

Bashian & Farber, LLP v Syms
2015 NY Slip Op 32669(U)
June 29, 2015
Supreme Court, Westchester County
Docket Number: 60595/2014
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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BASHIAN & FARBER, LLP and GARY E. BASHIAN, P.C.,

Plaintiffs,

DECISION and ORDER

Index No. 60595/2014
Motion Date: June 29, 2015
Seq. No. 6

-against-

RICHARD SYMS; RICHARD SYMS AS TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; INEVA SYMS aka I. EVE SYMS aka EVE SYMS; ; INEVA SYMS aka I. EVE SYMS aka EVE SYMS AS TRUSTEE OF THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; THE SYMS FAMILY REVOCABLE TRUST DATED MARCH 11, 2014; AND John Does #1-10,

Defendants.

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LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order compelling defendant Richard Syms ("Mr. Syms") to provide his medical records for the past five years in his possession and medical authorizations for his medical providers for the past five years. and for such other and further relief as this court deems just and proper. Defendants oppose the motion.

- Order to Show Cause dated- Affirmation in Support -Exhibits A-R
- Memorandum of Law in Support
- Memorandum of Law in Opposition

Upon the foregoing papers and oral argument heard on June 29, 2015, this motion is determined as follows:

In this action, commenced by the filing of a summons and verified complaint dated July 10, 2014, plaintiffs seek to recover legal fees from defendant Mr. Syms, and allege, among other things, claims of fraud and fraudulent conveyances as against Mr. Syms and his wife Ineva

Syms (“Mrs. Syms”). Plaintiffs state that they were retained by Mr. Syms in 2010 to represent him in a complex estate litigation matter. Plaintiffs contend that Mr. Syms represented to plaintiffs that he planned to use the proceeds from the sale of real estate holdings to pay plaintiffs’ legal fees. However, plaintiffs allege that starting in August 2011, Mr. Syms began transferring properties that were held by himself, or jointly with Mrs. Syms, to Mrs. Syms solely, to third persons, and/or to the Syms Family Revocable Trust. Plaintiffs contend that the foregoing transactions were all made without adequate consideration. Plaintiffs state that except for one partial payment on June 21, 2012, Mr. Syms stopped paying his legal bills due to alleged “financial constraints.” Plaintiffs allege that defendants purposefully engaged in fraudulent transfers of real property with the intent to protect their assets from any future judgment entered in favor of plaintiffs concerning the unpaid legal fees in the amount of \$329,068.90.

Plaintiffs bring this motion seeking to compel Mr. Syms to produce all of his medical records and authorizations for his medical providers for the past five years on the grounds that defendants have placed Mr. Syms’ medical history in controversy. Plaintiffs state that in opposition to an earlier motion filed by plaintiffs, defendants submitted affidavits by defendants’ attorney Michael S. Haber, Esq. (“Mr. Haber”), Mr. Syms, and Mrs. Syms. In his affirmation Mr. Haber affirmed that rather than being part of a scheme to defraud plaintiffs, the transfers of real property were made by Mr. Syms as part of his estate planning “...after he suffered a heart attack and had open-heart surgery.” (Affirmation of Michael, S. Haber, Esq. dated August 3, 2014, at ¶9). Mr. Syms and Mrs. Syms both submitted affidavits wherein they attested that the statements made in Mr. Haber’s affirmation were true and correct (affidavit of Richard Syms, dated August 4, 2014 at ¶2, and affidavit of Ineva Syms, dated August 4, 2014 at ¶2).

On January 26, 2015, counsel for the parties appeared for a Preliminary Conference at which time defense counsel affirmed that Mr. Syms had suffered a heart attack. The so ordered Preliminary Conference Stipulation which issued from that conference directed, among other things, that Mr. Syms would provide an affirmation from his cardiologist on or before February 26, 2015 confirming that Mr. Syms had suffered a heart attack. Under the Stipulation, plaintiffs reserved their rights to seek additional disclosure of Mr. Syms’ medical records.

In response, defendants provided an unsworn letter dated February 25, 2015 from Mr. Sym’s cardiologist, Dr. Valentin Fuster (“Dr. Fuster”). The entirety of the letter reads as follows:

Mr. Richard Syms was diagnosed with hypertrophic cardiomyopathy in 2011. He suffered a syncopal attack on 5/4/2014 and had been experiencing brief episodes of shortness of breath on exertion. An angiogram was undertaken that revealed 2 vessel disease with significant left ventricular outflow obstruction. He underwent myomectomy and 1 vessel CABG on 5/12/14 without any complications.

By letter dated March 10, 2015, to Mr. Haber, plaintiffs’ counsel requested Mr. Syms’ medical records for the past five years, as well as executed HIPAA authorizations for all of Mr.

Syms' medical providers, including his primary care physician and any specialists. The letter further provided that if defendants refused to provide the requested documents, plaintiffs would seek motion practice. When defendants did not agree to provide the requested documents and authorizations, by letter dated March 20, 2015, plaintiffs' counsel contacted the court requesting a pre-motion conference. The issue of Mr. Syms' medical records and medical authorizations was discussed at compliance conferences held on March 26, 2015, April 15, 2015, May 4, 2015 and May 18, 2015. Plaintiffs were provided with a briefing schedule for this motion at the May 19, 2015 conference.

In support of the motion, plaintiffs argue that Mr. Syms has waived any privilege with respect to his medical records by submitting sworn statements to the court asserting that his medical condition was the reason for the transfers of real estate. Plaintiffs contend that these medical records are relevant to prove the requisite intent necessary to prosecute the claims of fraud and fraudulent conveyance. Plaintiffs argue that Mr. Syms' medical records will show that he was aware of his medical condition prior to 2011 and that the transactions were not estate planning but rather an effort to render Mr. Syms judgment proof from plaintiffs' efforts to collect the legal fees owed.

In opposition, defendants argue that the medical records are not relevant and are only being sought to embarrass, harass and any Mr. Syms. Defendants state that the only relevance Mr. Syms' medical condition has to this action is "that certain estate planning objectives of his were prompted by his subjective mindset that focused on his mortality because of the cardiac event." In an affirmation dated April 3, 2015, Mr. Syms clarifies that the attack he experienced in 2014 may not have been a heart attack, but was a syncopal attack as explained to him by Dr. Fuster. He states that he did, however, have emergency open-heart surgery. He states that the hypertrophic cardiomyopathy was diagnosed in 2011 and that two of his siblings died as a result of heart conditions and that his father also had a heart condition. He further states that the real estate transactions were estate planning efforts which were motivated by his diagnosis coupled with the open-heart surgery. Defendants argue that to allow plaintiffs access to five years' worth of Mr. Sym's medical records is unduly burdensome and an invasion of his privacy.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "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" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

The party seeking to compel production of medical records has the initial burden of making an evidentiary showing that the other party's medical condition has been placed in controversy in the action (Modern New York Discovery, Scope of Disclosure § 23:31). It is well settled that a party waives the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue (*Lombardi v Hall*, 5 AD3d 739, 740 [2d Dept 2004]). A party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR when that party has waived the physician-patient privilege by affirmatively putting his physical condition in issue (*Bravo v Vargas* 113 AD3d 577 [2d Dept 2014]; *M.C. v Sylvia Marsh Equities, Inc.*, 103 AD3d 676 [2d Dept 2013]). *see* CPLR 3121 [a]). A party affirmatively places his entire medical condition in controversy through broad allegations of physical injury or mental anguish (*O'Rourke v Chew*, 84 AD3d 1193 [2d Dept 2011]; *DeLouise v S.K.I. Wholesale Beer Corp.* 79 AD3d 1092 [2d Dept 2010]).

However, a party does not waive the physician-patient privilege with respect to unrelated illnesses or injuries. Although CPLR 3101 (a) requires full disclosure of all matter material and necessary in the prosecution or defense of an action the principle of "full disclosure" does not give a party uncontrolled and unfettered disclosure. An injured plaintiff waives the physician-patient privilege with respect to his relevant prior medical history concerning those physical conditions which he has affirmatively placed in controversy (*Romance v Zavala*, 98 AD3d 726 [2d Dept 2012]).

The essential elements for a cause of action sounding in fraud are a representation of a material fact, falsity, scienter, reliance, and injury or damage (60 N.Y. Jur. 2d, Fraud and Deceit §2). To set aside a conveyance as fraudulent, a plaintiff need only show that the transfer was made with an intent to hinder, delay, or defraud him or her (New York Debtor and Creditor Law §276). Moreover, the provision reaches conveyances intended to defraud future creditors, including conveyances which occurred prior to the time that the obligation of the plaintiff arose (*Id.*, See also, 30 N.Y. Jur. 2d Creditors' Rights § 352). Moreover, every conveyance made and obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors (New York Debtor and Creditor Law §275).

Here, defendants argue that the allegedly fraudulent transactions were not done with an intent to render Mr. Syms judgment proof but rather as part of his estate planning which was prompted by his cardiac event. Defendants, in using Mr. Syms' heart condition as an explanation for his motivation for the real estate transactions in question, have affirmatively put Mr. Syms' physical condition at issue with respect to his intent in transferring his real estate assets.

However, insofar as it is only Mr. Syms' cardiac health which has been placed in controversy, plaintiffs' demands for all of Mr. Syms' medical records for the past five years is overbroad. Defendants are directed to provide plaintiffs authorizations limited to the physicians and health care providers who provided cardiac care and treatment to Mr. Syms from January, 2011 to June, 2015.

Accordingly it is:

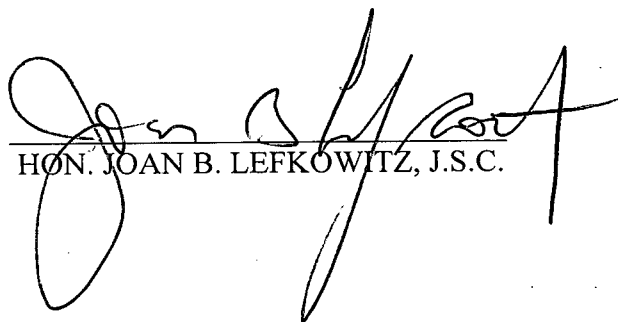
ORDERED that plaintiffs' motion is granted to the limited extent that defendants shall provide authorizations for the physicians and health care providers who provided cardiac care and treatment to Richard Syms from January, 2011 to June, 2015, on or before July 9, 2015; and it is further

ORDERED that plaintiffs are directed to serve a copy of this order with notice of entry on defendants within seven days of notice of entry; and it is further,

ORDERED that counsel for all parties are directed to appear for a conference in the Compliance Part, Courtroom 800 on July 14, 2015, at 9:30 A.M.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 29, 2015


HON. JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk