Polgar v Kuo
2017 NY Slip Op 32523(U)
November 28, 2017
Supreme Court, New York County
Docket Number: 805200/2016
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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ALEXIS POLGAR,

Plaintiff,

- against -

JONATHAN C. KUO, M.D., and HUDSON SPINE AND PAIN MEDICINE, P.C.

Defendants.

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Index No. 805200/2016

DECISION and ORDER

Mot. Seq. 002

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Alexis Polgar ("Polgar") commenced this medical malpractice action by summons and complaint on May 17, 2016 against Defendants Jonathan C. Kuo, M.D. ("Kuo") and Hudson Spine and Pain Medicine, P.C. ("Hudson"). Polgar alleges that Kuo departed from accepted standards of medical practice when he administered to her an epidural injection. Polgar also claims that Kuo failed to procure her informed consent. On June 8, 2016, Kuo and Hudson interposed their Answer.

Presently before the Court is Polgar's Order to Show Cause for an Order compelling the defendants to produce certain records specified on non-party Veronica O'Reilly's signed HIPAA authorization, directing non-party Jason J. Yu M.D. ("Yu") to appear for a further deposition because he failed to answer questions at a prior deposition, and extending the November 15, 2017 note of issue.

Polgar asserts that she initially believed Dr. Kuo performed the epidural injection on September 21, 2015. However, non-party Veronica O'Reilly ("O'Reilly"), testified in her deposition that O'Reilly was present during the procedure and witnessed another doctor administer the injection to Polgar.

O'Reilly's description of this doctor allegedly matched the description of non-party Yu. On August 10, 2017, the defendants provided Hudson's schedule for September 21, 2015 indicating that Polgar treated with Kuo and O'Reilly treated with Yu. In submitting the schedule, the defendants stated that "plaintiff's trial witness, Ms. Veronica O'Reilly, not the plaintiff, . . . appears as a patient on the schedule of non-party Dr. Jason Yu on 9/21/15." (affirmation of Sattler at 3) Thereafter, Polgar sought further scheduling information and medical records of O'Reilly from Hudson. O'Reilly allegedly signed a HIPAA compliant authorization specifically stating that she requests the medical records, billing and scheduling records related to any and all treatment of September 21, 2015 be sent to Polgar's counsel. Defendants, however, informed Polgar that they would not release O'Reilly's information notwithstanding the HIPAA authorization. As the aforementioned events transpired, the parties took the deposition of Yu. Polgar asserts that Yu's counsel objected and did not permit Yu to answer certain questions.

In opposition, the defendants assert that Kuo and non-party witness Dr. Alexander Rances testified that Kuo administered the epidural injection on Polgar on September 21, 2015. The defendants also assert that Yu testified that O'Reilly could not possibly have witnessed the injection because patients are not permitted to bring other people into the procedure room at Hudson Spine. Kuo and Hudson also argue that O'Reilly should travel to Hudson where she may collect the records herself or this Court should issue an Order directing Hudson to produce O'Reilly's records only for September 21, 2015 with redactions as to medical information. Defendants argue that the billing records sought would not provide any additional information that cannot already be gleaned from O'Reilly's medical records. Finally, Defendants note that although O'Reilly purportedly signed the HIPAA authorization, she allegedly is unwilling to collect the records herself and includes no affidavit in this instant Order to Show Cause.

Yu also opposes the motion and argues that the questions he was asked were plainly improper and would cause significant prejudice to him and the Defendants. At the deposition, Yu's counsel objected to the following questions:

> "What is the basis that delay would be an alternative to a cervical epidural steroid injection in 2015?" (tr at 72)
>
> "Was it your custom and practice in 2015 to recommend a cervical epidural steroid injection for a patient who had not yet had a trial of conservative therapy?" (tr at 73)

"Would you recommend that a patient starts with conservative physical therapy like stress relief if a patient has a history of anxiety or depression before recommending intervention?" (tr at 79)

"And that involves communication between physician and patient?" (tr at 80)

