

**Achekzai v Kisner**

2010 NY Slip Op 32403(U)

August 25, 2010

Supreme Court, Suffolk County

Docket Number: 21193/2007

Judge: William B. Rebolini

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

Short Form Order

## SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

COPY

PRESENT:

**WILLIAM B. REBOLINI**  
Justice

---

 Sahra Achekzai,

Plaintiff,

-against-

Alan M. Kisner, M.D., Alan M. Kisner, FACS,  
FRCS Plastic Surgery, P.C. and Alan M. Kisner,  
FACS, FRCS Plastic Surgery, PLLC,

Defendants.

Index No.: 21193/2007Motion Sequence No.: 001; MGMotion Date: 4/21/10Submitted: 7/14/10Motion Sequence No.: 002; XMOT.DMotion Date: 5/26/10Submitted: 7/14/10Attorney for Plaintiff:

Richard J. Jaegers, Esq.  
217 Broadway, Suite 505  
New York, New York 10007

Attorney for Defendants:

Fumuso, Kelly, DeVerna  
Snyder, Swart & Farrell, LLP  
110 Marcus Boulevard, Suite 500  
Hauppauge, New York 11788

Clerk of the Court

Upon the following papers numbered 1 to 51 read on this motion by defendants to preclude and cross motion by plaintiff to compel: Notice of Motion and supporting papers, 1 - 24; Notice of Cross Motion and supporting papers, 25 - 38; Answering Affidavits and supporting papers, 39 - 43; Replying Affidavits and supporting papers, 44 - 46, 47 - 48, 49 - 51.

This is a medical malpractice action to recover damages for the defendants' alleged negligent care and treatment of the plaintiff Sahra Achekzai. The plaintiff allegedly developed complications, including hyperpigmentation, due to laser hair removal treatments performed by

Achekzai v. Kisner

Index No.: 21193/2007

Page 2

the defendants. The defendants served upon the plaintiff demands for authorizations and/or notices of discovery and inspection on August 13, 2007, September 17, 2007, March 27, 2008, June 25, 2008, July 3, 2008 and December 11, 2008. The demands seek authorizations compliant with the Health Insurance Portability and Accountability Act (HIPAA) for the records of 24 nonparty physicians and medical providers, and other authorizations seeking documents and records from non-medical entities. The notices seek information and various documents, records, photographs, and addresses which the defendants allege are relevant to this action. This Court issued a Preliminary Conference Order on October 26, 2007.

The defendants now move for a conditional order of preclusion, in essence, to compel the plaintiff to provide previously requested HIPAA-compliant authorizations permitting them to obtain the plaintiff's medical records, other authorizations previously requested and responses to their notices for discovery and inspection. In support of the motion, counsel for the defendants has submitted an affirmation of good faith pursuant to 22 NYCRR §202.7 and copies of letters to counsel for the plaintiff seeking compliance with the defendants' demands dated September 17, 2007, January 3, 2008, March 8, 2008, March 28, 2008, May 6, 2008, June 25, 2008 and August 1, 2008. It is clear from the record that the plaintiff has supplied some, but not all, of the requested disclosure and that counsel for the parties are at an impasse regarding the open items of disclosure addressed herein.

