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

PRESENT: JOAN B. LOBIS PART 6

Index Number : 111928/2008
KOSTOVSKI, OLGA
VS.
NYC POLICE DEPT.
SEQUENCE NUMBER : 001
OTHER RELIEFS

INDEX NO.
MOTION DATE 10/1/08
MOTION SEQ. NO.
MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of ~~Motion~~ Petition/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7; 8-10
Replying Affidavits	11

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the accompanying decision, order and judgment.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/28/08

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of Application of OLGA KOSTOVSKI, Individually and as Administratrix of the Estate of DRAGAN DAVID KOSTOVSKI,

Deceased,

for an Order directing: Disclosure Pursuant to C.P.L.R. 3102(c) Prior to Initiating Suit

Index No. 111928/08

Decision, Order and Judgment

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JOAN B. LOBIS, J.S.C.:

Petitioner Olga Kostovski brings this special proceeding seeking pre-action disclosure, pursuant to C.P.L.R. § 3102(c), from Elmhurst Hospital Center ("Elmhurst"), Zucker Hillside Hospital ("Zucker"), and the New York City Police Department (the "NYPD"). Petitioner seeks access to certain medical records of her son, Dragan David Kostovski, who died on November 18, 2008, from the hospitals, and video footage from two NYPD security cameras which may have captured the events leading up to her son's death, as well as audio recordings from an NYPD patrol car which may have recorded the events leading up to her son's death.

Petitioner's son, who is referred to in the papers as David, was shot and killed by NYPD officers on November 18, 2007. Petitioner's papers aver that David had a history of mental illness requiring numerous hospitalizations dating back to 1997, and that prior to his death, he had been most recently diagnosed with "schizoaffective disorder, bipolar type." Petitioner asserts that David was hospitalized at Elmhurst in the spring and summer of 2007, and received follow-up care at Elmhurst in August 2007. David was also hospitalized at Zucker multiple times from 1997 through 2000, and again in 2003.

On January 31, 2008, petitioner was issued letters of limited administration for decedent's estate by the Surrogate's Court of the State of New York, Queens County. Petitioner made a written request for David's records from Zucker in February 2008, but it appears that this request was rejected. Annexed to petitioner's papers is a letter to Zucker from petitioner's attorney, dated July 17, 2008, which notes that Zucker denied petitioner's February 2008 request for records over the telephone but never set forth the denial in writing, nor provided petitioner with the opportunity to have the denial reviewed. A written response from Zucker, dated July 24, 2008, sets forth that Zucker is unable to accept the request for the records because it requires a subpoena so-ordered by a court, in accordance with Mental Hygiene Law § 33.13. A similar pattern occurred between petitioner and Elmhurst when requesting David's records from Elmhurst, except that it appears that Elmhurst never set forth a written rejection; however, in opposing this application, Elmhurst also indicates that it requires a court order pursuant to § 33.13 in order to release David's clinical mental health records.[1]

C.P.L.R. § 3102(d) provides that pre-action discovery is available by court order "to aid in bringing an action, to preserve information or to aid in arbitration." In most cases, pre-action

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[1] Elmhurst, in opposing this petition, argues that disclosure of decedent's records is expressly controlled by Mental Hygiene Law §§ 33.13 and 33.16, and expressly excluded by Public Health Law § 18, but acknowledges that if this court determined that the interests of justice significantly outweighed the need for preserving decedent's confidentiality, Elmhurst would have no objection to an order granting petitioner's application. Public Health Law § 18 deals with access to patient information, except for "information and clinical records subject to the provisions of sections 23.05 or 33.13 of the mental hygiene law." Public Health Law §18(1)(e). Mental Hygiene Law §33.13 addresses the maintenance and confidentiality of clinical records. Section 33.13(c) sets forth that clinical information, including the identification of patients or clients, and clinical records or clinical information tending to identify patients or clients, at office facilities shall not be a public record and shall not be released by the offices or its facilities to any person or agency outside of the offices. . . ." The exceptions to this rule are enumerated, and include an exception for when a court finds that the "interests of justice significantly outweigh the need for confidentiality." M.H.L. § 33.13(c)(1).

