

Marceda v Obadiah

2007 NY Slip Op 30814(U)

March 27, 2007

Supreme Court, Suffolk County

Docket Number: 0011454/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-14-06
ADJ. DATE 1-4-07
Mot. Seq. # 001 - MotD
002 - XMotD

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| -----X | |
| ROSE MARCEDA and SYLVIO MARCEDA, | : |
| | : |
| Plaintiffs, | : |
| | : |
| | : |
| | : |
| - against - | : |
| | : |
| BARRY S. OBADIAH, M.D., RICHARD N. | : |
| STELLER, M.D., LONG ISLAND | : |
| GASTROENTEROLOGY GROUP, P.C. and | : |
| NORTH SHORE UNIVERSITY HOSPITAL AT | : |
| MANHASSET, | : |
| | : |
| | : |
| Defendants. | : |
| | : |
| -----X | |

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Upon the following papers numbered 1 to 16 read on this motion to compel HIPAA-complaint authorizations; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 8 - 13; Answering Affidavits and supporting papers 14 - 16; Replying Affidavits and supporting papers _____; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendants Richard N. Steller, M.D. and Long Island Gastroenterology Group, P.C. for an order pursuant to CPLR 3124 compelling plaintiff to provide HIPAA-compliant authorizations permitting defendants to subpoena records for trial and conduct post note of issue, ex parte interviews with plaintiff's nonparty-treating physicians or, in the alternative, issuing a qualified protective order pursuant to 45 CFR § 164.512 (e) permitting plaintiff's treating physicians to engage in ex parte interviews with defense counsel is determined herein; and it is further

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ORDERED that this cross motion by defendant North Shore University Hospital for an order pursuant to CPLR 3124 compelling plaintiff to provide HIPAA-compliant authorizations permitting defendants to subpoena records for trial and conduct post note of issue, ex parte interviews with plaintiff's nonparty-treating physicians or, in the alternative, issuing a qualified protective order pursuant to 45 CFR § 164.512 (e) permitting plaintiff's treating physicians to engage in ex parte interviews with defense counsel is determined herein.

This is a medical malpractice action to recover damages for defendants' alleged negligent care and treatment of plaintiff Rose Marceda. The Court's computer records indicate that the note of issue in this action was filed on August 1, 2006.

Defendants Richard N. Steller, M.D. and Long Island Gastroenterology Group, P.C. (Steller and Long Island Gastroenterology) served upon plaintiffs a Demand for Authorizations to Interview Providers dated August 28, 2006 seeking authorizations which were compliant with the Health Insurance Portability and Accountability Act (HIPAA) to interview 25 named party and nonparty physicians and medical providers in preparation for trial and a Demand for Authorizations to Subpoena Records dated August 29, 2006 seeking HIPAA-compliant authorizations to subpoena records from 45 named party and nonparty physicians and institutions in preparation for trial. Counsel for said defendants sent a follow-up letter dated October 3, 2006 to counsel for plaintiffs. Defendant North Shore University Hospital (Hospital) served upon plaintiffs a Demand for Authorizations to Subpoena Records dated September 7, 2006 seeking HIPAA-compliant authorizations to subpoena records from 45 named party and nonparty physicians and institutions in preparation for trial. Counsel for defendant Hospital sent a follow-up letter dated October 5, 2006 to counsel for plaintiffs.

Defendants Steller and Long Island Gastroenterology now move and defendant Hospital now cross-move to compel plaintiff Rose Marceda to provide HIPAA-compliant authorizations permitting defendants to subpoena records for trial and to conduct post note of issue, ex parte interviews with plaintiff's treating physicians or, in the alternative, for a qualified protective order permitting plaintiff's treating physicians to engage in ex parte interviews with defense counsel.

Plaintiffs oppose the motion and cross motion based on the holding of the recent decision of the Appellate Division, Second Department, *Arons v Jutkowitz*, ___ AD3d ___, 825 NYS2d 738 (2d Dept 2006) that post-note of issue ex-parte interviews are not authorized by any statute, rule or regulation.

The Court in *Arons v Jutkowitz* held that although courts are empowered to supervise disclosure (*see*, CPLR 3104), the Uniform Rules of the New York State Trial Courts and the provisions of CPLR article 31 do not authorize private, ex parte interviews as a disclosure device and that therefore compulsion of such unsupervised, private and unrecorded interviews plainly exceeded the scope of CPLR article 31 (*see*, *Arons v Jutkowitz*, ___ AD3d ___, 825 NYS2d

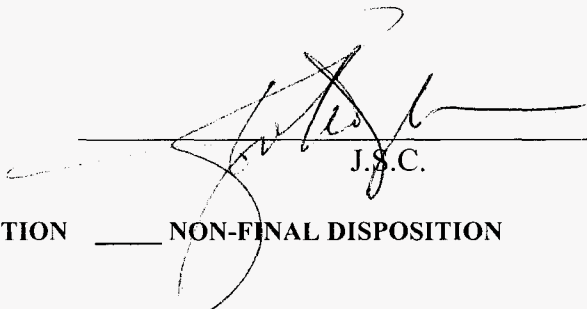
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738, 743 [2d Dept 2006]). The Court pointed out that after the filing of a note of issue, a court's authority to permit additional pretrial disclosure is limited to a party's demonstration of "unusual or unanticipated circumstances" pursuant to 22 NYCRR § 202.21(d) (*see, id.*). It quoted language from a decision of the Supreme Court, Niagara County, **Holzle v Healthcare Services Group, Inc.**, 7 Misc 3d 1027(A), 801 NYS2d 234 (Sup Ct, Niagara County, May 24, 2005) in holding that "[i]n the absence of additional statutory authority, the 'courts should not become involved in post-note of issue trial preparation matters and should not dictate to plaintiffs or defense counsel the terms under which interviews with non-party witnesses may be conducted'" (*see, Arons v Jutkowitz, supra* at 743 quoting **Holzle v Healthcare Services Group, Inc.**, *supra* at 8). In conclusion, the Court determined that the request to compel plaintiffs to consent to these interviews "is simply not authorized by statute" and must therefore be denied (*see, Arons v Jutkowitz, supra* at 743).

Thus, based on the reasons set forth in **Arons v Jutkowitz**, the requests by defendants to compel plaintiff to execute the authorizations pursuant to HIPAA to allow defendants to conduct post note of issue, ex parte interviews are denied (*see, Webb v New York Methodist Hosp.*, 35 AD3d 457, 825 NYS2d 645 [2d Dept 2006]; *see also, D'Ambrosio v 85 Crystal Run Co.*, ___ NYS2d ___, 2007 WL 613733, 2007 NY Slip Op 01677 [NYAD 2 Dept Feb 27, 2007]). It so follows that the alternate requests for the issuance of a qualified protective order pursuant to 45 CFR § 164.512 (e) are denied for the same reasons (*see, Arons v Jutkowitz, supra; id.*).

However, the requests by defendants to compel HIPAA-compliant authorizations permitting them to subpoena records for trial is granted inasmuch as "[t]here is a distinction between pre-trial discovery and the marshaling of evidence for trial by the use of a subpoena duces tecum (*see, Singh v Friedson*, 36 AD3d 605, ___ NYS2d ___, 2007 WL 57799, 2007 NY Slip Op 00127 [NYAD 2 Dept Jan 09, 2007]; **Valli v Viviani**, 7 Misc3d 1002[A], 801 NYS2d 243 [Sup Ct, Suffolk County, Mar 31, 2005]; *see also, CPLR 3122 [a]*). Plaintiff shall provide defendants with said authorizations within twenty (20) days of the entry date of this order.

Dated: MAR 27 2007



J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION