

<b>Rothenberg v Melone</b>
2015 NY Slip Op 32357(U)
December 11, 2015
Supreme Court, New York County
Docket Number: 805271/12
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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MICHAEL ROTHENBERG,

Plaintiff,

-against-

CHARLES P. MELONE, JR., M.D.,

Defendants.  
-----X

Index No. 805271/12

Mot. Seq. 002

SCHLESINGER, J:

This medical malpractice action arises from allegations that on March 16, 2010, the defendant, Charles P. Melone, Jr., M.D. ("defendant" or "Dr. Melone") negligently performed surgery related to the nerves of plaintiff Michael Rothenberg's upper left arm (decompression, neurolysis, and epineurolysis of the ulnar nerve at the left medial epicondyle and elbow, and anterior submuscular transposition). Now before the court is a motion brought by defendant to compel plaintiff to produce the plaintiff's psychiatric treatment records before and after his treatment with Dr. Melone.<sup>1</sup>

Plaintiff first presented to defendant on March 3, 2010. Defendant's records show that in the initial evaluation questionnaire, plaintiff circled "No" with regard to a whether he had a prior history of psychological problems. In the Medication section and Past Medical History section of these records, nothing is listed. Additionally, in Dr. Melone's notes, there is no mention of current medications or psychological problems,

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<sup>1</sup> Defendant's motion is also labeled as one to dismiss, and sought other forms of relief; however, at an in-court conference on November 18, 2015, the parties resolved all other issues regarding the instant motion by stipulation, a copy of which is attached. Further, defendant's counsel made clear at the November 18 appearance that at this juncture, he seeks production of the psychological records at issue and not dismissal. Therefore, the factual background of this matter will be discussed only to the extent necessary to resolve the remaining issue.

and Dr. Melone maintains that plaintiff never told him that he took anti-depressants.

However, plaintiff testified at his deposition that he had been treating with a psychologist, Dr. Marina's, for the past seven years, had been diagnosed with depression, and was taking anti-depressants during his treatment with Dr. Melone. Also, plaintiff's pharmacy records indicate that in the weeks before and after his treatment with Dr. Melone which began in March 2010, he was prescribed various medications to treat anxiety and depression.

Dr. Melone testified at his deposition that had he known about plaintiff's true mental health and medication history, he would not have proceeded directly to surgery as he did in this case, and instead would have first consulted with plaintiff's psychologist and referred plaintiff for pain management.

In support of the motion, Dr. Melone's counsel references the above<sup>2</sup> and also attaches three peer-reviewed medical journal articles from surgeons regarding outcomes of cubital and carpal tunnel release surgeries, which are procedures that involve neurological issues in the upper arm similar to the kind at issue in this case. Def's Motion, Ex. R. The authors of those articles argue that those patients with psychological factors such as depression and a history of taking anti-depressants have an increased chance of unsatisfactory results.

Counsel thus contends that Dr. Melone should have been told about plaintiff's psychiatric and medication history so that he could have properly evaluated plaintiff

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<sup>2</sup> The court notes that Dr. Melone did not provide any sworn statement with his moving papers. Counsel referenced his deposition testimony without attaching a transcript of same, although noting that a transcript was unable at the time the motion was made. In any event, counsel submits portions of Dr. Melone's deposition transcript in reply.

before recommending surgery or some other treatment. Thus, to defendant, plaintiff's psychiatric and medication records are discoverable, as their evaluation is relevant to an evaluation of plaintiff's surgery itself as well as the claimed damages arising from the surgery.

In opposition, plaintiff's counsel notes that plaintiff has not claimed psychological injury in this action, but rather only physical problems with his left arm and elbow. As to defendant's claim that he was not informed as to plaintiff's prior psychological history, counsel points out that plaintiff advised Dr. Melone that he took medicine to "help him sleep". Additionally, before the surgery, Dr. Melone referred plaintiff to Dr. Daniel MacGowan, a neurologist who was certified by the American Board of Psychiatry and Neurology (for whom defendant was provided an authorization to obtain records). Dr. MacGowan wrote a report dated February 18, 2010, in which he noted that plaintiff had a past history of anxiety and was taking Welbutrin (an anti-depressant). It is undisputed that Dr. MacGowan sent this report to Dr. Melone before the surgery.

