

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

D33616
O/kmb

_____AD3d_____

Argued - December 6, 2011

REINALDO E. RIVERA, J.P.
RANDALL T. ENG
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2010-09905
2010-11774

DECISION & ORDER

Jay H. Fox, etc., et al., respondents, v Evan Marshall,
et al., appellants, et al., defendants.

(Index No. 14183/08)

Joseph Ferrante, Hauppauge, N.Y., for appellant Evan Marshall.

Landman Corsi Ballaine & Ford, P.C., New York, N.Y. (William G. Ballaine, Ronald E. Joseph, and William Miller of counsel), for appellants SLS Residential, Inc., SLS Health, Inc., SLS Wellness, Inc., Supervised Lifestyles, Inc., Joseph Santoro, Alfred Bergman, Shawn Prichard, Lauren Miller, Kendra Kohut, and Betsy Bergman.

Marcus, Ollman & Kommer, LLP, New Rochelle, N.Y. (Jonathan S. Klein of counsel), for appellants SDL Case Management, Inc., SDL Case Management, and SLS Health, LLC.

Martin Clearwater & Bell, LLP, New York, N.Y. (Peter T. Crean, Gregory J. Radomisli, and Stewart G. Milch of counsel), for appellant Mark J. Stumacher.

Heidell, Pittoni, Murphy & Bach, LLP, New York, N.Y. (Daniel S. Ratner of counsel), for appellant Dave Moore.

Purcell & Ingrao, P.C., Mineola, N.Y. (Lynn A. Ingrao of counsel), for appellant Jacqueline Marshall.

Allegaert, Berger & Vogel, LLP, New York, N.Y. (Cornelius P. McCarthy and Ronald Busloff of counsel), for respondents.

January 17, 2012

Page 1.

FOX v MARSHALL

In an action, inter alia, to recover damages for wrongful death, (1) the defendant Evan Marshall appeals, as limited by his brief, from so much of an order of the Supreme Court, Nassau County (Winslow, J.), dated November 12, 2010, as granted the plaintiffs' motion to compel production of certain medical records and, in effect, denied his request for an in camera review of certain medical records, (2) the defendants SLS Residential, Inc., SLS Health, Inc., SLS Wellness, Inc., Supervised Lifestyles, Inc., Joseph Santoro, Alfred Bergman, Shawn Prichard, Lauren Miller, Kendra Kohut, and Betsey Bergman separately appeal, as limited by their brief, from so much of an order of the same court dated August 23, 2010, as denied that branch of their cross motion which was for a protective order precluding the plaintiffs from obtaining certain medical and psychiatric records of the defendant Evan Marshall and, in effect, denied that branch of their cross motion which was for an in camera review of certain medical records, and from so much of the order dated November 12, 2010, as granted the plaintiffs' motion to compel the production of those records, (3) the defendants SDL Case Management, Inc., SDL Case Management, LLC, and SLS Health, LLC, separately appeal, as limited by their brief, from so much of the order dated August 23, 2010, as denied that branch of their cross motion which was for a protective order and, in effect, denied that branch of their cross motion which was for an in camera review of certain medical records, and from so much of the order dated November 12, 2010, as granted the plaintiffs' motion to compel production of certain medical records, (4) the defendant Mark J. Stumacher separately appeals, as limited by his brief, from so much of the order dated August 23, 2010, as denied his cross motion for a protective order, and from so much of the order dated November 12, 2010, as granted the plaintiffs' motion to compel production of certain medical records, (5) the defendant Dave Moore separately appeals, as limited by his brief, from so much of the order dated August 23, 2010, as denied his cross motion for a protective order, and from so much of the order dated November 12, 2010, as granted the plaintiffs' motion to compel production of certain medical records, and (6) the defendant Jacqueline Marshall separately appeals, as limited by her brief, from so much of the order dated August 23, 2010, as denied her cross motion for a protective order, and from so much of the order dated November 12, 2010, as granted the plaintiffs' motion to compel production of certain medical records.

ORDERED that the appeal by the defendant Jacqueline Marshall is dismissed as academic, in light of the decision and order of this Court dated August 9, 2011 (*see Fox v Marshall*, 88 AD3d 131); and it is further,

ORDERED that on the Court's own motion, the notice of appeal by the defendant Evan Marshall from so much of the order dated November 12, 2010, as, in effect, denied his request for an in camera review of certain medical records, is treated as an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see CPLR 5701[c]*); and it is further,

ORDERED that the orders dated August 23, 2010, and November 12, 2010, are affirmed insofar as appealed from by the defendants Evan Marshall, SLS Residential, Inc., SLS Health, Inc., SLS Wellness, Inc., Supervised Lifestyles, Inc., Joseph Santoro, Alfred Bergman, Shawn Prichard, Lauren Miller, Kendra Kohut, Betsey Bergman, SDL Case Management, Inc., SDL Case Management, LLC, SLS Health, LLC, Mark J. Stumacher, and Dave Moore; and it is further,

ORDERED that one bill of costs is awarded to the plaintiffs payable by the appellants appearing separately and filing separate briefs.

The physician-patient privilege prohibits disclosure of any information acquired by a physician “in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity” (*Dillenbeck v Hess*, 73 NY2d 278, 284 [internal quotation marks omitted]). Pursuant to CPLR 4504, physicians, nurses, and related professionals “shall not be allowed to disclose any information which he [or she] acquired in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity” (CPLR 4504[a]; *see also* CPLR 4507).

Discovery of medical records regarding a party’s mental or physical condition is permitted when a defendant waives that privilege by affirmatively placing his or her mental or physical condition “in controversy” (CPLR 3121[a]; *see Dillenbeck v Hess*, 73 NY2d at 286-287; *Lombardi v Hall*, 5 AD3d 739, 739-740). In order to effect a waiver, a party must affirmatively assert the condition and place that condition in issue “either by way of counterclaim or to excuse the conduct complained of by the plaintiff” in the pending action or in a related matter (*see Dillenbeck v Hess*, 73 NY2d at 288, quoting *Koump v Smith*, 25 NY2d 287, 294; *see Grafi v Solomon*, 274 AD2d 451, 452).

Under the circumstances of this case, the Supreme Court did not err in finding that the defendant Evan Marshall waived the physician-patient privilege with respect to the medical records and other documents relating to a prior criminal proceeding in which he was a defendant that are the subject of the orders appealed from here (*see Webdale v North Gen. Hosp.*, 7 Misc 3d 947, 955, *affd* 24 AD3d 153; *see also Szmania v State of New York*, 82 AD3d 1688, 1690). Further, under the circumstances of this case, the Supreme Court properly, in effect, denied the requests for an in camera review of certain medical records (*cf. J.Z. v South Oaks Hosp.*, 67 AD3d 645; *Sohan v Long Is. Coll. Hosp.*, 282 AD2d 597).

RIVERA, J.P., ENG, ROMAN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court