Westchester Med. Ctr. v State Farm Mut. Auto. Ins. Co.
2009 NY Slip Op 30553(U)
February 25, 2009
Supreme Court, Nassau County
Docket Number: 7711-06
Judge: William R. LaMarca
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

WESTCHESTER MEDICAL CENTER, As Assignee of DONALD GJELAJ,

Plaintiff,

-against-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

Motion Sequence #3, #4
Submitted November 18, 2008

INDEX NO: 7711/06

The following papers were read on these motions:

Notice of Motion.....1
Notice of Cross-Motion.....2
Affirmation in Opposition and in Reply.....3
Reply Affirmation.....4

Requested Relief

Counsel for defendant, STATE FARM MUTUAL AUTO INS. CO. (hereinafter referred to as "STATE FARM"), moves for an order, pursuant to CPLR §3124, compelling plaintiff to respond to discovery demands and to compel plaintiff's assignor to attend a deposition. Counsel for plaintiff, WESTCHESTER MEDICAL CENTER (hereinafter referred to as the "Hospital") as assignee of DONALD GJELAJ, opposes the motion and cross-moves for a protective order limiting the defendant's Demand for Interrogatories and

striking the defendant's Notice for Discovery and Inspection. The motion and cross-motion are determined as follows:

Background

In this action to recover for no-fault benefits provided on behalf of the Hospital's assignor, DONALD GJELAJ, counsel for STATE FARM relates the procedural history of the litigation in which STATE FARM allegedly timely denied payment on the basis that plaintiff's assignor was intoxicated when the motor vehicle accident occurred. Thereafter, both parties moved for summary judgment and the Court denied the Hospital's motion for summary judgment and granted STATE FARM's cross-motion for summary judgment. On appeal, Second Department modified the adverse finding against the Hospital and found that STATE FARM was unable to establish, *prima facie*, that GJELAJ was intoxicated at the time of the accident as no proper foundation was laid for admission of the blood alcohol test, however, triable issues of fact were raised regarding intoxication, from both the blood alcohol test and the police accident report, sufficient to defeat the Hospital's motion. Counsel for STATE FARM states that, in pertinent part, the case was remanded for trial as to a) whether plaintiff's assignor was intoxicated at the time of the loss; and b) whether the motor vehicle accident was the cause of plaintiff's assignor's injuries. Moving counsel asserts that STATE FARM served interrogatories, discovery and inspection demands and demands for authorizations, and scheduled an Examination Before Trial (EBT) for May 28, 2008, but that counsel for the Hospital advised that they did not represent the assignor and would not comply with STATE FARM's discovery demands. It is STATE FARM's position that the Hospital must comply with the discovery demands and its assignor must be

compelled to attend an EBT in that his testimony is "material and necessary", pursuant to CPLR §3101(a), and because the Hospital has failed to challenge the notices for discovery within the prescribed time to challenge the propriety of the information sought.

Counsel for the Hospital's argues that pending dispositive motions in the Appellate Division have stayed all discovery, citing CPLR §3214(b), however, the Court notes that STATE FARM's motion to reargue Second Department's decision on the appeal is neither a 3211, 3212 nor a 3213 motion and, more importantly, said motion was denied on September 17, 2008. Therefore, no stay of the demanded discovery exists and the Court turns to the merits of the demands. In support of its cross-motion for a protective order, counsel for the Hospital objects to supplying the name, address, telephone number and license number of individuals involved in the patient's treatment or laboratory testing, and asserts that the information demanded in items 9c, d, e; 10 e, f iii; 12 d; 13 c, d, e is irrelevant and an invasion of the individual's privacy. Additionally, the Hospital objects to STATE FARM's demand to produce the assignor for deposition, and points out that the assignor is a non-party witness over whom the Hospital does not have control nor any contact or communication after his discharge. Counsel states that the Hospital will supply the last known address of the assignor to assist STATE FARM in obtaining a non-party deposition of the assignor, although it claims that a showing of "special circumstances" has not been made. The Hospital also objects to any demands that are "palpably improper" and suggests that STATE FARM's demands in its Demand for Discovery and Inspection for, *inter alia*, HIPAA authorizations, police reports, MV104 forms, and copies of all criminal charging documents are improperly made to the Hospital. Counsel for the Hospital states that many of the documents demanded are public records which are available to STATE

FARM by independent investigation, and that the prescribed no-fault bill (Hospital Facility Form) contains an Authorization for Release of Health Service or Treatment Information that is relevant to the claim. The Hospital asks the Court to limit defendant's interrogatories and to strike the Notice for Discovery and Inspection.

