

McInerney v Thomas
2018 NY Slip Op 33093(U)
December 3, 2018
Supreme Court, New York County
Docket Number: 805078/17
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Kate McInerney and Sean McInterney,

Plaintiffs,

- v -

Defendants.

Gary Thomas, M.D., Chaim Mandelbaum, M.D.,
and Comprehensive Pain Management/Anesthesia
Services, P.C.,

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Index No.
805078/17

**DECISION
and ORDER**

Mot. Seq. #001

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

Plaintiffs Kate McInerney (“Kate”) and Sean McInterney (collectively, “Plaintiffs”) bring this action for medical malpractice arising from *inter alia*, the over prescribing of opiates by Defendants and their employees, including certain Physician Assistants, to Kate from June 2008 through July 2016, resulting in her opiate addiction.

Presently before the Court is Plaintiffs’ Order to Show Cause seeking leave for Plaintiffs to file an Amended Complaint to add causes of action for negligent hiring and supervision in conformity with the Verified Bills of Particulars served upon Defendants in June 2017. Plaintiffs’ Verified Bills of Particulars include allegations that Defendant Physicians “failed to adequately supervise physician’s assistants; negligently hired staff; [and] failed to adequately review the prescriptions prescribed and treatment rendered by physician’s assistants.” Defendants oppose Plaintiffs’ motion to amend the Complaint to add the additional claims.

Plaintiffs also move for an Order directing defendants Gary Thomas, M.D. (“Thomas”), and Comprehensive Pain Management/Anesthesia Services, P.C. (“CPM”), to produce personnel files of CPM employees Daniel Lauferswiler, P.A. (“Lauferswiler”), Richard Kratzenberg, P.A. (“Kratzenberg”), Cynthia Aragon Roberto, P.A. (“Roberto”), Igor Faiz, P.A. (“Faiz”), and Sandy Ching, P.A. (“Ching”) at least one week in advance of Thomas’ deposition. These employees

worked as Physician Assistants at CPM. Defendants object to the production of these files.

Leave to Amend Complaint

Plaintiffs commenced this action on March 2, 2017. Defendants interposed Answers in April and May 2017. Presently Plaintiffs seek to amend the Complaint to add claims against all Defendants for negligent hiring and supervision of their employees and specifically, their Physician Assistants.

Pursuant to CPLR § 3025(b), “A party may amend his pleading... at any time by leave of court.... Leave shall be freely given upon such terms as may be just....” “CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice” (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). In the absence of prejudice, leave to amend a pleading should be denied only when the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

In light of CPLR § 3025(b)’s directive that leave to amend be freely given, Plaintiffs’ Amended Verified Complaint in the proposed form annexed to Plaintiffs’ moving papers is accepted. There is no prejudice to Defendants as discovery is still ongoing and the proposed claims are not plainly lacking in merit.

Disclosure of Personnel Records

Plaintiffs also move for an Order compelling Defendants to disclose the personnel records of CPM employees Lauferswiler, Kratzenberg, Roberto, Faiz, and Ching. Plaintiffs contend that these records are “relevant to Plaintiffs’ claims, in light of evidence that the Physician Assistants prescribed opiates to plaintiff Kate McInerney, two of the Physician Assistants [Kratzenberg and Roberto] were under investigation by CVS Pharmacy for overprescribing opiates to Mrs. McInerney, and a third Physician Assistant [Lauferswiler], who admitted to having been previously fired and rehired by the Defendants due to his methamphetamine addiction, engaged in a social relationship [with Kate].” More specifically, Plaintiffs contend that the records are relevant as to whether Defendants properly selected the Physician Assistants prior to hiring; properly supervised them; properly investigated that some of them were under investigation by CVS for overprescribing medication to Kate; and fired Lauferswiler for drug addiction and then rehired him to prescribe opiates

to patients. Plaintiffs further contend that “[s]alary records are also relevant, as they may indicate that the Defendants either incentivized the Physician Assistants to treat patients in a certain manner, or hired compromised or otherwise questionable physicians assistants who would accept work at a below-market-rate salary.”

Defendants argue that that Plaintiffs have failed to make the requisite showing to demonstrate that disclosure of the personnel files is warranted. Defendants also argue “the copy of the CVS records for plaintiff that this office received contain nothing about an ‘investigation’ by CVS of two PA’s at Comprehensive ‘over-prescribing,’ contrary to plaintiff’s assertions.”

“A trial court is vested with broad discretion in its supervision of disclosure.” (*MSCI Inc. v Jacob*, 120 A.D. 3d 1072, 1075 [1st Dept 2014]). “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: a party.” (CPLR § 3101 [a] [1]). 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.” (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). “The test is one of usefulness and reason.” (*id.* at 407) However, discovery demands for ‘any and all’ information may be overbroad and inappropriate. (*see Kantor v Kaye*, N.Y.S. 2d 42, 43 [1st Dept 1985]).

The First Department has held, “[P]ersonnel records must be disclosed, at least to the extent of requiring an in camera inspection by the court, whenever there is a reasonable possibility that these files contain relevant and material documents.” (*Meder v. Miller*, 173 A.D.2d 392, 393 [1st Dept 1991]).

Here, “there is a reasonable possibility that the [requested] files containing relevant and material documents.” (*Meder*, 173 A.D.3d at 393). Defendants are directed to produce the requested records for an in camera inspection to determine relevance within 30 days from the date of this Order.

Wherefore, it is hereby

ORDERED that the portion of Plaintiffs’ motion which seeks to amend the Complaint to add claims against all Defendants for negligent hiring and supervision of their employees is granted; and it is further

ORDERED that the Amended Summons and Amended Verified Complaint in the proposed form annexed to Plaintiffs’ moving papers shall be deemed served

on Defendants upon service of a copy of this Order with notice of entry thereof; and it is further

ORDERED that Defendants shall produce the requested personnel records for an in camera inspection to determine within 30 days from the date of this Order; and it is further

ORDERED that the parties are reminded to appear for a compliance conference on Tuesday, January 22, 2019, at 9:30 AM in Part 6, Room 205 at 71 Thomas Street.

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

DATED: DECEMBER 3, 2018


EILEEN A. RAKOWER, J.S.C.