

Oxford Health Ins., Inc. v Powers

2008 NY Slip Op 33221(U)

November 19, 2008

Supreme Court, New York County

Docket Number: 603020/2006

Judge: Charles E. Ramos

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

PRESENT: CE Ramos

PART 53

Index Number : 603020/2006
OXFORD HEALTH INSURANCE
vs.
POWERS, EDWARD M.D.
SEQUENCE NUMBER : 001
COMPEL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

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):

IS DISPOSED OF
IN ACCORDANCE WITH THE ACCOMPANYING
MEMORANDUM DECISION.

FILED
DEC 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/15/08

CHARLES E. RAMOS ^{AS.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:COMMERCIAL DIVISION

-----X
Oxford Health Insurance, Inc.,

Plaintiff,
-against-

Powers, Edward M.D.

Defendant.

-----X

Charles Edward Ramos, J.S.C.:

Defendant Dr. Powers ("defendant") moves to compel the deposition of Dr. Raymond Janevicius ("Dr. Janevicius").

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BACKGROUND

Defendant is a plastic surgeon at White Plains Medical Center. Oxford Health Insurance, Inc. ("Oxford") provides medical insurance for its members. Defendant provided health services as an "out-of-network" health care provider for Oxford's members at White Plains Medical Center on an emergency basis. Defendant renders bills to Oxford using CPT¹ codes for specific services he provided, and Oxford reimburses the total amount defendant upon CPT codes.

In 1999, Dr. Finley, a Medical Director at Oxford wrote to Oxford's Vice President of Quality Management seeking to take steps to recover amounts paid to defendant due to alleged inappropriate coding.

In 2000, Oxford's Provider Compliance Unit, which is a part of its Special Investigations Unit ("SIU"), started an

¹ CPT. Current Procedural Terminology-commonly used industry wide in medical billing to describe services rendered by a medical provider to determine appropriate reimbursement.

investigation to determine what, if any, excess amounts were paid to defendant.

Not until June 2004, did Dr. Finley report to Oxford that defendant was exaggerating the size of wounds in his medical records. At this point, the case was transferred to Rita Ambrose, a manager of Oxford's SIU.

In September or October 2004, Oxford's SIU and Dr. Finley decided to send the records reviewed by Dr. Finley for review to Dr. Janevicius.

Finally, by letter dated November 23, 2005, Ms. Ambrose stated to defendant's attorney that she was providing detail concerning the alleged overpayment, including the "appropriate claim lines that should have been billed per our consultant." Oxford now seeks to characterize that "consultant" as an expert (although not identified as an expert witness), immune from discovery.

Defendant's attorney responded and requested the consultant's report from Oxford. Oxford declined to give more detailed information about its consultant's findings other than what had already been provided.

DISCUSSION

Defendant moves to compel the deposition of Dr. Janevicius. Oxford opposes by arguing that Dr. Janevicius is an expert retained in anticipation of litigation.

"There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless

of the burden of proof, by a party, or the officer, director, member, agent or employee of a party." CPLR §3101(d)(a)(1).

There is no doubt that Dr. Janevicius is an agent/employee of Oxford because Dr. Janevicius was engaged as a consultant. That retention was in the ordinary course of business of insurance companies, to monitor claims. He was not retained as an expert witness in anticipation of litigation. Thus, full disclosure is warranted. CPLR §3101(d)(1)(a).

The only exception that could apply is if a "substantial bona fide reason existed to investigate." Any reports and investigations subsequently obtained can be considered as prepared for litigation, and "immunized from discovery." *Moskowitz v Traveler's Indemnity Company*, 91 AD2d 976 (2nd Dept a.1983). However, any finding of a substantial bona fide reason for Oxford to investigate defendant's billing practices to invoke the privilege must be based on more than Dr. Finley's suspicions.

Even if this exception were to apply, Oxford has waived any right to assert this privilege by its disclosure and open reliance on the consultant's report. Indeed, the very reason given by Ms. Ambrose for Oxford's position regarding the defendant was the consultant's report. To permit Oxford to now withhold that consultant from discovery would be manifestly unfair.

Even if Dr. Janevicius was designated as an expert witness at trial, special circumstance exists to depose Dr. Janevicius.

A party seeking discovery can obtain further disclosure upon showing of undue hardship in seeking trial materials substantially equivalent to that of the other party. *Concoran v Peat, Marwick, Mitchell and Co.*, 151 AD2d 443, 444 (1st Dept 1989)². "Special circumstances may be shown by establishing that the information sought cannot be obtained from other sources." *Bostrom v William Penn Life Ins. Co., of New York*, 285 AD2d 482, 483 (2nd Dept 2001).

Special circumstance exist because the deposition of Dr. Janevicius is necessary explore the relationship between Dr. Janevicius and Oxford, and the reason why Dr. Janevicius was asked to review the documents. Dr. Janevicius' deposition testimony as to the motives of Oxford in requesting review from Dr. Janevicius will be material and necessary to defendant's preparation of his defense.

CONCLUSION

Defendant's motion to compel the deposition of Dr. Janevicius is granted.

Dated: November 19, 2008



J.S.C.

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² "Materials ... prepared in anticipation of litigation ... may be obtained only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means..." CPLR §3101 (d)(2).