"Is proper informed consent essential to patient-centered care?" (tr at 80)

"Do you have an opinion within a reasonable degree of medical certainty whether injury to the long thoracic nerve during the performance of a cervical epidural steroid injection would be considered a departure from accepted standard of care?" (tr at 81)

"Is that something that has to be disclosed to the patient before performing the procedure?" (tr at 83)

"You have an opinion within a reasonable degree of certainty whether the risk of spinal nerve damage has to be disclosed to a patient before obtaining consent for a cervical epidural steroid injection?" (tr at 83)

"What are the indications for the performance of a trigger point injection?" (tr at 84)

"Was a trigger point injection an available alternative to a cervical epidural steroid injection on 2015 for a patient complaining of neck pain?" (tr at 85)

"How is it determined whether a patient has radiculopathy in 2015; how is that diagnosed?" (tr at 87)

"What were the methods of diagnosis available for a patient you suspected of having cervical radiculopathy in 2015?" (tr at 87)

"Do you have an opinion within a reasonable degree of medical certainty whether failing to advise the patient of the identity of the provider of the injection before having the patient sign the consent form would be a departure from accepted standard of care?" (tr at 89)

"Do you have an opinion within a reasonable degree of medical certainty whether failure to advise the patient of the type of injection you were performing before the patient signed the consent form would be a departure from accepted standard of care?" (tr at 90)

"What would it depend on?" (tr at 91)

"Was it your custom and practice to maintain the ability to communicate with the patient that you were administering Propofol to during an epidural injection procedure?" (tr at 93)

"Do you have an opinion within a reasonable degree of medical certainty whether the use of unconscious sedation during a cervical epidural steroid injection would be a departure from standard of care?" (tr at 94)

"Why?" (tr at 107)

"Was it possible to see a patient at Hudson Spine and Pain Medicine that if a patient had insurance, that doctor that was scheduled didn't accept that the patient could be treated by that doctor but billed to another provider at Hudson Spine who accepted their insurance?" (tr at 111)

"When you would write an anesthesia record at the Hudson Spine and Pain Medicine in 2015, would you write on the record; would you input the information; would a medical assistant put the information in or something else?" (tr at 128)

"When you would prepare an anesthesia record in connection with the performance of an injection at

> Hudson Spine and Pain Medicine in 2015, was it your custom and practice to sign the anesthesia record?" (tr at 128)
>
> "Was it your custom and practice in 2015 when you worked as an anesthesiologist at Hudson Spine and Pain Medicine to complete the pre-operative evaluation for a patient?" (tr at 129)

On November 14, 2017, the Court heard oral argument at which time it became plain that Polgar intends to name Yu as a Defendant in this action.

Non-party Disclosure

"A trial court is vested with broad discretion in its supervision of disclosure." (*MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014].) Disclosure from a nonparty may be obtained when it is "'material and necessary' . . . i.e., that the requested discovery is relevant to the prosecution or defense of an action." (*Kapon v Koch*, 23 NY3d 32, 37 [2014].) The words "material and necessary" . . . must be interpreted 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." (*id.* at 38) "The test is one of usefulness and reason." (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 407 [1968].) However, when a discovery motion is premature, the Court may deny it with leave to renew. (*see Ward v Arcade Bldg. Maintenance, Inc.*, 200 AD2d 455, 455 [1st Dept 1994].)

Non-party Medical Records

The Health Insurance Portability and Accountability Act's ("HIPAA") "Privacy Rule forbids an organization subject to its requirements (a "covered entity") from using or disclosing an individual's health information ('protected health information") except as mandated or permitted by its provisions." (*Arons v Jutkowtiz*, 9 NY3d 393, 412 [2007].) "'Covered entities' generally include health plans, health care clearinghouses and health care providers such as physicians, hospitals and HMOs." (*id.* at 413) "'Protected health information' encompasses any individually identifiable health information held or transmitted by a covered entity in any form or medium, whether electronic, paper or oral." (*id.*)

