

Skinner v Memorial Sloan Kettering Cancer Ctr.

2008 NY Slip Op 30789(U)

March 19, 2008

Supreme Court, New York County

Docket Number: 0104715/2004

Judge: Stanley L. Sklar

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

PRESENT: STANLEY L SKLAR
Justice

PART 29

Julianh Skinner, as Executrix of the
estate of Michael F. Skinner,
- v -
Memorial Sloan Kettering

INDEX NO. 104715/04
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to 20 were read on this motion to/for

~~Notice of Motion / Order to Show Cause~~ - Affidavits / Exhibits ... 7
~~Answering Affidavits - Exhibits~~
~~Supplemental Affidavit - 1, XL - 1~~
Replying Affidavits 2
oral argument transcript - 1

PAPERS NUMBERED	
1-9	
10-15	
16-17	
18-19	
20	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
THE ATTACHED MEMORANDUM DECISION.

FILED
MAR 20 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/19/08

Stanley L. Sklar
STANLEY L. SKLAR J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

-----x
JULIANN SKINNER, as Executrix of the
ESTATE OF MICHAEL F. SKINNER, deceased,

Plaintiff,

Index No.: 104715/04

-against-

MEMORIAL SLOAN KETTERING CANCER CENTER,

Defendant.
-----x

SKLAR, J.:

FILED
MAR 20 2008
NEW YORK
COUNTY CLERK'S OFFICE

In this negligence/medical malpractice action in which it is alleged that plaintiff decedent, Michael Skinner, died as a result of the administration of a contaminated platelet product while at Memorial Sloan Kettering Cancer Center (“the hospital”), the hospital moves by order to show cause for an order quashing subpoenas served on it and on non-parties Metro Blood Services and the New York Blood Center, about 17 months after plaintiff filed a note of issue and certificate of readiness. Plaintiff, the decedent’s widow and the executrix of his estate, opposes the application and cross-moves for an in limine ruling barring defendant from presenting evidence at trial of certain hold harmless language contained in a patient consent form signed by the decedent while a patient at the hospital.

At oral argument both counsel requested that the trial of this action be adjourned from May 28, 2008 to June 11, 2008. That request is granted and the trial is adjourned until June 11, 2008. Also, at oral argument plaintiff’s counsel indicated that he would be willing to discontinue the lack of informed consent cause of action if the hospital would stipulate to preclude the

aforementioned consent form from evidence, and both counsel agreed to discuss that. See O.A. transcript pp 2-3

The cross motion is denied without prejudice to renewal before the trial judge (who will not necessarily be me), since the cross motion seeks an evidentiary trial ruling. This leaves the motion to quash the subpoenas. It appears that while undergoing a stem cell transplant for treatment of a multiple myeloma at the hospital, 61-year-old Michael Skinner was administered a platelet product which consisted of six different units of platelets from six donors, which units were pooled. Five of the six units were provided to the hospital by the New York Blood Center, and the sixth was provided to the hospital by Metro Blood Services. The six units were pooled into one bag by the hospital at 10:30 on the day of the transfusion. An hour and a half later at 12:00 the platelet transfusion into Skinner was commenced. It was then discontinued at 12:30 when Skinner became cyanotic and sustained chills. The hospital tested what was left of the pooled units and discovered that it contained a bacteria, *Klebsiella oxytoca*.

At his June 29, 2006 deposition, David Wuest, M.D., the hospital's director of its blood bank and transfusion service, testified that the hospital's pooling of the six units was ruled out as the source of the contamination since the time period between the pooling and the transfusion was an insufficient time for an organism to grow to any significant level to cause a reaction. Wuest EBT, pp 45-46 Dr. Wuest believed that the platelets arrived contaminated, indicating that while steps are taken when collecting blood from a donor to minimize contamination (e.g. by appropriately decontaminating the skin before the phlebotomy and by selecting an appropriate site to perform the phlebotomy), 100% prevention of contamination is never possible because of

the collection process itself and because the donor could have asymptomatic bacteria in his/her bloodstream and be unaware of it. Id 29-30

According to Dr. Wuest after Skinner's reaction, the hospital sent notifications to the two blood banks which had provided the 6 units, and by letters was advised that neither was able to identify the source of the infection. Id 48-49 Dr. Wuest testified that he had no means available to identify the source of the contamination. Id 49 Plaintiff's counsel at Dr. Wuest's deposition asked for those letters from the blood banks and was told by defense counsel that he would take it under advisement. Id 48

About a month and a half later on August 15, 2006, before its due date of August 30, 2006, plaintiff's counsel filed a note of issue and certificate of readiness, certifying that discovery was complete and that the case was ready for trial. About 17 months later, plaintiff served the instant subpoenas on the hospital and the two blood banks which provided the six units.

