

**Matter of Marino v Karopkin**

2009 NY Slip Op 32893(U)

December 7, 2009

Supreme Court, New York County

Docket Number: 113772/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

In the Matter of  
DEPUTY CHIEF MICHAEL MARINO

INDEX NO. 113772/09

Petitioner,  
-against-

MOTION DATE Nov. 18, 2009

MOTION SEQ. NO. 001

DEPUTY COMMISSIONER MARTIN G.  
KAROPKIN, IN HIS CAPACITY AS DEPUTY  
COMMISSIONER OF TRIALS FOR THE NEW  
YORK POLICE DEPARTMENT,  
Respondent.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this petition pursuant to CPLR Article 78

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

PAPERS NUMBERED

1-4

Answering Affidavits — Exhibits \_\_\_\_\_

5-6

Replying Affidavits \_\_\_\_\_

7


Cross-Motion:  Yes  No

Upon the foregoing papers, the petition pursuant to CPLR article 78 respondent's cross motion to dismiss are decided in accordance with 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: 12/7/09

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

**UNFILED JUDGMENT**  
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In the Matter of  
**DEPUTY CHIEF MICHAEL MARINO,**  
**Petitioner,**

For an Order and Judgment Pursuant to Article 78 of the CPLR

**DECISION  
AND ORDER**

**-against-**

**DEPUTY COMMISSIONER MARTIN G. KAROPKIN,**  
**IN HIS CAPACITY AS DEPUTY COMMISSIONER OF**  
**TRIALS FOR THE NEW YORK POLICE DEPARTMENT,**

Index.: 113772/2009

Respondent.

**UNFILED JUDGMENT**  
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**O. PETER SHERWOOD, J.:**

In this proceeding pursuant to New York CPLR Article 78, petitioner, Deputy Chief Michael Marino, seeks an order directing respondent to seal petitioner's medical records and to close the trial room during testimony relating to petitioner's medical condition and treatment in an administrative employment disciplinary proceeding that is pending before respondent.

In 2007, the Albany County District Attorney's Office, along with investigators from the New York State Health Department, conducted an investigation into allegations that prescriptions from Florida for anabolic steroids were being filled by certain New York pharmacies, including Lowen's Pharmacy ("Lowen's") located in Brooklyn, New York. Investigators from the NYPD's Internal Affairs Bureau ("IAB") obtained a copy of the prescription records from Lowen's that had been turned over to the Albany County District Attorney, pursuant to a grand jury subpoena. Petitioner and his former doctor were identified from the Lowen's records. In October 2007, petitioner's former doctor identified petitioner. Thereafter, petitioner provided IAB an Authorization for Release of Health Information Pursuant to HIPPA ("HIPPA Release").

On April 22, 2008, the NYPD preferred departmental charges against petitioner. Specifically, petitioner was charged with the following:

Said Deputy Chief Michael Marino, while assigned to Patrol Borough Brooklyn North, on or about and between January 24, 2006 and September 25, 2007, did engage in conduct prejudicial to the good order, efficiency or discipline of the

Department, in that said Deputy Chief did possess and/or use anabolic steroids and/or human growth hormones (hGH) for purposes outside the normal course of standard medical care.

On September 25, 2009, petitioner appeared in his departmental disciplinary hearing before the Honorable Martin G. Karopkin, Deputy Commissioner of Trials for the NYPD ("Deputy Commissioner"). Petitioner was represented by counsel and the NYPD was represented by the Department Advocate's Office. At the hearing, petitioner's counsel made an application to the Deputy Commissioner, requesting that he:

Seal any of petitioner's records that would be introduced into evidence in the employment disciplinary proceeding and to close the trial room during testimony related the petitioner's medical condition and treatment by doctors who examined him or reviewed his medical records.

The Department Advocate opposed petitioner's application, arguing that the requested closure would include every aspect of the hearing. After considering the arguments presented by both sides, the Deputy Commissioner denied petitioner's application. He ruled that:

It's the view of this Court that although the testimony about this, it's been made clear to me that some of the testimony will come in on the Department's case, the essence of the issue of a medical condition to justify the use of testosterone, of the substance, is related to the explanation of a medical condition. That certainly has been made clear to me over and over again. So the issue of the medical records, in my view, is something that's brought up the defense.

