2014, the parties entered into a consent order, agreeing that "[t]he audit trail issue will be addressed by CCP or by motion."

At issue is the disclosure of the hospital's EMR audit trail of the plaintiff's admission from May 1 through May 17, 2012. Plaintiff asserts that the audit trail provides material and necessary information regarding the timing and substance of plaintiff's care. Wyckoff objects to disclosure on the grounds that it constitutes overreaching, is overbroad and unduly burdensome, and not relevant to any issue to be litigated in this case.

DISCUSSION

CPLR § 3101(a) provides for full disclosure of all matter material and necessary in the prosecution or defense of an action. The words, “material and necessary” are to “be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist in preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [Ct App 1968]). The scope of disclosure is left to the sound discretion of the trial court and must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure (*id.*; *Andon v 302-304 Mott Street Associates*, 94 NY2d 740, 747 [2000]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2nd Dept 2010]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531, 845 N.Y.S.2d 124 [2nd Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate that the ... discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Crazytown Furniture v Brooklyn Union Gas Co.* 150 AD2d 420, 421 [2nd Dept 1989]).

The issue of metadata production is at the forefront of present day e-discovery disputes. Metadata, often referred to as “data about data,” is electronically stored information (ESI) that describes the “history, tracking or management of an electronic document” and includes the “hidden text, formatting, codes, formulae, and other

information associated” with an electronic document (*Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep’t of Homeland Sec.*, 255 FRD 350, 352 [SD NY 2008]; see *The Sedona Principles, Second Edition: Best Practices Recommendations and Principles for Addressing Electronic Document Production* [Sedona Conference Working Group Series 2007])¹. There are several distinct types of metadata, including substantive, system and embedded. An EMR audit trail constitutes system metadata as it is an “automated set of chronological records of system activities that may enable the reconstruction and examination of a sequence of events and/or changes in an event” (*The Sedona Conference Glossary* [Sedona Conference Working Group Series 2007]). System metadata is not routinely produced unless the requesting party shows good cause [*Aguilar*, 255 FRD at 353].

Here, defendants seek to compel production of plaintiff’s EMR audit trail on the grounds that it is relevant to the question of proper and timely treatment of plaintiff’s post-surgical complications. However, plaintiff has not distinguished the audit trail’s utility from that of its corresponding EMR. Plaintiff can presumably obtain the patient’s treatment details from the already produced EMR. In some instances, system metadata production has been considered relevant when the process by which a document is created is in issue or there are questions concerning a document’s authenticity (*Aguilar*, 255 FRD at 354; *Kingsway Fin. Servs. v Pricewaterhouse-Coopers LLP*, 2008 US Dist

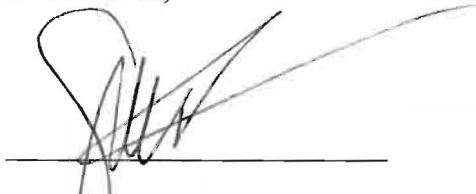
¹ Metadata includes “all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records” (*Autotech Techs. Ltd. P’Ship v AutomationDirect.com, Inc.* 248 F.R.D. 556, 557 n.1 [N.D. Ill. 2008]).

Ct. 03 Civ. 5530 [SD NY 2008]). While not a prerequisite to meta-data production, such authenticity issues speak to the utility and necessity of such production. Here, plaintiff does not articulate any analogous or salient consideration. General comments that the audit trial may provide discovery on the “timing and substance of plaintiff’s care” are insufficient. Thus, the plaintiff has not satisfied his burden of establishing the necessity and utility of audit trail production. Accordingly, it is

ORDERED that plaintiff’s motion is denied without prejudice to renew upon a proper showing; and it is further

ORDERED that the defendant Wyckoff Heights Medical Center’s cross-motion is denied without prejudice to renew.

E N T E R,



J. S. C.

HON. GLORIA DABIRI

FILED
PROPERTY CLERK
25 JUN 10 AM 8:35
my