A patient's medical records and communications with his or her physician are generally shielded from disclosure under CPLR §4504. However, a plaintiff who commences a personal injury action is deemed to have waived the physician-patient privilege to the extent that his or her physical or mental condition is affirmatively placed in controversy (see, Arons v. Jutkowitz, 9 NY3d 393 [2007]; Dillenbeck v. Hess, 73 NY2d 278 [1989]; Koump v. Smith, 25 NY2d 287 [1969]). A waiver of such privilege also occurs "when the patient personally, or through his witnesses, either lay or medical, introduces testimony or documents concerning privileged information," (Hughson v. St. Francis Hosp. of Port Jervis, 93 AD2d 491 [2<sup>nd</sup> Dept., 1983] and when there is a failure to object to disclosure of privileged material (see, Iseman v. Delmar Med.-Dental Bldg., 113 AD2d 276 [3<sup>rd</sup> Dept., 1985]; Scharlack v. Richmond Mem. Hosp., 102 AD2d 886 [2<sup>nd</sup> Dept., 1984]). The scope of the waiver, however, is limited to records of the plaintiff's medical treatments that are relevant to the injury or condition alleged in the action (see, Cynthia B. v. New Rochelle Hosp. Med. Ctr., 60 NY2d 452 [1983]; Gill v. Mancino, 8 AD3d 340 [2<sup>nd</sup> Dept., 2004]; DeStrange v. Lind, 277 AD2d 344 [2<sup>nd</sup> Dept., 2000]; Iseman v. Delmar Med.-Dental Bldg., 113 AD2d 276 [3<sup>rd</sup> Dept., 1985]).

In her bill of particulars and in her supplemental bill of particulars, the plaintiff alleges that her injuries include burns and hypertrophic scarring of her face and neck, as well as a general claim of injury to her face and neck. A review of the record reveals that most of the

**Achekzai v. Kisner****Index No.: 21193/2007****Page 3**

authorizations demanded by the defendants are not relevant to the injury or conditions set forth in this action. Parties to litigation are entitled to “full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof” (CPLR §3101[a]). This provision has been liberally construed to require disclosure “of any facts bearing on the controversy which will assist [the parties’] preparation for trial by sharpening the issues and reducing delay and prolixity” (Allen v. Crowell-Collier Publ. Co., 21 NY2d 403 [1968]). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (see, Beckles v. Kingsbrook Jewish Med. Ctr., 36 AD3d 733 [2<sup>nd</sup> Dept., 2007]; Smith v. Moore, 31 AD3d 628 [2<sup>nd</sup> Dept., 2006]; Vyas v. Campbell, 4 AD3d 417 [2<sup>nd</sup> Dept., 2004]).

The record supports the defendants’ contentions that they are entitled to the plaintiff’s medical records involving her obstetric and gynecological treatment. There is some evidence in the record that the plaintiff suffered from melasma, a condition related to skin pigmentation, during her earlier pregnancy. Therefore, the plaintiff is directed to provide HIPPA-complaint authorizations for Dr. Mary White and Dr. Glad.<sup>1</sup> In addition, the plaintiff’s primary care physician, working in a health center, prescribed certain medications for the treatment of skin conditions. Therefore, the plaintiff is directed to provide HIPPA-complaint authorizations for Dr. Bennie White and the Dolan Family Medical Center. Despite the plaintiff’s position to the contrary, the latter authorizations shall not be limited to dermatological care only. In addition, the plaintiff acknowledges the defendants’ right in this matter to an Arons authorization for Dr. Flugman. Counsel for the plaintiff indicates that the authorization will be provided upon the plaintiff’s return from military service overseas. However, the defendants’ assert that the plaintiff is in possession of a report prepared by Dr. Flugman that has not been exchanged and the plaintiff does not address the issue. In the event that the plaintiff or her attorneys are in possession of such a report, they are directed to provide a copy to the defendants.

The plaintiff is further directed to provide the defendants with an authorization for her employment records at the YMCA. In her deposition, the plaintiff indicated that she was employed at the YMCA during the period of her treatment by the defendants. In addition, the plaintiff has admitted that she has not yet appeared for an independent medical examination (IME) pursuant to the preliminary conference order dated October 26, 2007, or the Conference Order dated February 3, 2010. In the case of the latter order, this is allegedly because the plaintiff was scheduled to return to the United States from her military service on or about July 13, 2010.

---

<sup>1</sup> The plaintiff was not clear at her deposition whether “Glad” is the first or last name of her doctor. Regardless, the plaintiff is directed to provide an appropriate authorization for the pertinent records.

