

**Lehr v Cohen**

2006 NY Slip Op 30832(U)

April 5, 2006

Supreme Court, New York County

Docket Number: 101545/04

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: EILEEN BRANSTEN PART 6  
Justice

DAVID LEHR, M.D. and LISA LEHR,  
Plaintiffs,  
- v -  
LAWRENCE B. COHEN, M.D., et al.,  
Defendant.

RECEIVED  
APR 6 2006  
IAS MOTION  
SUPPORT OFFICE

INDEX NO. 101545/04  
MOTION DATE 3/21/06  
MOTION SEQ. NO. 05

The following papers, numbered 1 to 3 were read on this motion to compel authorizations and disclosure and preclude expert and evidence as to damages.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

FILED

Cross-Motion:  Yes  No APR 12 2006 Page 1 of 5

NEW YORK COUNTY CLERK OFFICE

Upon the foregoing papers, it is Ordered that this motion by defendant to compel plaintiffs to provide HIPAA-compliant authorizations and to preclude evidence is DENIED.

The note of issue in this case was filed on July 15, 2005.

Trial of this action was originally scheduled for January 2006 but was adjourned until April 24, 2006.

Now, less than a month before trial (and after the previously-scheduled trial date passed), defendants seek additional disclosure.

22 N.Y.C.R.R. 202.21(d) sets forth that post-note-of-issue disclosure may be authorized "to prevent substantial prejudice" if "unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness." (Continued on page 2.)

Dated: 4/5/06 SEE PAGE 5  
EILEEN BRANSTEN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

MPD/FF

Authorization for Massachusetts Records

Defendants move for an Order requiring Dr. Lehr, who is over ninety years old, to produce a HIPAA-compliant authorization allowing them to obtain records of his treatment for diverticulitis, which he underwent in Massachusetts in approximately 1996. Defendants urge that when they served their answer, they demanded authorizations for all of Dr. Lehr's medical providers, and therefore, plaintiffs were under an obligation to produce a proper authorization much earlier in the course of the litigation. Affirmation in Support ("Aff. Supp."), at ¶ 16. Significantly, defendants have not produced any correspondence or prior court orders evidencing that they specifically sought an authorization for the Massachusetts treatment. Despite the fact that they should have known of the Massachusetts treatment before the note of issue was filed (there is absolutely no indication that they only recently learned of the 1996 medical care), defendants never moved to compel production of such an authorization before the note of issue was filed. *See*, CPLR 3124.

*Perhaps* this Court would have required production of a HIPAA-compliant authorization for the Massachusetts treatment had defendants timely pursued this disclosure (although it is entirely unclear how the diverticulitis relates to the injuries alleged). This Court will not consider the request now--months after the trial date originally assigned passed and just a month before trial--because defendants have not demonstrated any "unusual or unanticipated" circumstances to justify such relief nor have they offered any explanation for failing to timely seek the disclosure. *See*, *Schroeder v. IESI NY Corp.*, 24 A.D.3d 180, 181 (1st Dept. 2005) (no basis for permitting additional disclosure as defendants knew of the facts underlying request before the note of issue was filed); *Med Part v. Kingsbridge Heights Care Ctr., Inc.*, 22 A.D.3d 260, 261 (1st Dept. 2005) (additional disclosure, which could have been sought before the note of issue was filed, properly denied in the absence of "unusual or unanticipated circumstances").

Examination Report and Authorization for Records and Private Discussions With Dr. Klein

Defendants also seek an authorization from Dr. Lehr, allowing defense counsel to privately interview Ludwig Klein, M.D. ("Dr. Klein"), plaintiffs' expert witness and a physician who treated Dr. Lehr. Defendants argue that Dr. Klein "is a critical fact witness with unique knowledge relevant to this litigation because of his role in plaintiff's treatment, and the examinations that he conducted, and upon which plaintiff bases his claims of injury and malpractice." Aff. Supp., at ¶ 10. Defendants argue that Dr. Lehr has unfettered access to Dr. Klein and that they "should be afforded the same access to this witness." *Id.*, at ¶ 8. Defendants further assert that Dr. Klein's records are illegible and that "at the very least [they] should be allowed to speak with him to obtain his interpretation of his records." *Id.*, at ¶ 14.

Defendants also point out that plaintiffs' 3101(d) expert disclosure reveals that Dr. Klein bases his expert opinion on his examination of Dr. Lehr. *Id.*, at ¶ 2. Defendants seek an Order compelling plaintiffs to produce an examination report by Dr. Klein and an authorization allowing them to discuss "the examination" with him.

Defendants argue that this motion comes at a late stage because it was only after plaintiffs revealed their intention to use Dr. Klein as an expert that "the lack of information in his records became a glaring problem." Reply to Opposition to Defendants' Motion, at ¶ 4.

Again, defendants entirely fail to offer a valid explanation as to why they never sought a deposition of Dr. Klein during the period set aside for disclosure. They had every right to do so, and could have asked Dr. Klein any and all questions related to Dr. Lehr's treatment, including asking him what his allegedly difficult-to-read medical records set forth. Defendants were never denied an opportunity to obtain disclosure from Dr. Klein, who they were well aware of early on in the course of this litigation. The sudden urgency to obtain information from Dr. Klein apparently stems from plaintiffs' disclosure that he will serve as

their expert. That fact, however, does not justify allowing post-note-of-issue disclosure on the eve of trial. It was always possible that Dr. Klein would serve as plaintiffs' expert or appear as a witness on their behalf at trial. Plaintiffs, moreover, are not even required to reveal the identity of their expert in a medical malpractice action. *See*, CPLR 3101(d). Defendants have no right to depose or interview Dr. Klein at this late juncture simply because he agreed to be the Lehrs' expert. Nor have defendants established any "unusual or unanticipated" circumstances justifying late disclosure now (whether through provision of an authorization allowing them to conduct a private interview or a deposition).

Additionally--cognizant of case law to the contrary--this Court has concluded time and again that it will not compel a plaintiff to cooperate with a defendant's efforts to conduct private, unsupervised discussions with a treating physician. This Court will not play an active role in defendants' post-note-of-issue investigation of the case or preparation for trial by forcing a plaintiff to allow for such unlimited open-ended discussions. *See, Browne v. Horbar*, 6 Misc. 3d 780, 788; *see also, Estate of Raynor v. St. Vincent's Hosp.*, 7 Misc. 3d 1031(A) (Sup. Ct. New York County May 11, 2005).

Finally, plaintiffs' counsel has affirmed that "Dr. Klein has prepared no report regarding his examinations of Dr. Lehr, and has not examined Dr. Lehr expressly for the purposes of this litigation, but only in the usual course of treatment of Dr. Lehr as his patient." Affirmation in Opposition, at ¶ 26. Plaintiffs' counsel, moreover, has assured the Court that updated authorizations have continuously been provided, allowing defendants to obtain Dr. Klein's most recent records of Dr. Lehr's treatment. Defendants have not established that Dr. Klein has any obligation to generate a report based on his treatment of Dr. Lehr.

In the end, there is absolutely no basis for preclusion or granting defendants any of the relief that they seek.


Accordingly, it is ORDERED that defendants' motion is denied; and it is further

ORDERED that the parties are to appear in Court prepared for trial on Monday, April 24, 2006 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York  
April 5, 2006

ENTER:

  
Hon. Eileen Bransten

**FILED**  
APR 12 2006  
NEW YORK  
COUNTY CLERK'S OFFICE