discovery is not available when a notice of claim has already been served, because the notice of claim represents that the potential plaintiff has enough information to frame a complaint. See Matter of Uddin v. N.Y.C. Transit Auth., 27 A.D.3d 265, 266 (1st Dep't 2006). In this case, petitioner served a notice of claim and an amended notice of claim on Elmhurst in February 2008, indicating that the nature of the claim against Elmhurst is negligence and medical malpractice. Petitioner asserts that the hospital records from Elmhurst are required in order to obtain the certification required for filing a medical malpractice claim. Petitioner argues that she "cannot obtain the certification required for filing a medical malpractice claim without having the medical records for her expert to review." She relies on Matter of Taylor, 143 Misc. 2d 259 (Sup. Ct. Kings Co. 1989) to support her position that she is entitled to obtain David's records from Elmhurst through a petition for pre-action discovery. However, the petitioner in Taylor was seeking hospital records and depositions in order to determine the identity of defendants, and in that respect, the court held that a petitioner's application for pre-action discovery for a "medical malpractice action contemplated in the near future" did not require an affidavit of merit from a doctor, that being impossible without access to the pertinent records. In this case, petitioner's notices of claim identify Elmhurst as the potential defendant and "set forth the time, place and particulars" of the claims against Elmhurst. See Uddin, supra, at 266. Additionally, "[w]ith respect to petitioner's claim that pre-action discovery is necessary to enable her to file a certificate of merit pursuant to CPLR § 3012-a, we note that where, as here, relevant medical records have not been produced, a plaintiff is not required to serve such a certificate until 90 days after the records are provided." Matter of Bliss, 176 A.D.2d 106, 108 (1st Dep't 1991); C.P.L.R. § 3012-a(d).

As to Zucker, it is not clear whether petitioner is contemplating any claim against Zucker. In support of her petition for pre-action discovery against Zucker, petitioner asserts that these

records are "necessary to obtain a complete history of David's mental health and treatment." "'A petition for pre-action discovery should only be granted when the petitioner demonstrates that he has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong.'" Uddin, supra, at 266, citing Holzman v. Manhattan & Bronx Surface Tr. Operating Auth., 271 A.D.2d 346, 347 (1st Dep't 2000). Petitioner's explanation for seeking David's records from Zucker does not demonstrate that the information sought is "material and necessary to the actionable wrong." Uddin, supra.

Petitioner also seeks pre-action disclosure of NYPD audio and video recordings that may or may not have captured the events leading up to David's death. The video recordings were allegedly taken by two NYPD security cameras positioned above the intersection where David was shot, and the audio recordings were allegedly captured by recording devices within the patrol cars that were at the scene of the police confrontation and shooting. In her petition, she claims that the recordings would likely resolve the "contradictory version of events proffered by the NYPD, and the identification of the Potential Defendants . . . ."[2] In opposition, the NYPD asserts, upon information and belief, that footage from NYPD security cameras is "recycled if it is not accessed within 30 days of recording" and that it would likely not be able to produce such footage. The NYPD also submits that it is unknown whether any audio recordings exist, and thus it is impossible to produce such recordings at this time. The NYPD affirms that there is an ongoing investigation to determine whether

[2] It also appears that there are pending Freedom of Information Law ("FOIL") requests from petitioner to the NYPD for the video and audio recordings. There is no documentation regarding the FOIL requests annexed to petitioner's papers; however, petitioner asserts that her FOIL requests for these items have been denied. Petitioner is not seeking to compel the NYPD to respond to her FOIL requests.

the patrol car had the ability to make audio recordings; whether such recordings are kept; and, if kept, how long the recordings are stored. Petitioner's reply to the NYPD's affirmation is that pre-action disclosure of these materials is necessary to preserve the evidence, because, according to the NYPD's affirmation, "it is possible that highly relevant evidence may have already been destroyed."

Petitioner is seeking to preserve information, and under C.P.L.R. § 3102(d), pre-action disclosure is available by court order to preserve information. Thus, petitioner's application with respect to the video and audio recordings she seeks is granted. However, the NYPD cannot be directed to produce something that it does not have. To the extent that the audio and video recordings exist, respondent NYPD shall preserve such recordings and produce them for petitioner's inspection.

Accordingly, the petition is denied and dismissed as to respondents Elmhurst and Zucker, and granted to the extent that the NYPD shall preserve and produce for petitioner's inspection, within sixty (60) days of the date of this decision and order, the November 18, 2007 video recordings from the two NYPD security cameras at the intersection of Pitkin and Grant Avenues, identification number 6 1028, as well as the audio recordings from the NYPD patrol cars present at the scene when David Kostovski was shot on November 18, 2007, to the extent that these recordings exist.

This constitutes the decision, order, and judgment of the court.

Dated: October 28, 2008

JOAN B. LOBIS, J.S.C.