

**Matter of Varona v Rivera**

2007 NY Slip Op 32377(U)

July 18, 2007

Supreme Court, New York County

Docket Number: 0105805/2007

Judge: Marcy L. Kahn

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

PRESENT: KATH  
Justice

PART 501c

ERNESTO VARONA  
- F -

INDEX NO. 105805/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for CPLR § 3102  
pre-action discovery (PHL § 17)

~~Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...~~  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
JUL 31 2007  
NEW YORK COUNTY CLERK'S OFFICE

Dated: 1 JUL 18 2007

[Signature]  
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: IAS PART 50K

-----X  
In the Matter of the Application of :

ERNESTO VARONA, :  
 :  
 Petitioner, : :

DECISION AND  
ORDER ON MOTION  
PURSUANT TO PUBLIC  
HEALTH LAW §17 AND  
CPLR §3102(c)

-against- :  
 :

Index No. 105805/07

SALMON RIVERA, M.D., GREGORY A.  
RIVERA, D.P.M., YDELFONSO A. DECOO :  
M.D., and COLUMBIA PRESBYTERIAN :  
HOSPITAL, :  
 :  
 Respondents. :  
-----X

**FILED**  
**JUL 31 2007**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

MARCY L. KAHN, J.S.C.

By order to show cause and verified petition dated April 20, 2007, petitioner Ernesto Varona seeks an order pursuant to section 17 of the Public Health Law and section 3102(c) of the Civil Practice Law and Rules compelling respondents Salmon Rivera, M.D., Gregory A. Rivera, D.P.M., Ydelfonso A. Decoo, M.D., and Columbia Presbyterian Hospital ("the Hospital") (together, "respondents") to turn over any and all medical and hospital records pertaining to their care and treatment of petitioner. Affidavits of service were sworn on May 4 and 5 2007, respondents have failed to appear in this proceeding, and the application is granted on default.

I. FACTUAL BACKGROUND

Petitioner alleges that he received medical treatment from

respondents. He engaged his present counsel to prosecute a claim for damages arising from personal injury through the negligence or medical malpractice of the respondents. In order to obtain copies of his medical records, petitioner also executed a New York State Department of Health Authorization for Release of Health Information Pursuant to HIPAA (Office of Court Administration official form number 960) ("HIPAA release") directed to each respondent authorizing release of the records to his attorneys. (Verified Pet., Exh. A). On two occasions, December 21, 2006 and March 16, 2007, petitioner's counsel contacted the Hospital and each of the other respondents requesting copies of petitioner's medical records pursuant to Public Health Law §§ 17 and 18, attaching the HIPAA release the first time and enclosing a copy of the original request on the second occasion. (Verified Pet., Exh. A). To date, petitioner's counsel has received no records from any of the respondents to any of these requests.

## II. APPLICABLE LAW

The pertinent portion of Public Health §17 provides as follows:

Upon the written request of any competent patient . . . , an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital . . . .

This right extends both to a requesting patient and to a qualified representative, including an attorney, who is authorized to receive such information on the patient's behalf. (Pub. Health L. §18[1][g]; Boltja v. Southside Hosp., 186 AD2d 774 [2nd Dept. 1992]; see Casillo v. St. John's Episcopal Hosp., Smithtown, 151 Misc.2d 420, 423 [Sup. Ct. Suffolk Co. 1992]). The reasonable charge for copying of such records may not exceed \$.75 per page. (Pub. Health L. §18[2][e]; Boltja, supra, 186 AD2d at 775; Silber & Rabar, "Medical Malpractice Litigation: Access to a Patient's Records," NYLJ, Sept. 30, 1994, at 3, col.1).

Civil Practice Law and Rules section 3102(c) provides in relevant part that prior to commencement of an action, the court may order "disclosure to aid in bringing an action, to preserve information or to aid in arbitration . . . ." In order to obtain pre-action disclosure, however, a petitioner must demonstrate "a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." (Matter of Uddin v. New York City Transit Auth., 27 AD3d 266 [1<sup>st</sup> Dept. 2006]; Holzman v. Manhattan & Bronx Surface Transit Operating Auth., 271 AD2d 346, 347 [1<sup>st</sup> Dept. 2000]; Bliss v. Jaffin, 176 AD2d 108 [1<sup>st</sup> Dept. 1991]).<sup>1</sup>

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<sup>1</sup> At least one court has recognized the apparent unfairness in this rule, which sometimes forces a petitioner to attempt to express medical information that is beyond the