"The Privacy Rule mandates disclosure in only two situations: when an individual asks a covered entity for his or her own health information, or when the Secretary of HHS asks a covered entity for access to such information in order to enforce HIPAA." (*id.*) "The Rule, however, permits uses and disclosures in numerous circumstances . . ." (*id.*) "Uses and disclosures qualifying as permissive under the Privacy Rule are just that – for purposes of compliance with HIPAA, the covered entity is permitted, but not required to use the information or make the disclosure." (*id.*) "Stated another way, a covered entity . . . who releases a patient's protected health information in a way permitted by the Privacy Rule does not violate HIPAA; however, neither the statute nor the Rule requires the [covered entity] to release this information." (*id.*)

Non-Party Depositions

A nonparty witness is entitled to refuse to answer questions which seek testimony in the nature of opinion evidence. (*Horowtiz by Horowitz v Upjohn Co.*, 149 AD2d 467, 467-468 [2d Dept 1989].) Additionally, "in an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness." (*Carvalho v. New Rochelle Hosp.*, 53 A.D.2d 635, 635–636 [2d Dept 1976].) "Where, however, the opinion sought refers to the treatment rendered by the witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from deposing as an expert." (*id.*) In *Clack v Sayegh*, (148 AD3d 1664, 1664 [4th Dept 2017]), the parties deposed a nonparty nurse and the defendant objected to any questions related to fetal monitoring tracing strips. The defendant argued that the questions violated *Carvalho v. New Rochelle Hosp.* (53 A.D.2d 635, [2d Dept 1976]). However the Fourth Department held that the questions were not precluded by *Carvalho* because they related to the nonparty's care and treatment of the plaintiff. (*Clack v Sayegh*, 148 AD3d at 1665)

Discussion

To order non-party Yu to appear for a further deposition at this juncture when Polgar made plain her intentions of naming Yu as a defendant would be a waste of judicial and non-judicial resources. (*see MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 [1st Dept 2014].) Accordingly, it is the opinion of the Court that Polgar's Order to

Show Cause seeking a further deposition of Yu is premature. (*see Ward v Arcade Bldg. Maintenance, Inc.*, 200 AD2d 455, 455 [1st Dept 1994].)

With respect to O'Reilly's medical records and scheduling information, the Court is similarly disinclined to grant the relief sought by Polgar. Preliminarily, Hudson is not required to produce such information in spite of the purported authorization signed by O'Reilly. (*see Arons v Jutkowtiz*, 9 NY3d 393, 413 [2007].) Should O'Reilly who allegedly signed the authorization decide to collect her records from Hudson, that remedy remains available to Polgar. More importantly, the defendant's have already provided certain discovery indicating that O'Reilly "appears as a patient on the schedule of non-party Dr. Jason Yu on 9/21/15[,]" the date in which Polgar received the injection. (affirmation of Sattler at 3) Compelling Hudson to turn over additional medical records and scheduling information of this nonparty witness whose medical records are not at issue in this trial, would not sharpen the issues or reduce delay. (*see Kapon v Koch*, 23 NY3d 32, 37 [2014].) To the contrary, Polgar's decision to pursue this discovery would only increase the prolixity of this action. O'Reilly's medical records do not pass the test of usefulness and reason. Indeed, Polgar's attempt to acquire these records bears the appearance of a fishing expedition.

Wherefore, it is hereby

ORDERED that Plaintiff Alexis Polgar's Order to Show Cause for an Order directing Jason Yu, M.D., to appear for an additional deposition is denied without prejudice to renew; and it is further

ORDERED that Plaintiff Alexis Polgar's Order to Show Cause for an Order directing Defendants Jonathan C. Kuo, M.D. and Hudson Spine and Pain Medicine, P.C. to produce the medical billing and scheduling records related to any and all treatment on September 21, 2015 is denied; and it is further

ORDERED that the date of filing for Plaintiff Alexis Polgar's note of issue is extended to March 30, 2018.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: November 28, 2017

Eileen A. Rakower, J.S.C.