

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

D19080
X/hu

_____AD3d_____

Argued - April 1, 2008

WILLIAM F. MASTRO, J.P.
DAVID S. RITTER
EDWARD D. CARNI
RANDALL T. ENG, JJ.

2007-04541
2007-04543

DECISION & ORDER

Clifford Braganza, et al., respondents, v Nicholas
Harding, appellant.

(Index No. 12974/04)

Belair & Evans LLP, New York, N.Y. (Raymond W. Belair and James B. Reich of
counsel), for appellant.

Widlitz & Stern, P.C., Huntington, N.Y. (Stephen I. Widlitz and Susan R. Nudelman
of counsel), for respondents.

In an action to recover damages for medical malpractice, etc., the defendant appeals
from (1) stated portions of an order of the Supreme Court, Nassau County (Spinola, J.), entered May
11, 2007, which, inter alia, denied his motion to strike the complaint, and (2) an order of the same
court dated April 12, 2007, which granted the plaintiffs' motion to preclude him from offering the
testimony of a certain witness at trial.

ORDERED that the notice of appeal from an order of the Supreme Court, Nassau
County, dated April 11, 2007, is deemed a premature notice of appeal from the order entered May
11, 2007 (*see* CPLR 5520[c]; *Town of Hempstead v Incorporated Vil. of Atl. Beach*, 278 AD2d 308);
and it is further,

ORDERED that the appeal from the order dated April 12, 2007, is dismissed; and it
is further,

April 29, 2008

BRAGANZA v HARDING

Page 1.

ORDERED that the order entered May 11, 2007, is affirmed insofar as appealed from; and it is further,

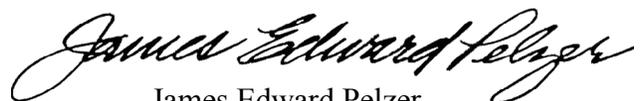
ORDERED that one bill of costs is awarded to the plaintiffs.

In March 2006 the injured plaintiff signed an authorization waiving his confidentiality rights under the Health Insurance and Portability and Accountability Act of 1996 (42 USC § 1320d *et seq.*; hereinafter HIPAA) by permitting the defendant's attorneys, inter alia, to interview his treating physician, Dr. Andrew Sands. The injured plaintiff subsequently revoked his authorization in reliance upon this Court's December 2006 decision in *Arons v Jutkowitz* (37 AD3d 94), which concluded that there is no statutory or regulatory authority which requires a plaintiff to execute a HIPAA-compliant authorization permitting defense counsel to privately interview his or her treating physician. Under these circumstances, the Supreme Court providently exercised its discretion in denying the defendant's motion to strike the complaint. The injured plaintiff's revocation of his authorization permitting defense counsel to interview Dr. Sands, based upon recent appellate authority, did not constitute willful and contumacious conduct warranting the drastic remedy of the striking of a pleading (*see* CPLR 3126; *A.F.C. Enters., Inc. v New York City School Constr. Auth.*, 33 AD3d 737; *Bach v City of New York*, 304 AD2d 686). However, we note that after this appeal was perfected, the Court of Appeals reversed our decision in *Arons v Jutkowitz* (9 NY3d 393), and concluded that a plaintiff who places his or her medical condition at issue by bringing suit may be compelled to execute a valid HIPAA authorization permitting his or her treating physician to submit to an interview by defense counsel. In light of the decision of the Court of Appeals, the plaintiffs now represent that they will provide a HIPAA-compliant authorization allowing defense counsel to interview Dr. Sands.

The appeal from the order dated April 12, 2007, which granted the plaintiffs' motion to preclude the defendant from offering the testimony of a certain witness at trial, must be dismissed. "Such an 'evidentiary ruling,' even when 'made in advance of trial on motion papers constitutes, at best, an advisory opinion, which is neither appealable as of right nor by permission'" (*Matter of Jones*, 47 AD3d 931, quoting *Keeley v Tracy*, 19 AD3d 460).

MASTRO, J.P., RITTER, CARNI and ENG, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court