Achekzai v. Kisner

Index No.: 21193/2007

Page 4

Lastly, the Court notes that a significant factor in the disclosure disputes between the parties involves the defendants' attempt to obtain evidence that the plaintiff has been less than forthright in her denial that, despite medical advice to the contrary, she exposed herself to the sun during the period of her laser hair removal treatments. Specifically, the defendants assert that the plaintiff took a vacation to Dorney Park against medical advice. In her deposition, the plaintiff testified that she canceled her trip when advised to do so. In their attempt to discredit the plaintiff's testimony, the defendants have demanded documents and information that is either irrelevant or palpably improper including, *inter alia*, banking statements, tax returns, a copy of her passport and the addresses of the plaintiff's father. A party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information or are otherwise improper (see, e.g. Astudillo v. St. Francis-Beacon Extended Care Facility, Inc., 12 AD3d 469 [2<sup>nd</sup> Dept., 2004]; Bettan v. Geico Gen. Ins. Co., 296 AD2d 469 [2<sup>nd</sup> Dept., 2002], *lv dismissed* 99 NY2d 552 [2002]; Crazytown Furniture v. Brooklyn Union Gas Co., 150 AD2d 420 [2<sup>nd</sup> Dept., 1989]).

Accordingly, the plaintiff is directed to provide HIPPA-compliant authorizations to the defendants for Dr. Mary White, Dr. Glad, Dr. Bennie White, Dolan Family Medical Center, Dr. Flugman, and an Arons authorization for Dr. Flugman. The plaintiff is further directed to provide a copy of Dr. Flugman's report, if any, an authorization for the YMCA and to comply with the Court's conference order dated February 3, 2010, including attending a scheduled IME, all within 45 days of the service of the date of this order. In the event that the plaintiff fails to comply with this order, she is precluded from introducing medical testimony or records at the trial of this action. However, in the event that the plaintiff has not yet returned to the United States from her military service by the date of this order, she is granted leave to move this Court (by order to show cause) for relief from this order upon proof thereof.

The plaintiff cross-moves for an order vacating the demands for disclosure set forth in the defendants' motion papers and compelling the defendants to provide certain disclosure items. For the reasons set forth above, that branch of the plaintiff's cross motion seeking to vacate the defendants' demands for disclosure is granted to the extent that the plaintiff is presently relieved from providing disclosure beyond that expressly set forth in this decision.

That branch of the plaintiff's cross motion for an order compelling the defendants to provide certain disclosure items is denied. 22 NYCRR §202.7[c] of the Uniform Rules for the Trial Courts, states that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform

Achekzai v. Kisner  
 Index No.: 21193/2007  
 Page 5

Rules for the Trial Courts, 22 NYCRR §202.7 [c]). Here, the plaintiff has not supported her motion with an affirmation of good faith. Therefore, summary denial of this branch of the plaintiff's motion is required (see, Barnes v. NYNEX, Inc., 274 AD2d 368 [2<sup>nd</sup> Dept., 2000]; Matos v. Mira Realty Mgt. Corp., 240 AD2d 214 [1<sup>st</sup> Dept., 1997]; Vasquez v. G.A.P.L.W. Realty, 236 AD2d 311 [1<sup>st</sup> Dept., 1997]).

Based on the foregoing, it is

**ORDERED** that this motion by defendants for an order pursuant to CPLR §3126 to conditionally preclude the plaintiff from introducing medical testimony and records due to the plaintiff's failure to comply with Court ordered disclosure is determined as set forth herein; and it is further

**ORDERED** that this cross motion by the plaintiff Sahra Achekzai for an order 1) pursuant to CPLR §3103 vacating the demands for disclosure set forth in the defendants' motion papers and 2) pursuant to CPLR §3124 compelling the defendants to provide certain disclosure items, is granted to the extent that the plaintiff is presently relieved from providing disclosure beyond that expressly set forth in this decision, and is otherwise denied.

Dated: August 28<sup>th</sup>, 2010

  
 HON. WILLIAM B. REBOLINI, J.S.C.

         FINAL DISPOSITION      X   NON-FINAL DISPOSITION