

Heinrich v Serens

2020 NY Slip Op 34574(U)

October 20, 2020

Supreme Court, Onondaga County

Docket Number: 4978/2018

Judge: Joseph E. Lamendola

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This opinion is uncorrected and not selected for official publication.

**At a Special Term of the Supreme
Court of the State of New York,
held in and for the County of
Onondaga on October 14, 2020.**

**PRESENT: HON. JOSEPH E. LAMENDOLA
Supreme Court Justice**

**STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA**

**KENNETH HEINRICH, individually and as the
Administrator of the estate of DAVID ALAN HEINRICH,
deceased,**

Plaintiff,

**DECISION AND ORDER
ON ORDER TO
SHOW CAUSE**

-vs-

Index No.: 4978/2018

**KELLEY A. SERENS, NP, LAUREN PIPAS, MD,
MARIAM ALEXANDER, MD, AMY PATEL, MD, LYNN
MARIE CLEARLY, MD, DRAGOS N. MANTA, MD,
ZACHARY J. SHEPHERD, MD, TARA L. GRIM, RN,
MAURA C. REILLY, RN, ALLISON M. SIMS, RN,
ASHLEY M. MARKHAM, RN, VIVIAN CHAN, MD,
RASHAD KHAN, MD and OKEKSANDRA KUTSENKO,
MD, SHAAN KHAN, MD, JACOB FRIER, MD, and
MICHAEL KOSTERS**

Defendants.

APPEARANCES: Sidney P. Cominsky, Esq., for the Plaintiff

**Attorney General Letitia James by Asst. Attorney General Maureen A.
MacPherson, Esq.**

**For the Defendants Mariam Alexander, M.D., Amy Patel, M.D.,
Maura Reilly, R.N., Allison Sims, R.N., Ashley Markham, R.N., Vivian
Chan, M.D., Rashad Khan, M.D., Oleksandra Kutsenko, M.D., Shaan
Khan, M.D., Jacob Frier, M.D. and Michael Kosters, M.D.**

**Robert P. Carpenter, Esq., of Gale Gale & Hunt, LLC
For the Defendant Zachary Shepherd, M.D.**

**Zachary M. Mattison, Esq., of Sugarman Law Firm, LLP
For the Defendants Kelley A. Serens, N.P. and Lauren Pipas, M.D.**

**Lisa Alexander, Esq., of the Office of the General Counsel of the State
University of New York, for the non-party SUNY Upstate Medical
University Hospital**

I.

This is a medical malpractice action filed on May 18, 2018. The decedent, David Alan Heinrich, died while a patient at SUNY Upstate Medical University Hospital in Syracuse. This case comes before the Court by an Order to Show Cause filed by the Plaintiff, requesting that the Court sign a judicial subpoena duces tecum pursuant to CPLR §2307. Oral argument via Skype for Business was heard on October 14, 2020.

Plaintiff's Counsel requests that this Court sign a judicial subpoena duces tecum to obtain "a complete and un-redacted copy of the entire electronic medical record (EMR), audit trail and access log" pertaining to the Plaintiff's medical records at SUNY Upstate Medical University Hospital in Syracuse ("University Hospital")(hereinafter collectively "EMR and audit trail"). The EMR is a digital version of a patient's medical records. An audit trail is an electronic chronological record of who accessed a medical record and what additions or changes were made. The proposed subpoena also delineates numerous specific details that Plaintiff's Counsel requests be included with the subpoena, including but not limited to, "all versions of the notes (original, edited and addended)", "any and all portions of the audit trail that include access log entries capturing each and every user who accessed" the medical record and "[t]he action that each user authorized, ordered or completed." *See* Proposed Judicial Subpoena Duces Tecum. This request is opposed by all defense counsel and by counsel for University Hospital.

Plaintiff has also initiated a companion lawsuit in the New York State Court of Claims alleging negligence by University Hospital (Claim No. 130674), which claim is still pending before Judge Minarik.

II.

This issue regarding the EMR and audit trail for the medical records was first addressed in 2019 by the Hon. Anthony J. Paris, J.S.C., who was previously assigned to this case. Plaintiff's Counsel brought a motion to compel, seeking in part a subpoena duces tecum requesting the same information requested now. After hearing arguments, Judge Paris denied the motion by a written order dated September 9, 2019, in which he ruled that “. . . those parts of Plaintiff's motion seeking to compel the production of documents from SUNY Upstate Medical University Hospital . . . are denied to the extent that the appropriate forum for such relief is the New York Court of Claims because Plaintiff's demands were made in the Court of Claims”. *See* Order of Hon. Anthony J. Paris, dated September 9, 2019. Plaintiff neither appealed nor requested reconsideration of this order.

One month later, on October 11, 2019, Plaintiff's Counsel filed a Trial Note of Issue and Certificate of Readiness, certifying that all discovery was complete and the case was trial ready. Plaintiff's Counsel filed a second Trial Note of Issue and Certificate of Readiness on March 16, 2020.

On October 21, 2019, Plaintiff's Counsel brought a motion before Judge Minarik in the Court of Claims in which he requested, among other things, the EMR and audit trail of the Plaintiff. After hearing arguments, Judge Minarik denied Plaintiff's request for the EMR and audit trail as being “overly broad and burdensome.” While Judge Minarik did factor in the on-going issues with the pandemic, her decision was not based solely on Covid considerations as Plaintiff's Counsel argues. However, Judge Minarik gave Plaintiff's Counsel the opportunity to re-file the request for the EMR and audit trail, requiring however that the “demands must be narrowly and specifically addressed to documented discrepancies in the record.” *See* Decision and Order filed May 18, 2020, Hon. Renee Forgensi Minarik. Plaintiff's Counsel did not appeal Judge Minarik's order, nor has he ever made any further application to the Court of Claims to obtain the EMR or audit trail, despite the fact that Judge Minarik left the door open for him to do so.

Plaintiff's Counsel was previously provided with a complete and certified copy of the decedent's medical record from University Hospital. However, he argues that this record is not actually complete, as it does not show the additional EMR and audit trail information that is being sought.

III.

In support of his request, Plaintiff's Counsel points to, among other things, alleged discrepancies between the deposition testimony of various Defendants and notations contained in the medical record. Those depositions all occurred between October 19, 2018 and June 3, 2019, well before Plaintiff's Counsel filed both Trial Notes of Issue and Certificates of Readiness.

He also argues that he needs the EMR and audit trail to determine "who, if anyone, actually supervised the medical residents" that treated the decedent. *See* Plaintiff's Counsel Affirmation in Support ¶¶ 14 & 16. However, he does not delineate how the EMR and audit log would show that, nor why that information could not (or was not) obtained through depositions or other discovery.

It is noted that the Plaintiff's alleged need for the EMR and audit trail is something that should have been known to counsel long before the filing of *two* Certificates of Readiness certifying that discovery was complete. Plaintiff's Counsel brought this request a mere two days before the deadline for Defense Counsel to file dispositive motions for summary judgment. Plaintiff's Counsel's argument, that since University Hospital is not a party to this action, this request therefore does not constitute discovery, is not persuasive. The delay in making this request can be fairly viewed as seeking to gain an unfair tactical advantage, as it is now too late for defense counsel to incorporate any such information in their motions for summary judgment now filed.

The Affirmation of Lisa Alexander, Senior Managing Counsel for the Office of General Counsel of the State University of New York, notes that "[a]n audit trail/access log is a document that does not exist. It is a document that employees of University Hospital would have to create using multiple applications." *See* Alexander Affidavit at ¶ 6. She notes that ". . . some of the information the Plaintiff is requesting the Court direct University Hospital to create, does not even exist and cannot be created." *Id.* CPLR §2307 requires the production of ". . . any books, papers or any things . . ." Implicit in that requirement is that the book, paper or thing actually now exists so that it can be turned over, not that it needs to be first created. The Court finds that the proposed subpoena duces tecum is improper to the extent that it requests currently non-existent material. It should be noted that Plaintiff's Counsel has not brought a motion challenging the sufficiency of the medical records that have already been produced.

The Court further finds that the order of Judge Paris determining that the proper forum for this relief is the Court of Claims, as well as the order of Judge Minarik in the Court of Claims, constitutes the “law of the case.” “The doctrine of the ‘law of the case’ is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.” *Martin v. Cohoes*, 37 NY2d 162, 165, 371 NYS2d 687 (1975) *rearg denied* 37 NY2d 817 (1975)(citations omitted). The “law of the case” in this matter still provides the Plaintiff with an open avenue to pursue this material in the Court of Claims. This Court is not otherwise inclined, however, to grant Plaintiff’s Counsel third request for the same information as was previously denied by both Judge Paris and Judge Minarik, sought a mere two days before the filing of multiple dispositive motions for summary judgment by defense counsel.

Therefore, it is hereby **ORDERED** that the Plaintiff’s request pursuant to CPLR §2307 to sign the Subpoena Duces Tecum is DENIED, with prejudice.

ENTER

Dated: October 20, 2020
Syracuse, New York


JOSEPH E. LAMENDOLA
Supreme Court Justice

Papers Considered:

1. Plaintiff’s Counsel proposed Order to Show Cause, filed September 29, 2020
2. Plaintiff’s Counsel Affidavit in Support with attached exhibits 1-33, dated September 29, 2020
3. Defense Counsel MacPherson’s Affidavit in Opposition with attached exhibits A-Q, dated October 9, 2020
4. Defense Counsel Carpenter’s Affidavit in Opposition with attached exhibits A-F, dated October 9, 2020

5. Affirmation in Opposition of Lisa Aleksander, Esq., with attached exhibits A-E, dated October 9, 2020
6. Plaintiff's Counsel Affidavit in Reply with attached exhibits A-L, dated October 13, 2020
7. Plaintiff's Counsel post-argument correspondence to Court with attachments thereto, dated October 14, 2020
8. Defense Counsel MaPherson's post-argument email to Court dated October 14, 2020