In opposition to the cross-motion and in reply, counsel for STATE FARM asserts that, by executing an assignment, the assignor, DONALD GJELAJ, or any other assignor cannot escape their duties to comply with the discovery requirements of CPLR Article 31, should a matter be brought in Court on their behalf. Counsel for STATE FARM contends that the general discovery rules apply to no-fault actions once a provider decides to bring an action in a Court of competent jurisdiction, citing *One Beacon Insurance Group, LLC. v Midland Medical Care, PC.*, 54 AD3d 738, 863 NYS2d 728 (2nd Dept. 2008), and that, since STATE FARM's defense that plaintiff's assignor was intoxicated and said intoxication was the proximate cause of the action was preserved in a timely denial, information that is material and necessary in relation to the defense may be demanded. In reply, counsel for the Hospital suggests that STATE FARM fails to state why it cannot issue a non-party subpoena to depose the witness and urges that a protective order be issued as the assignor is not under its control.

The Law

CPLR § 3101(a) provides that there shall be "full disclosure of all [evidence] material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . a party or the officer, . . . agent or employee of a party . . . [and] any other person, upon notice stating the circumstances or reasons such disclosure is sought or

required" (CPLR 3101 [a][1],[4]). The Court of Appeals has held that material and necessary must be interpreted liberally as to "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 Publishing Co.*, 21 NY2d 403, 288 NYS2d 449 (C.A. 1968). . .". *Elmont Open MRI & Diagnostic Radiology, PC, d/b/a All County MRI & Diagnostic Radiology, a/a/o Karen Garacia v New York Central Mutual Fire Ins. Co.*, 16 Misc3d 161, 835 NYS2d 866 (District Ct. Nassau Co. 2007)(citations omitted).

> Although the disclosure provisions of CPLR Article 31 are to be construed liberally, the scope of permissible discovery is not unlimited since the trial court is invested with broad discretion to (a) supervise discovery, to (b) limit or regulate, at any time on its own initiative, the use of any disclosure device in order to prevent abuse, prejudice or unreasonable annoyance, and to (c) determine what is "material and necessary" as the phrase is used in CPLR 3101(a) . . .

Elmont Open MRI & Diagnostic Radiology, PC, d/b/a All County MRI & Diagnostic Radiology, a/a/o Karen Garacia v New York Central Mutual Fire Ins. Co., supra.

CPLR §3101(a)(4) directs that discovery of a non-party may be obtained "upon notice stating circumstances or reasons such disclosure is sought or required".

> The existence of such special circumstances is not established merely upon a showing that the information sought is relevant. Rather, special circumstances are shown by establishing that the information sought cannot be obtained through other sources . . .

Tannenbaum v Tannenbaum, 8 AD3d 360, 777 NYS2d 769 (2nd Dept. 2004).

CPLR §3103(a), entitled Protective orders, provides as follows:

> Prevention of abuse. The court may at any time on its own initative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to

any person or the courts.

"The result of a blood alcohol test may be admitted on the issue of intoxication in litigation involving an exclusion in a no-fault policy provided that a proper foundation is laid". *Nyack Hospital v Government Employees Insurance Co.*, 139 AD2d 515, 526 NYS2d 614 (2nd Dept. 1988); *see also, Fafinski v Reliance Insurance Co.*, 106 AD2d 88, 484 NYS2d 729 (4th Dept. 1985).

> The general rule is that [since] the link between high blood alcohol levels and intoxication as well as the accuracy of measurements made under ideal conditions is well established, under the usual principles governing scientific evidence, the test results should be admissible if founded on a showing of authenticity and satisfactory care in the collection of the sample and its analysis. . .

Fafinski v Reliance Insurance Co., supra. As set forth by the Second Department on the appeal herein, the defendant must lay a proper foundation for submission of the Blood Alcohol Content by proffering evidence regarding the care in the collection of GJELAJ's blood sample and its analysis.

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that STATE FARM is entitled to full responses to its Demand for Interrogatories, with respect to the name, address, telephone number and license number of individuals involved in the patient's treatment or laboratory testing, as demanded in 9c, d, e; 10 e, f iii; 12 d; 13 c, d, e, which is material and necessary to the preparation of its defense based upon intoxication. The Court rejects the Hospital's argument that such information is an unwarranted invasion of privacy, and notes that the case cited by the Hospital, *New York Times Co. v New York State Dept. Of Health*, 243 AD2d 157, 674 NYS2d 826 (3rd Dept.

1998), concerns a Freedom of Information Law request for information, which found no invasion of privacy rights in releasing the identity of physicians. In the case at bar, the demanded information may be necessary to establish the credentials of the laboratory testors and the chain of control of the blood alcohol test.

However, with respect to STATE FARM's Notice of Deposition and the Discovery and Inspection Demands, the Court finds that they are too broad as they direct the plaintiff to produce a person regardless of whether that person is independent of, and not an employee or agent of the Hospital. The principle that the "assignee 'stands in the shoes' of an assignor" should not be construed to mean that it is the burden of the plaintiff hospital to produce at its deposition the nonparty who might possess information concerning STATE FARM's defense of intoxication, nor to produce records and reports of other persons and companies. Cf., *Elmont Open MRI & Diagnostic Radiology, PC, d/b/a All County MRI & Diagnostic Radiology, a/a/o Karen Garacia v New York Central Mutual Fire Ins. Co., supra.* The Court finds that the assignor is a non-party witness over whom the Hospital does not have control, and STATE FARM has failed to show otherwise. *Peter Doelger, Inc. v L. Fatato, Inc.*, 7 AD2d 1003, 184 NYS2d 256 (2nd Dept. 1959). GJELAJ was a patient in the Hospital who assigned his rights to plaintiff to obtain payment for such treatment. He is not a party to this action and, while it is the Court's view that a deposition and demand for documents from him appears to be necessary, the proper course is by subpoena and notice demonstrating special circumstances of a non-party witness, pursuant to CPLR §3101(a)(4).

Conclusion

Based on the foregoing, it is hereby

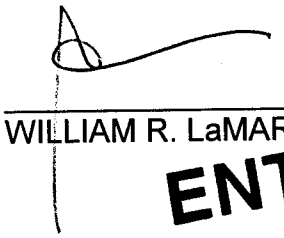
ORDERED, that STATE FARM's motion for an order compelling the Hospital to respond to discovery demands is granted to the extent that the Hospital is directed to provide full responses to STATE FARM's Demand for Interrogatories, with respect to the name, address, telephone number and license number of individuals involved in the patient's treatment or laboratory testing, as demanded in 9c, d, e; 10 e, f iii; 12 d; 13 c, d, e ; and it is further

ORDERED, that the Hospital's cross-motion for a protective order with respect to its Notice to Take Deposition and the Discovery and Inspection Demands is granted. Notwithstanding that the Hospital did not timely seek a protective order pursuant to CPLR §3103, the defendant's Notice to Take Deposition is palpably improper and is stricken, as are all demands for HIPAA authorizations, police reports, MV104 forms, and copies of all criminal charging documents and Court paper work (cf., *Elmont Open MRI & Diagnostic Radiology, PC, d/b/a All County MRI & Diagnostic Radiology, a/a/o Karen Garacia v New York Central Mutual Fire Ins. Co., supra).* Many of the requested documents are public records which are available to STATE FARM by independent investigation and said discovery is better obtained through questioning of the non-party assignor upon proper subpoena and notice to him. The Hospital is directed to provide responses to all demands for health service and treatment information pursuant to the authorization in the prescribed no-fault bill (Hospital Facility Form).

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: February 25, 2009



WILLIAM R. LaMARCA, J.S.C.

ENTERED

MAR 03 2009

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