Broadley v Matros
2018 NY Slip Op 31383(U)
June 27, 2018
Supreme Court, New York County
Docket Number: 805220/14
Judge: Joan A. Madden

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN PART 11

Justice

EDMUND BROADLEY,

Plaintiff,

INDEX NO. 805220/14
MOTION DATE:

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MOTION SEQ. NO. 006

EVAN MATROS, M.D.,

Defendant,

The following papers, numbered 1 to _____ were read on this motion to_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Non-party Memorial Sloan-Kettering Cancer Center (hereinafter "Memorial") moves to quash the judicial subpoena served by the *pro se* plaintiff. Plaintiff opposes the motion and seeks to compel Memorial to produce the documents ordered by the subpoena.

This is an action for medical malpractice and lack of informed consent. Plaintiff's Bill of Particulars alleges that "the anterolateral thigh ("ALT") flap reconstruction surgery performed by [defendant] at [Memorial] on January 31, 2012 immediately following a radical resection of plaintiff's left groin synovial sarcoma was contraindicated, unnecessary, and improperly performed." Plaintiff also asserts a claim for lack of informed consent "in that he would not have agreed to any surgical procedure on his leg that in any way posed a threat to his mobility." Plaintiff also alleges that defendant failed to ensure that a "specifically requested type of urinary catheter" be used during the ALT flap surgical reconstruction.

Note of issue was filed on August 30, 2016. Defendant filed a motion for summary

judgment on May 16, 2017.[1] The motion was submitted unopposed. Counsel for plaintiff then made a motion to withdraw as counsel. Before permitting counsel to withdraw, in its interim order dated October 12, 2017, the court required plaintiff's counsel, on or before October 30, 2017, to submit to the court:

1. An affirmation for in-camera inspection delineating his attempts to retain an expert and providing identifying information as to the experts he contacted, including their names, specialities, locations and affiliations; and

2. Subpoenas (at plaintiff's request) for (i) the operation manual for Memorial, (ii) any letters exchanged between plaintiff and the Memorial patient representative, together with any internal Memorial documents that were generated with respect to plaintiff's letters and/or communications with the patient representative, and (iii) defendant Dr. Matros' work schedule for the day before, the day of, and the day after plaintiff's surgery.

After, plaintiff's counsel complied with the interim order, and submitted the documents and the subpoena for the above-reference information to be so-ordered by the court, the court permitted him to withdraw.

Memorial now seeks to quash the judicial subpoena signed by the court on the ground that as discovery is complete and note of issue has been filed and no unusual or unanticipated circumstances have been shown that would warrant permitting further discovery pursuant to 22 NYRCC § 202.21(d). Memorial also argues that the information sought from Memorial is "palpably improper" and "patently irrelevant."

With one exception explained below, Memorial's arguments are without merit. As a preliminary matter, Memorial's argument that the subpoena is improper as it seeks discovery after note of issue is filed ignores that the subpoena was provided for court signature in connection with the withdrawal motion by plaintiff's former counsel pursuant to court's interim

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[1]The court extended defendant's time to move for summary judgment so that defendant could conduct a non-party deposition.

order dated October 12, 2017. Thus, the post-note discovery sought in the subpoena was authorized by the court in light of the circumstances surrounding the application of plaintiff's counsel to withdraw after note of issue was filed and before counsel had responded to defendant's summary judgment motion. Such circumstances qualify as "unusual or unanticipated circumstances" under 22 NYCRR § 202.21(d), warranting this limited post-note discovery. . Notably, the cases cited by Memorial in support of its position (see e.g., Arons v. Jutkowitz, 9 NY3d 393 (2007); Abbot v. Memorial Sloan-Kettering Cancer Center, 295 AD2d 136 (1st Dept 2002)), are distinguishable from the circumstances here which, as described above, involve the withdrawal of counsel after filing of the note of issue.

With respect to Memorial's argument that the information sought by the subpoena is "palpably improper," and/or irrelevant, the court notes that "[a]n application to quash a subpoena should be granted [o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious ... or where the information sought is utterly irrelevant to any proper inquiry.... It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances." Kapon v. Koch, 23 NY3d 32, 38 (2014)(internal citations and quotations omitted).

In this medical malpractice action arising out of allegations of departures related to surgery and lack of informed consent, the operations manual and Dr. Matos' work schedule for the date of the surgery are clearly relevant, as are plaintiff's communications with Memorial's patient representative. In other words, under the liberal disclosure principles, the subpoena properly seeks "material and necessary" information as such "facts bear[ ] on the controversy [and] will assist preparation for trial by sharpening the issues and reducing delay and prolixity." Kapon v. Koch, 23 NY3d at 38, citing Allen v. Crowell–Collier Publ. Co., 21 NY2d 403, 406 (1968). On the other hand, to the extent the subpoena seeks Dr. Matos' schedule for the day before and the day after the surgery, such information is irrelevant and need not be produced.

Finally, as for Memorial's argument that the information sought with regard to plaintiff's

communications with Memorial's patient representative are shielded from disclosure as privileged under New York Public Health Law § 2305-m, such argument, is not clearly supported by this provision, nor does Memorial explain or substantiate its position. Accordingly, Memorial's motion to quash based on allegedly privileged nature of the communications with the patient representative is denied. See Kneisel v. QPH Inc., 124 AD3d 729, 730 (2d Dept 2015)(the party seeking to invoke privilege under the Education Law and Public Health Law "has the burden of demonstrating that the documents sought were prepared in accordance with the relevant statutes").

In view of the above, it is

ORDERED that the motion to quash the subpoena is denied except to the extent that Memorial is not required to produce Dr. Matos' schedule for the day before and the day after the surgery.

Dated: June 27, 2018

HON. JOAN A. MADDEN
J.S.C.

Check One: [ ] FINAL DISPOSITION [x] NON-FINAL DISPOSITION