

Schultz v Chillemi

2002 NY Slip Op 30143(U)

August 21, 2002

Sup Ct, Suffolk County

Docket Number: 12032-2001

Judge: Ralph F. Costello

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SHORT FORM ORDER

INDEX NO. 12032-2001

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXVII SUFFOLK COUNTY

PRESENT:

Honorable Ralph F. Costello

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JENNIFER SCHULTZ, as
Administratrix of the Estate
of WAYNE HOPPING,

Plaintiff,

-against-

CRAIG J. CHILLEMI, JESSICA A.
BELLOWS, DANIEL BAIONE,
MICHAEL J. BAIONE and NATHAN
J. WELCH,

Defendants

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The above entitled matter having been assigned to the under-
signed pursuant to I.A.S. has resulted in several conferences
being held before this Court. In particular, the conferences
dealt with records in the hands of the plaintiff which concern
themselves with alcohol and/or drug treatments of the decedent in
the above matter (based on the Court's review of the records
themselves, they are from the following institutions: (1) Eastern
Long Island Hospital; (2) Central Suffolk Hospital; (3) Seafield

Services, Inc., Riverhead, NY; (4) Brookhaven Memorial Hospital).

It is the contention of the defendants in this matter that discovery of the aforesaid documents must be had in order to properly prepare this claim for trial.

The instant claim arises out of a pedestrian/motorcycle accident which took place on July 29, 2000 at which time the decedent was killed as a result of the aforesaid occurrence. A claim has been made on behalf of his estate and an allegation has been made as to pecuniary loss based on the decedent's death.

It is also the completely unsupported rumors and innuendos as to a suicide and/or suicidal tendencies of the decedent that compels the defendant to seek these records. The Court will specifically address that aspect of this request further on in this Order.

In essence, it is the claim of the defendants in this matter that these records are necessary to determine the ability of the decedent to provide such pecuniary aid and assistance and that in fact his ability to do so would have been diminished to a great extent if not completely obviated by his drug and/or alcohol abuse history.

It is the position of the plaintiff in this matter that these records are protected under Federal statute at 42 U.S.C. §290(d-3) and also under New York State Mental Hygiene Law 533.13. On page 1 of her submission to the Court, plaintiff states that the criteria for the Court in reviewing these records to determine if they should be released, is that the Court make a determination that "the public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services." (Hazelton submission page 1).

After submission by all counsel, the Court has reviewed the records in toto and in addition has reviewed the individual submissions in support of the respective positions on this point.

After such extensive review, it is the opinion of the Court and the Order of the undersigned that solely and exclusively for the purposes of discovery relating to the instant matter, and

complete copies of the records as presented to the Court in the black binder by plaintiff's counsel, shall be made available for photocopying at the expense of the individual defendants for the reasons which shall be discussed further herein and the procedure as outlined below.

Under no circumstances is this decision to be in any way construed as to the question of the admissibility of said records at the time of trial of this matter. That of course would and should be left to the discretion of the trial justice and no part or portion of this Order should be used in that regard.

As to the two basic premises which the Court must acknowledge prior to its discussion of the substantive matters herein, first it must be noted that the Court has discretion as to ordering discovery (see Article 31 of the CPLR). Secondly, by the commencement of this lawsuit, the estate through the actions of the executrix have waived the physician-patient privilege concerning the decedent by making the claims that they have. While they have not expressly placed a physical condition into issue such as where an accident might produce a broken leg, in essence, it is the claim of the estate herein, that the death of the decedent has caused pecuniary loss. Therefore, those items and factors which would affect pecuniary loss must be placed into issue. See CPLR §3121; Kohn v. Fisch 692 NYS2d 429 (2nd Dept., 1999).

Thereafter, the Court must now turn its attention to the facts and circumstances of the instant action and after extensive review, it is the opinion of this Court that the alcohol and/or drug abuse records, for the sole and exclusive Purposes of discovery will be made available to defense counsel.

The pecuniary abilities of the decedent in this matter as to type of work, employment, abilities in such a position, prospects for the future, levels of income, etc. could all be affected by drug and/or alcohol abuse and for that reason discovery of these items must be allowed as to the defendants (the Court does note the high levels of ethanol found during the autopsy and while the same is not indicative of the nature and/or extent of any prior alcohol abuse, given the fact that these records did exist and the autopsy findings, the two dove-tail to the extent that again

for the purposes of discovery, the Court must allow the release of these records).

