

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D18519
Y/prt

_____AD3d_____

Submitted - January 31, 2008

REINALDO E. RIVERA, J.P.
HOWARD MILLER
MARK C. DILLON
ARIEL E. BELEN, JJ.

2007-03831

DECISION & ORDER

Susan Napoli, etc., respondent, v James Crovello,
defendant, Ellen Kanner, appellant.

(Index No. 19567/02)

Koff, Nardelli & Dopf, LLP, New York, N.Y. (Martin B. Adams of counsel), for appellant.

Salenger Sack Schwartz & Kimmel, LLP, New York, N.Y. (Carolyn M. Caccese of counsel), for respondent.

In an action to recover damages for wrongful death, etc., based upon medical malpractice, the defendant Ellen Kanner appeals from an order of the Supreme Court, Suffolk County (Kerins, J.), dated January 11, 2007, which denied her motion pursuant to CPLR 3124 to compel the plaintiff to provide an authorization pursuant to the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*) for the release of the plaintiff's treatment records and granted the plaintiff's cross motion for a protective order pursuant to CPLR 3103.

ORDERED that the order is affirmed, with costs.

“The Supreme Court is vested with broad discretion in supervising disclosure, and its determination will not be disturbed absent an improvident exercise of that discretion” (*Nieves v City of New York*, 35 AD3d 557, 558). Here, the Supreme Court providently exercised its discretion in denying the motion of the defendant Ellen Kanner (hereinafter Dr. Kanner) pursuant to CPLR 3124 to compel the plaintiff to provide an authorization pursuant to the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*) for the release of the plaintiff's psychiatric

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treatment records and in granting the plaintiff's motion for a protective order. Dr. Kanner failed to establish that the records she sought to discover were material and necessary to the defense of this action (*see* CPLR 3101[a]; *McLane v Damiano*, 307 AD2d 338). Moreover, although the decedent's medical records are clearly discoverable here (*see Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 71), the plaintiff's psychiatric treatment records are privileged (*see* CPLR 4504[a]). The mere fact that the plaintiff commenced this action did not result in an automatic waiver of the physician-patient privilege (*see Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d at 71) and there is no evidence that the plaintiff affirmatively placed her psychiatric condition in issue so as to effect a waiver of the privilege and permit disclosure (*see* CPLR 3121[a]; *Dillenbeck v Hess*, 73 NY2d 278, 287). Accordingly, the plaintiff's psychiatric treatment records are not subject to disclosure (*see Scipio v Upsell*, 1 AD3d 500; *Goldberg v Fenig*, 300 AD2d 439, 440; *Cottrell v Weinstein*, 270 AD2d 449, 449-450).

The parties' remaining contentions are without merit.

RIVERA, J.P., MILLER, DILLON and BELEN, JJ., concur.

ENTER:


James Edward Belen
Clerk of the Court