Although Dr. Melone claimed to have reviewed Dr. MacGowan's report, plaintiff argues he did not. According to plaintiff's counsel, had Dr. Melone actually reviewed this report before the surgery, he would have seen that plaintiff had a past history of anxiety and was taking an anti-depressant. Thus, Dr. Melone's argument that disclosure of the records would affect an evaluation of the case is problematic, as Dr. Melone should have known of plaintiff's condition regardless of how plaintiff filled out his pre-surgery questionnaire. Further, as to the legal standards governing discovery of psychiatric records, plaintiff argues that defendant's motion requires an expert affidavit, which defendant did not provide.

In reply, defendant maintains that under the controlling caselaw, an expert affidavit is not required to warrant disclosure, and that defendant met its burden by pointing to Dr. Melone's testimony, records, and the peer-review articles attached to the moving papers.

### Discussion

The burden of proving that a party's mental condition is in controversy, for purposes of obtaining relevant psychiatric or medical records, is on the party seeking the records. *Budano v Gordon*, 97 AD3d 497, 498 [1<sup>st</sup> Dep't 2011], citing *Koump v Smith*, 25 NY2d 287, 300 [1969]. The question of whether a party's mental condition is in controversy "can be developed on affidavits sworn to by persons having knowledge of the facts and by other available proof relevant to the issue, thus forming a basis for an order by the trial court which could be reviewed intelligently on appeal." *Koump*, 25 NY2d at 299-300.

This is a close case given that plaintiff has not asserted a claim based on emotional distress or based on psychological damages, and has only brought claims which sound in the negligent performance of surgery and potentially for lack of informed consent.

On one hand, plaintiff provided inconsistent accounts of his psychiatric history to Dr. Melone, who testified that his treatment would have been different had he known of plaintiff's true history. Furthermore, defendant's motion is supported not only by Dr. Melone's testimony and by his records of plaintiff, but also by the aforementioned peer-reviewed articles explaining the potential link between plaintiff's psychiatric history and treatment in this case.

On the other hand, it is undisputed that Dr. MacGowan sent his report to Dr. Melone before the surgery, and noted plaintiff's history of anxiety and medication usage in the report. As plaintiff's counsel indicates, defendant's failure to appreciate Dr. MacGowan's report may support a claim for lack of informed consent. Also, as noted above, defendant failed to include any sworn statements in the moving papers so as to meet his burden.

In sum, it appears that the parties both believe that plaintiff's psychological condition and medication usage, and the issue of whether Dr. Melone knew of this or should have known about this before surgery, are relevant to this case and may support their respective positions, albeit in opposite ways. Defendant essentially argues that had plaintiff disclosed his condition on his questionnaires to Dr. Melone, the surgery at issue would never have been performed. In contrast, plaintiff contends that had Dr. Melone reviewed Dr. MacGowan's report, he would have had to discuss the pros and cons of surgery with respect to plaintiff's condition, and his failure to do so indicates a lack of informed consent.

The clear language of *Koump* and *Budano* demonstrates that this issue may be determined upon a consideration of all relevant evidence and not just on expert affidavits. Although the holding of *Budano* is controlling, this case is factually distinguishable from *Budano, supra*, in which the First Department found that disclosure was not proper. In *Budano*, the First Department noted that even if the defendant therein established that the plaintiff suffered from chemical dependency and had HIV, the medical records discovery at issue were not discoverable because the defendant,

who submitted only an attorney affirmation in support of the motion, "failed to submit an expert affidavit or any other evidence that would establish a connection between . . . those conditions to plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life." *Id.* at 499.

Based on the above and given the relevance of plaintiff's condition to his treatment, disclosure is warranted. However, to protect plaintiff from the potential of a release of records which may be irrelevant and/or unduly prejudicial, the court orders production of plaintiff's psychiatric records (as demanded in Exhibit "H" of the moving papers) to the court for an in camera inspection. The court will then determine which, if any, records shall be turned over to defense counsel, and what redactions to the records before disclosure would be appropriate. Plaintiff shall provide all such records to the court in Room 222 within 45 days of this decision.

As such, it is hereby

ORDERED that defendant's motion is granted to the extent that plaintiff shall produce the psychiatric records referenced in his demand attached as Exhibit "H" to the moving papers to the court for an in camera inspection within 30 days. Counsel for defendant shall serve a copy of this decision and order with notice of entry on plaintiff's counsel within 20 days of entry.

Dated: December 11 , 2015

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J.S.C.  
**ALICE SCHLESINGER**