Apart from some isolated, and dated, lower court decisions which seek equitable results by recognizing non-statutory rights of patients to their own medical records, however (Casillo, supra; Taylor, supra; see Wheeler v. Comm'r of Social Serv., 233 AD2d 4, 10 [2<sup>nd</sup> Dept. 1997][Rosenblatt, J.][citing cases]), the common law of our state generally has not veered beyond statutory enactments in allowing pre-action discovery of a patient's medical records (see Cynthia B. v. New Rochelle Hosp. Med. Center, 60 NY2d 452, 460 n.3 [1983][ "[A]lthough patients may exercise a considerable degree of control over their own records, there is no statute that expressly allows them to obtain direct and complete access to their medical records regardless of whether litigation is pending"; Wheeler, supra). On the other hand, it has long been clear that patients are presumptively entitled to their own medical records, and the "general theme" of the legislation and case law in New York and elsewhere is to provide patients access to such information. (Wheeler, supra, 233 AD2d at 11-12).

Here, petitioner has established that he made valid requests pursuant to Public Health Law §17 for his medical

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petitioner's fund of knowledge. In such circumstances, "[t]o require an affidavit of the petitioner is an exercise in futility since all one could reasonably expect is a layperson's recitation of treatment received followed by an unwanted result." (Matter of Taylor, 143 Misc.2d 259, 260-261 [Sup. Ct. Kings Co. 1989]).

records and that the respondents have repeatedly, and inexplicably, refused to honor those requests, in violation of the clear requirements of that statute.

Notwithstanding the absence of any opposition from respondents, however, petitioner has not established the existence prima facie of a meritorious cause of action, which continues to be a prerequisite to pre-action discovery under recent controlling decisional law interpreting CPLR §3102(c). Pre-action disclosure is unavailable to ascertain whether facts supporting a cause of action exist. (See Matter of Uddin, supra; Matter of Belmont v. Bristol-Myers Squibb Co., 18 AD3d 292 [1<sup>st</sup> Dept. 2005]; Holzman v. Manhattan and Bronx Surface Tr. Operating Auth., supra).

Petitioner maintains that the production of his medical records is "necessary to properly frame a medical malpractice claim against" the respondents. (Verified Pet., ¶8). The petitioner has not yet alleged a cause of action, but instead is seeking the medical records so that he may be able to do so. Such disclosure without a proper allegation of a cause of action, however, "is not permissible as a fishing expedition to ascertain whether a cause of action exists." (Liberty Imports, Inc. v. Bourquet, 146 AD2d 535, 536 [1<sup>st</sup> Dept. 1989]). He has thus not satisfied the requirements for pre-action discovery of CPLR §3102(c).

Under the circumstances presented, then, petitioner is entitled to receive the copies of the records his counsel has demanded pursuant to the Public Health Law, although not pursuant to CPLR §3102(c).

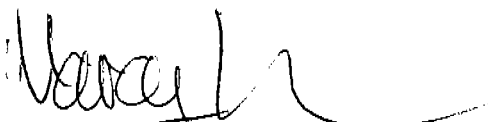
IV. CONCLUSION

Accordingly, petitioner's application pursuant to Public Health Law §17 is granted, and respondents are ordered to provide petitioner's counsel with copies of any and all medical records pertaining to respondents' care and treatment of petitioner, at a cost not to exceed \$.75 per page for paper copies, within 15 days from the date of service of a copy of this order upon them. Petitioner's request for pre-action discovery pursuant to CPLR §3102(c) is denied, without prejudice to a further application on a proper showing, should the discovery ordered herein prove inadequate.

The foregoing constitutes the decision and order of this court.

**FILED**  
JUL 31 2007,  
NEW YORK  
COUNTY CLERKS OFFICE

ENTER:

  
Marcy L. Kahn, J.S.C.

**MARCY L. KAHN**

DATED: New York, New York  
July 18, 2007

Supreme Court  
of the  
State of New York



MARCY L. KAHN  
JUSTICE

CHAMBERS  
100 CENTRE STREET  
NEW YORK, NY 10013

July 18, 2007

Albert B. Aquila, Esq.  
Sullivan Papain Block  
McGrath & Cannavo P.C.  
55 Mineola Boulevard  
Mineola, New York 11501

Re: ERNESTO VARONA, et al.,  
Index No. 105805/07

Dear Mr. Aquila:

Enclosed please find a copy of my decision and order in the above-referenced proceeding filed today.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Marcy L. Kahn", with a long horizontal flourish extending to the right.

Marcy L. Kahn

MLK:ob

Enc.

cc: Court file  
Columbia Presbyterian Hospital  
Gregory A. Rivera, D.P.M.  
Salomon Rivera, M.D.  
Ydelfonso A. DeCoo, M.D.