

Revfeim v Filiaci

2010 NY Slip Op 30759(U)

April 5, 2010

Supreme Court, New County

Docket Number: 109867/07

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lobis
Justice

PART 6

Index Number : 109867/2007

REVFEIM, BJORN

VS.

FILIACI, CARLO A.

SEQUENCE NUMBER : 00

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE 1/29/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

1-8

9-11

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED

APR 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/5/10

JBL

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
NEW YORK COUNTY: IAS PART 6**

-----X
BJORN REVFEIM, as Administrator of the
Estate of ALLISON RICHMOND

Plaintiffs,

Index No. 109867/07

-against-

CARLO A. FILIACI, M.D.,

Defendant.

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

Decision and Order
FILED
APR 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendant moves, pursuant to C.P.L.R. § 3124, for an order compelling plaintiff to produce a journal he made during his wife's hospitalization from November 30, 2006 until her death on December 11, 2006.

This action sounds in medical malpractice. Plaintiff alleges that defendant negligently prescribed a mood stabilizer, Lamictal, on November 20, 2006, to his wife, Allison Richmond. Plaintiff alleges that Lamitcal caused an allergic reaction in Ms. Richmond, resulting in progressive deterioration, multi-organ failure, and eventually death.

Sometime after defendant treated Ms. Richmond, plaintiff suspected that malpractice had occurred and contacted Jennifer Kate Lander, an attorney. Ms. Lander instructed plaintiff to keep a journal to record plaintiff's decedent's subsequent treatment and health, as well as the effect of the hospitalization on plaintiff's life. Plaintiff began the journal on November 30, 2006 and ended it upon his wife's death on December 11, 2006. Plaintiff's father-in-law also recorded some entries in the journal.

Defendants now move for an order to produce the journal. Plaintiff argues that it is protected by the attorney-client privilege and C.P.L.R. § 3101(d)(2) as material prepared in anticipation of litigation.

The party seeking to protect the material must demonstrate that the material was a “confidential communication” made to the attorneys for the purpose of obtaining legal advice or services.” In re Alpert v. 79 Realty Corp., 214 A.D.2d 316, 318 (1st Dep’t 1995), citing In re Priest v. Hennessy, 51 N.Y.2d 62, 68-69 (1980); see C.P.L.R. § 4503. The attorney-client privilege does not arise “unless an attorney-client relationship has been established.” Priest v. Hennessy, 51 N.Y.2d 62, 68 (1984). The entries were not made at the request of the attorneys who currently represent plaintiff in this malpractice action. Plaintiff has not established that an attorney-client relationship existed between plaintiff and Ms. Lander at the time plaintiff began making entries into the diary. See People v. Whyte, 48 A.D.3d 1040, 1041-42 (4th Dep’t 2008) leave to appeal denied, 10 N.Y.3d 872 (2008). Accordingly, protection of the journal under the attorney-client privilege does not lie.

As to whether the journal is protected as material prepared in anticipation of litigation, C.P.L.R. § 3101(d)(2) states, in pertinent part, that

materials . . . prepared in anticipation of litigation or for trial by . . . another party or by or for that other party’s representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a 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.

In medical malpractice cases, this section has been held to protect “daily logs documenting the condition of [a] plaintiff’s daughter” (Maisch v. Millard Fillmore Hospitals, 278 A.D.2d 838 [4th Dep’t 2008]) and notes that a defendant doctor took on the day one of his patients died, recounting that day’s events, when he suspected that a medical malpractice lawsuit would be commenced. Nhylen v. Millard Fillmore Hospitals, 275 A.D.2d 943, 944 (4th Dep’t 2000). These cases coupled with plaintiff’s clear desire to pursue a lawsuit—i.e., he suspected malpractice immediately after defendant treated his wife and he contacted a lawyer immediately—constrain the court to hold that the journal is protected.

If the material is protected under C.P.L.R. § 3101(d)(2), the party seeking production has the burden of “showing that there is a substantial need for the materials and [that] the party . . . is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Massachusetts Bay Ins. Co. v. Stamm, 228 A.D.2d 321 (1st Dep’t 1996); see also C.P.L.R. § 3101(d)(2). The fact that the material sought contains information that was recorded while fresh in the writer’s head is not enough to order production. Cf. Maisch 278 A.D.2d at 838; Nhylen, 275 A.D.2d at 944. Furthermore, the existence of other readily available evidence warrants the protection of plaintiff’s journal. For example, plaintiff’s decedent’s hospitalization records likely contain more accurate information about plaintiff’s decedent’s treatment and condition. Moreover, plaintiff’s deposition will likely reveal the nature and content of any alleged conversations between he and plaintiff’s

decendent's doctors as well as further expound on plaintiff's decendent's treatment and condition.

The motion is denied. The parties are advised that a status conference is scheduled for April 20, 2010. This constitutes the decision and order of the court.

Dated: April 5, 2010



JOAN B. LOBIS, J.S.C.

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