Petitioner commenced the instant Article 78 Proceeding by Order to Show Cause on or about September 30, 2009, seeking a judgment annulling the decision of the hearing officer denying petitioner's application to seal his medical records and to close the trial room to the public.

### *DISCUSSION*

In New York, CPLR §4504 governs the protection of doctor-patient communication and provides that:

Unless the patient waives the privilege, a person authorized to practice medicine...shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity...

See CPLR §4504. The doctor-patient privilege is waived when a patient puts his medical condition in issue by asserting it as an affirmative defense (see, *Green v. Montgomery*, 95 NY2d 693, 700 [2001]; citing *Koump v. Smith*, 25 NY2d 287, 294 [1969][The doctor-patient privilege is waived when “a defendant affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff”]; *People v. Edney*, 39 NY2d 620, 624 [1976]). In *Green*, the Court of Appeals also explained that “privileges, while important in law, are not absolute.” 95 NY2d at 700. The Court of Appeals further said that,

Further, when a privilege is designed to protect an individual by keeping certain information or conduct secret, that protection may be deemed waived where the individual affirmatively places the information or conduct in issue.

Respondent argues that petitioner is charged with use of “anabolic steroids and/or human growth hormones for purposes outside the normal course of standard medical care, that it is the petitioner who has put his medical condition into issue and therefore has waived the privilege. Respondent adds that even if the Court finds that petitioner did not affirmatively put his medical condition in issue as a defense to the disciplinary charge, the doctor-patient privilege is still waived because petitioner signed a HIPPA release form authorizing the NYPD to access his medical records. Respondent argues that petitioner never contested the validity of the HIPPA release until he made the application to seal his medical records and close the trial during testimony concerning his medical condition, two years after the HIPPA Release was signed.

In *Koump*, the Court of Appeals explained when the doctor-patient privilege should continue to be recognized and when it is effectively waived:

We do not hold that the privilege is waived whenever a party defends an action in which his mental or physical condition is in controversy. The rule laid down today is limited to cases in which a defendant affirmatively asserts the condition either by way of counterclaim or to excuse the conduct complained of by the plaintiff. Thus in the instant case where defendant has simply denied the allegation of the complaint, the privilege should be recognized.

25 NY2d at 294.

Petitioner is charged with use of human growth hormones for purposes “outside the normal course of standard medical care” thereby requiring respondent to show petitioner’s use of the drugs were for other than legitimate medically indicated reasons. In these circumstances it is respondent

who has put in issue the purposes for which the drugs were used and the need to consider petitioner's medical records. The records are confidential and it cannot be said that he has waived the right to protect them from public disclosure.

Petitioner signed the HIPPA form thereby allowing the NYPD to conduct an internal investigation. By doing so, he did not authorize the NYPD to make his medical records public.

Accordingly, it is hereby

**ORDERED** and **ADJUDGED** that the petition is **GRANTED**; and it is further

**ORDERED** and **ADJUDGED** that respondent's cross-motion to dismiss the petition is **DENIED**; and it is further

**ORDERED** that the documents filed under seal, specifically (1) Affidavit of Dr. E. Barry Gordon, dated October 24, 2009, shall be returned to counsel for petitioner and (2) the Affirmation of Andre L. Lindsay, dated November 13, 2009, shall be returned to counsel for respondents with neither document being retained in court files, and it is further

**ORDERED** that so much of the disciplinary hearing before the NYPD Deputy Commission of Trials involving petitioner, Michael Marino, as shall involve the medical records of petitioner, including introduction into evidence of said records and testimony concerning petitioner's medical condition and treatment as reflected in said records, shall be sealed.

**DATED: December 7, 2009**

**ENTER,**



**O. PETER SHERWOOD  
J.S.C.**

**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 1412).**