Maher v Palazzolo
2009 NY Slip Op 31354(U)
June 25, 2009
Supreme Court, Nassau County
Docket Number: 1902/08
Judge: Roy S. Mahon
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

TARA MAHER,

Plaintiff(s),

- against -

SALVATORE PALAZZOLO,

Defendant(s).

TRIAL/IAS PART 8

INDEX NO. 1902/08

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: April 15, 2009

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers the motion by defendant for an Order compelling discovery including, inter alia, a response to preliminary conference order and an authorization for plaintiff's subsequent treating dentist, is determined as hereinafter provided:

This dental malpractice action arises out of certain dental treatment rendered to the plaintiff by the defendant between May 24, 2007 and July 18, 2007.

The defendant in the instant application seeks authorizations for the plaintiff's subsequent treating dentist pursuant to the holding of the Court in **Arons v Jutkowitz**, 9 NY3d 393, 850 NYS2d 345, 880 NE2d 831. The plaintiff has declined to provide an authorization on the ground that the plaintiff has designated the plaintiff's subsequent treating dentist as the plaintiff's expert pursuant to the provisions of CPLR §3101(d)(1) although the Court observes that the plaintiff has not included in the plaintiff's submission a copy of the plaintiff's response to the dentist's demand for expert witness information. The plaintiff, however, has provided to the defendant copies of the subsequent treating dentist's narrative report and office records albeit with the dentist's name and address redacted.

In pertinent part, CPLR §3101(d)(1) provides:

(d) Trial preparation.

1. Experts. (I) Upon request, each party shall identify each person whom the

> party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph."

In opposition to the requested relief, the plaintiff contends that the holding of the Court in **Wagner v Kingston Hospital**, 182 AD2d 616, 582 NYS2d 214 (Second Dept., 1992) substantiates the plaintiff's provision of redacted records. In the Court's holding, the Court stated:

> "The plaintiff was examined by a doctor on February 7, 1991, in connection with the instant medical malpractice action, and subsequently served a copy of this doctor's report on the defendants. However, the name and address of the doctor were redacted based on the plaintiff's claim that the doctor was his medical expert who would testify at the trial. The respondents moved to preclude the plaintiff from offering evidence of his physical condition unless an unredacted copy of the report was served upon them. The court granted the respondents' motion. We reverse.
>
> The plaintiff does not dispute that he was required pursuant to CPLR 3121(b) to serve a copy of the report on the respondents, even though it was prepared by his medical expert (*see, Hoenig v Westphal, 52 NY2d 605, 439 NYS2d 831, 422 NE2d 491; Ciriello v Virgues, 156 AD2d 417, 548 NYS2d 538; Pierson v Yourish, 122 AD2d 202, 505 NYS2d 165).* However, the plaintiff contends that pursuant to CPLR 3101(d)(1) (I) he was entitled to withhold the identity of the doctor. CPLR 3101(d)(1)(I), which governs the disclosure of information from expert witnesses, includes a provision which permits a party to withhold the identity of a medical expert. This provision was enacted because of the concern that medical experts might be discouraged from testifying by their colleagues (*see, Jasopersaud v Rho, 169 AD2d 184, 572 NYS2d 700).* Permitting a plaintiff to serve a copy of the report with his or her expert's name and address redacted is an appropriate accommodation of the competing purposes of broad disclosure under CPLR 3121(b) and protection of the expert's identify under CPLR 3101(d)(1)(I) (*cf., Jasopersaud v Rho, supra; Zuck v Sierp, 169 AD2d 717, 564 NYS2d 468; Bonoelli v New York Hosp., 144 Misc2d 543 NYS2d 851; Rubenstein v Columbia Presby. Med. Center, 139 Misc2d 349, 527 NYS2d 680).*"
>
> **Wagner v Kingston Hospital, supra at 214-215**

[* 3]

Germane to the instant application, the Court observes that the Court in **Wagner v Kingston Hospital**, supra, does not set forth whether the doctor in issue was a subsequent treating physician and that said case predated the holding of the Court in **Arons v Jutkowitz**, supra.

Amongst other things, the Court in **Arons v Jutkowitz**, supra, stated:

> "We have no reason why an nonparty treating physician should be less available for an off-the-record interview than the corporate employees in Niesig or the former corporate executive in Siebert. As an initial matter, a litigant is "deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue" *(Dillenbeck v Hess, 73 NY2d 278, 287 [1989], citing Koump v Smith, 25 NY2d 287, 294 [1969]; see also Hoenig v Westphal, 52 NY2d 605 [1981] [physician-patient privilege waived by commencement of personal injury* lawsuit]). This waiver is called for as a matter of basic fairness: "[A] party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim" (*Dillenbeck at 287).*
>
> Plaintiff's counter that informal interviews of treating physicians are nonetheless impermissible because article 31 of the CPLR and part 202 of the Uniform Rules do not identify them as a disclosure tool. But there are no statutes and no rules expressly authorizing - or forbidding - ex parte discussions with any non-party, including the corporate employees in Niesig and the former corporate executive in Siebert. Attorneys have always sought to talk with non-parties who are potential witnesses as part of their trial preparation. Article 31 does not "close off" these "avenues of informal discovery," and relegate litigants to the costlier and more cumbersome formal discovery devices (*Niesig, 76 NY2d at 372).* As the dissenting Justices pointed out in Kish, choking off informal contacts between attorneys and treating physicians invites the further unwelcome consequence of "significantly interfering with the practice of medicine": "[i]nstead of communicating with an attorney during a 10-minute telephone call, a physician could be required to attend a four-hour deposition or to provide a time-consuming response to detailed and lengthy interrogatories" (*Kish v Graham, 40 AD3d 118, 129 [4th Dept. 2007, Pine, J., dissenting]).*
>
> Plaintiffs also complain that in a more casual setting and without opposing counsel present, a physician might unwittingly divulge medical information as to which the privilege had not been waived, or might be gulled into making an improper disclosure. This is the same "danger of overreaching" that we rejected explicitly in Niesig and implicitly in Siebert, finding it to afford no basis for relinquishing the considerable advantages of informal discovery.
>
> Again, we "assume that attorneys would make their identity and interest known to interviewees and comport themselves ethically" (*Niesig, 76 NY2d at 376).* In Siebert, where the executive was privy to information for which the

[* 4]

attorney-client privilege had not been waived, we considered the risk of improper disclosure adequately addressed where the attorney conducting the interview prefaced his questioning with admonitions designed to prevent this from happening, and there was no reason to believe that privileged information had, in fact, been disclosed. Here, the danger that the questioning might encroach upon privileged matter is surely no greater than was the case in Siebert since the subject matter of the interview or discussion - a patient's contested medical condition - will be readily definable and understood by a physician or other health care professional. In sum, an attorney who approaches a nonparty treating physician (or other health care professional) must simply reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation."

Arons v Jutkowitz supra at 409-410

The Court notes that the determination to designate the plaintiff's subsequent treating dentist as the plaintiff's expert is a determination that in the first instance lies with the plaintiff in the facts of this action. The Court opines that the clear holding of **Arons v Jutkowitz**, supra is the availability of non-party treating physicians for interview and any limitation on the availability of such a subsequent treating physician or dentist such as a designation of same as an expert would vitiate the clear direction as to availability set forth by the Court of Appeals.

Based upon all of the foregoing, the defendant's application for an Order compelling discovery including, inter alia, a response to preliminary conference order and an authorization for plaintiff's subsequent treating dentist, is **granted**.

SO ORDERED.

DATED: 6/11/2009

Roy S. Mahon
J.S.C.

ENTERED
JUN 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE