

Giannicos v Bellevue Hospital Medical Center

2006 NY Slip Op 30449(U)

January 3, 2006

Supreme Court, New York County

Docket Number: 113964/01

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Eileen Bransten
Justice

PART 6

Francis Brannick

INDEX NO. 113904/01

MOTION DATE 10/25/05

- v -

Deverne Ashford Medical Center

MOTION SEQ. NO. 008

MOTION CAL. NO. 005

The following papers, numbered 1 to 2 were read on this motion to/for compel

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 12 2006
NEW YORK COUNTY CLERK'S OFFICE

Dated: 1-3-06

Eileen Bransten
EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
FRANCIS GIANNICOS, as guardian of the person
and property of PETER GIANNICOS, an Incapacitated
Person and GEORGIA GIANNICOS,

Petitioners,

-against-

Index No.: 113964/02
Motion Date: 10/25/05
Motion Seq. No.: 008

BELLEVUE HOSPITAL MEDICAL CENTER,
NEW YORK CITY HEALTH AND HOSPITAL
CORPORATION, MIGUEL FIGUEROA,
NEW YORK EYE & EAR INFIRMARY
and BARBARA ZEIFER,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

Defendants Bellevue Hospital Medical Center (“Bellevue”), New York City Health and Hospitals Corporation (“HHC”), and Miguel Figueroa (“Dr. Figueroa”) move pursuant to CPLR 2308(a) for an Order compelling non-party Emmanuel Lambrakis, M.D. (“Dr. Lambrakis”) to comply with defendants’ judicial *subpoena duces tecum* served June 13, 2005. Plaintiff Francis Giannicos, as guardian of the person and property of Peter Giannicos (“Mr. Giannicos”), an incapacitated person, opposes the motion.* Dr. Lambrakis does not oppose the motion.

* The Court granted defendant Barbara Ziefer’s motion to dismiss on March 23, 2004. Furthermore, on August 30, 2004, the Court granted defendants’ motion to dismiss Georgia Giannicos’s derivative cause of action. Therefore, neither Barbara Ziefer nor Georgia Giannicos are parties to this action.

Background

In this medical malpractice action – commenced on July 20, 2001 – plaintiff claims that defendants negligently treated Mr. Giannicos for hydrocephalus, a condition causing an excessive accumulation of fluid resulting in enlargement and atrophy of the brain.

On March 21, 2002, Justice Charles Thomas of Supreme Court, Queens County, found that Mr. Giannicos was an incapacitated person and appointed Francis Giannicos as his guardian. Affirmation in Support of Motion (“Aff.”), at 2. Subsequently, on January 7, 2004, defendants moved for dismissal of plaintiff’s complaint, arguing that it was untimely pursuant to CPLR 3211(a)(7). Aff., at 3. Plaintiff opposed the motion, claiming that because Mr. Giannicos is incapacitated, he is entitled to a toll under CPLR 208 and his claim is timely. *Id.* Thus, on August 30, 2004, the Court referred the matter to a referee to determine whether Mr. Giannicos is entitled to the insanity toll.

On June 13, 2005, as part of pre-hearing discovery, defendants subpoenaed Mr. Giannicos’s treating physician, Dr. Lambrakis, commanding “a certified copy of any/all office records, charts, x-rays, MRIs, CT scans and files in your possession pertaining to the care of Peter Giannicos.” Aff., at 3-4. The subpoena specified that “failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.” Aff., Ex. F, at 1.

On July 8, 2005, Dr. Lambrakis produced one volume of records consisting of only three pages of records and covering only one office visit. *Aff.*, at 2,4. When Dr. Lambrakis appeared to testify at the hearing, however, he brought three volumes of records and more than three pages of records. *Aff.*, at 4.

Defendants now move for an Order directing Dr. Lambrakis to comply with the June 13, 2005 subpoena and produce *all* of his records. *Aff.*, at 5. They contend that the Court can hold Dr. Lambrakis in contempt of court for failing to produce the records because the records are necessary and essential to their defense. *Aff.*, at 5-8. Defendants do not, however, move for an order holding Dr. Lambrakis in contempt.

Plaintiff opposes the motion, arguing that defendants have failed to prove that Dr. Lambrakis did not produce Mr. Giannicos's full and complete medical chart. Affirmation in Opposition to Motion ("Opp."), at ¶ 2. They claim, moreover, that defendants do not need the medical chart because they have had ample opportunity to question Dr. Lambrakis with regard to his treatment of Mr. Giannicos. *Id.*

Dr. Lambrakis does not submit any opposition to the motion.

Analysis

CPLR 2308(a) provides that refusal to comply with a subpoena issued by an “officer of the court *shall* be punishable as a contempt of court.” (Emphasis added). Indeed, “the mere act of disobedience *** is sufficient to sustain a finding of civil contempt if such disobedience defeats, impairs, impedes or prejudices the rights of a party.” *McNulty v. McNulty*, 81 A.D.2d 581, 582 (2d Dept. 1981).

Here, defendants’ subpoena unequivocally mandated Dr. Lambarkis to produce Mr. Giannicos’s *entire* medical record before the hearing. “The propriety of a subpoena is for the court to determine, not for the person served, and regardless of his being cognizant of the law, a person who takes it upon himself to abide or not to abide the command of a subpoena, does so at the pain of suffering the hazardous consequence of a contemnor, if wrong in disobeying.” *Interfaith Hosp. v. State*, 71 Misc. 2d 910, 913 (Sup. Ct., Queens County, Oct. 2, 1972).

Dr. Lambarkis’s failure to produce the complete medical records was unlawful. To begin, Dr. Lambarkis waived his right to oppose the subpoena because he did not timely respond to it or oppose it. CPLR 3101(a). Furthermore, in disobeying the decree and providing defendants with an incomplete set of medical records, Dr. Lambarkis acted in contempt of court and defeated, impaired, impeded and prejudiced the rights of the parties. *See, McNulty v. McNulty*, 81 A.D.2d, at 582. Dr. Lambarkis’s disregard for the judicial

system and its mandates will not be tolerated. He may only purge himself of the contempt by promptly providing defendants with Mr. Giannicos's entire medical record by January 17, 2006. *Id.* In the event that Dr. Lambrakis fails to produce the entire record by January 17, 2006, the matter will be scheduled for a hearing as to the sanctions that will be imposed.

Accordingly it is

ORDERED that Dr. Lambrakis is directed to produce Mr. Giannicos's entire medical record by January 17, 2006, and it is further

ORDERED that the parties are directed to appear for trial on February 13, 2006.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
January 3, 2006

FILED

JAN 12 2006

ENTER

NEW YORK
COUNTY CLERK'S OFFICE



Hon. Eileen Bransten