The hospital now seeks an order¹ quashing the subpoenas served on it and the other two entities, urging in essence that these subpoenas are in reality seeking discovery, which is impermissible since the plaintiff long ago filed a note of issue and certificate of readiness and has failed to establish any unanticipated or unusual circumstances that arose thereafter warranting further discovery. See *Henry L. Fox Co., Inc. v Sleicher*, 186 AD2d 537 (2d Dept, 1992); *C.P.I. Equipment Corp. v Nasso Concrete Corp.* 306 AD2d 141 (1st Dept, 2003); *White v Bronx*

¹The original order to show cause only mentioned the subpoenas served on the hospital and Metro Blood Services because, according to defense counsel and not disputed by plaintiff's counsel, a copy of the subpoena served on the New York Blood Center was never served on the hospital. Thereafter the hospital supplemented its papers to include the subpoena served on the New York Blood Center, after counsel for that entity sent a copy of the subpoena to the hospital, which subpoena is essentially the same as the one served on Metro Blood Services.

Lebanon Hospital Center, 240 AD2d 212 (1st Dept, 1997); Pena v NYCTA, ___ AD3d ___, 2008 WL 450822 (1st Dept) In addition, as to item 5 in the subpoena served on the hospital, which deals with quality assurance committee materials, defense counsel represented at oral argument that no such discoverable materials existed, which representation was accepted by plaintiff's counsel. The hospital also asserted that certain items sought from it are exempt from disclosure pursuant to Education Law § 6527(3) and the privacy rule of H.I.P.A.A.

Defense counsel further noted that copies of certain documents sought from the hospital had in fact been provided during discovery. Copies of all but one of those documents were attached as Exhibit "E" to the order to show cause. At oral argument defense counsel stated that in addition to the copy of the table of contents of the hospital's blood bank's Standard Operating Procedures Manual having been provided during discovery, a copy of one specific part of that manual had been provided during discovery. See O.A. transcript, pp 8-9 The hospital is willing to comply with the subpoena to the extent of producing the originals of materials copies of which had previously been provided to plaintiff during discovery. See O.A. transcript, pp 7, 10-11

Plaintiff's counsel at oral argument asserted that the hospital had no standing to seek to quash the subpoenas served on the non-parties. As to the subpoena served on the hospital, at oral argument plaintiff's counsel indicated that as to items 1, 3 and 4, plaintiff would be satisfied with the originals of what had already been produced (See O.A. transcript, pp 8-9, 9-11, 6-7), and as previously noted plaintiff was satisfied that there was nothing to produce under item 5 (O.A. transcript, pp 11-12). Plaintiff thus wants the hospital to produce items 2, 6, 7 and 8 of the subpoena served on it and all of the items sought from the two non-party blood banks. As to

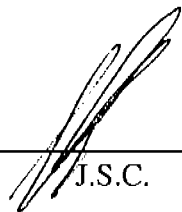
items 6 and 7, plaintiff's counsel asserts that since Dr. Wuest testified that there were such documents (See Wuest EBT, pp 27, 48-49), plaintiff is entitled to subpoena them.

Except to the extent of the documents set forth in Exhibit "E", and the part of the manual previously provided, the application to quash the subpoenas served on the hospital, Metro Blood Services and the New York Blood Center is granted since it is readily apparent that the requested material is sought for purposes of discovery long after plaintiff filed her note of issue and certificate of readiness, and no unusual or unanticipated circumstances have been demonstrated. Further, the hospital has standing to move to quash the subpoenas served on the two non-parties. See e.g. White, supra at 212

Accordingly the application to quash all of the subpoenas is granted except that the hospital shall comply with the subpoena served on it to the extent that the subpoena seeks the documents the hospital previously provided which are set forth at Exhibit "E" to its application and the one additional portion of the manual referred to at oral argument.

The foregoing constitutes the order and decision of the court.

Dated: March 19, 2008
60 Centre Street
New York, NY



J.S.C.

STANLEY L. SKLAR

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