As to the analysis by the undersigned of the relevant factors herein, the Court did review a recent discussion of the Court of Appeals decision in Matter of World Trade Center Bombing Litigation 93 NY2d 1. While the nature and level of the information sought to be kept confident are easily distinguishable between that litigation and the instant matter, criteria cited by the Court of Appeals and discussed by the Supreme Court, Dutchess County, certainly and demonstrably are applicable herein.

As to the release of the confidential information, the Court noted the need for a balancing determination by the Court which would include the "need for disclosure, the availability of the information elsewhere, the facts of the case, the sensitivity of the information in question, and the advantages of preserving its confidentiality." Lavalle v. State of New York 185 Misc.2d 699 (Supreme Ct. Dutchess Co., 2000).

To demonstrate the fundamental soundness of the balancing act as described by the Court of Appeals, the Court notes that the Lavalle actual situation concerned records from a state agency in regard to a sexual abuse and harassment claim, as opposed to the security matters that would exist vis-a-vis the World Trade Center bombing litigation questions. After the analysis however, the Court must conclude that again for the purposes of discovery, drug and alcohol records to be absolutely necessary for the defense of this matter and therefore the same should be allowed for review.

The Court in the Lavalle decision at page 701, discusses the chilling effect that disclosure of sensitive information would have on the willingness of the persons to provide such information whether it be as to national security, sexual harassment suits and/or the fact situation of the instant matter. While the Court would comment that release of the information herein was caused and occasioned by the intervening factor of the decedent's death and the bringing of the subsequent lawsuit based on such pecuniary loss. This combination of factors provides the key to open the door for the discovery as set forth herein. See Lavalle, supra paue 701.

Lastly, the Court must point out what can only be described as its extreme disappointment in the completely unsupported innuendo by co-counsel herein concerning the alleged suicidal history of the decedent in this matter.

The Court would first point out that if such does exist, there is absolutely no information whatsoever provided to this Court as to the basis or existence of such information. While further explanation might demonstrate the genesis of this information as to each respective counsel, the Court finds each of the submissions made by defense counsel to be extremely rife of any such explanation for their claims as to suicidal history or suicidal tendencies for then what must be deemed innuendos.

In particular, the submission by Carole A. Burns' office at page 6 states ". . . the fact that the decedent may have contributed and/or caused his own death." (Burns submission p.6) which again is unsupported throughout any of the information provided to the Court either in writing by submission or during the aforesaid conferences. Further, in what must be deemed to be a bootstrap attempt to obtain the records, counsel wants to review the records to determine whether there were any suicide attempts or suicide ideations on the part of the decedent which represent to the Court nothing more than calling for one's fishing rod and can of worms in order to be properly equipped to go on a fishing expedition.

Again at page 9 the submission on behalf of Ms. Burns' office again discusses "the distinct possibility that the decedent may have contributed and even wholly caused his own demise. . ." (Burns' submission page 9). Also the submissions by Mr. Ragoli's office in the penultimate paragraph of **the** letter and on page 3 of the Keller submission again raise these innuendos. The Keller submission specifically states "It is also believed that decedent had suicidal tendencies" again no support whatsoever in any manner, shape or form is provided in that regard.

The Court has taken this particular time to point out and disparage these claims in order to firmly establish that none of this fully unsupported or undocumented discussion as to suicidal history and/or tendencies have anything to do with the Court's release of these records. Secondly, it would behoove counsel

that any future reference to such serious allegations, be supported by more than what appears to be unsubstantiated innuendos. If not for the cogent arguments presented by defense counsel relative to the drug and alcohol abuse, the records would not be released. In particular the Court notes that at again the penultimate paragraph of Mr. Crowe's letter, he raises the question regarding suicide but in his first sentence succinctly sets forth the basic reason that the Court is allowing these records to be released.

As to the copying of the documents, it is suggested that at an agreed date and time, the documents be retrieved from chambers by a representative from each of the respective offices herein including plaintiff's, that the records be then brought to a mutually agreed upon photocopy establishment at which point the entire record shall be recreated in triplicate with the cost of one-third of the expense being borne by each of the defendants herein and the original then being returned to counsel for the plaintiff.

The foregoing constitutes the complete Order of the Court in this matter.

Dated: August 21, 2002

RALPH F. COSTELLO
Ralph F. Costello

J.S.C.

Check One _____ Final Disposition X Non-Final Disposition