

Peluso v C.R. Board, Inc.

2010 NY Slip Op 32595(U)

September 20, 2010

Sup Ct, NY County

Docket Number: 117378/08

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

PELUSO, ANDREW

Plaintiff(s),

- v -

CR BARD, INC.

Defendant(s).

INDEX NO. 117378/08
MOTION DATE 8/19/10
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to 12 were read on this motion for sanctions

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

PAPERS NUMBERED

1-9
xnot 10-11
12

Cross-Motion: Yes [] No

*motion & cross-motion decided
in accordance with accompanying
decision & order*

FILED
SEP. 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/20/10

JBL
JOAN B. LOBIS, J.S.C.

Check one: [] FINAL DISPOSITION

NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ANDREW PELUSO and MICHELE PELUSO,

Plaintiffs,

Index No. 117378/08

-against-

Decision and Order

**C.R. BARD, INC., DAVOL, INC., AKBAR F. AHMED,
M.D., CRYSTAL RUN HEALTH CARE, LLP and
ORANGE REGIONAL MEDICAL CENTER,**

Defendants.

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

FILED
SEP. 21 2010
NEW YORK COUNTY CLERK'S OFFICE

Defendants Akbar Ahmed, M.D., Crystal Run Healthcare, LLP, and Orange Regional Medical Center (the "Moving Defendants"), move for an order issuing sanctions against plaintiffs Andrew Peluso ("Mr. Peluso") and Michele Peluso under 22 N.Y.C.R.R. § 130-1.1(a), and for the fees in bringing this motion. The motion is denied for the reasons set forth below. Plaintiffs' cross-motion for an extension of the note of issue date is denied as moot, as the note of issue was extended to October 12, 2010, at the parties' prior appearance before the court.

This action sounds in medical malpractice. During discovery, defendants requested, and plaintiffs provided, duly executed HIPAA-compliant authorizations allowing defense counsel permission to interview three of Mr. Peluso's treating physicians. Plaintiffs' counsel also sent a letter to these three treating physicians. One of the treating physicians is Peter Chang, M.D. Plaintiffs' counsel's letter to Dr. Chang—which is the subject of the instant motion—sets forth the following: the defendants' attorneys have requested permission to speak with Dr. Chang; Dr. Chang's participation with regard to such an interview is entirely voluntary and he has the right to decline the request; if Dr. Chang goes forward with the interview, the patient objects to any private

meetings; the patient “insists on the strict maintenance of the right to confidentiality of his medical information by the physician as required by the federal HIPAA law, and will hold [Dr. Chang] accountable for any breach of this duty”; and should Dr. Chang voluntarily agree to such an interview, plaintiffs’ attorney asks that Dr. Chang tell defendants’ attorneys that he would like to have plaintiffs’ counsel present during the interview to “make certain that the interview does not intrude into any protected or privileged information.”

An investigatory agency hired by the Moving Defendants’ attorneys contacted Dr. Chang to schedule an interview with him. Dr. Chang then wrote a letter to the Moving Defendants’ attorneys stating that he had spoken to Mr. Peluso’s attorney and that he would honor his patient’s request that he not speak with the Moving Defendants’ attorneys regarding his case. The Moving Defendants’ motion for sanctions against plaintiffs for sending the letter to Dr. Chang followed shortly thereafter.

In Arons v. Jutkowitz, the Court of Appeals held that an attorney “may interview an adverse party’s treating physician privately when the adverse party has affirmatively placed his or her medical condition in controversy[,]” as long as the procedural requirements of the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) are complied with. 9 N.Y.3d 393, 401-02 (2007). Plaintiffs—having put their medical condition at issue—are not entitled to resist providing a HIPAA-compliant authorization for defense counsel’s interviews with treating physicians. In turn, the defendant’s attorney must reveal his client’s identity and interest in the interview and inform the physician that any discussion is entirely voluntary and limited in scope to

the particular medical condition at issue. The Court of Appeals emphasized that treaters are “free to decide whether or not to cooperate” and that they cannot be “forced to communicate with anyone.” Id. at 416.

From the Arons decision evolved a HIPAA-compliant form which, when signed by a patient, permits an interview of a treating physician by defense counsel; the form is commonly referred to as an “Arons Authorization.”¹ The form, or one like it, must be filled out by the plaintiff and provided to defense counsel upon request. The Arons Authorization informs the physician, in bold, all-capitalized typeface, that the physician is authorized to discuss certain medical conditions (further specified in the form by the patient) with defendants’ attorneys; the physician is not authorized to discuss anything about the patient other than the medical conditions specified; the purpose of the interview is to assist the defendants in the defense of a lawsuit brought by the patient and the authorization is not at the request of the patient; and the physician’s willingness to participate in the interview is voluntary and the physician is free to decline the request for the interview.

The Moving Defendants maintain that the letter to Dr. Chang “unquestionably interfered with the right of defendants guaranteed under Arons.” They contend that Arons held that plaintiffs forgo their doctor-patient privilege upon bringing suit. They further argue that plaintiffs’ counsel’s letter amounts to a threat against the physician and effectively nullifies the Arons Authorization that plaintiffs provided to defense counsel. The Moving Defendants urge the court find plaintiffs’ attorney’s acts frivolous and to sanction them under 22 N.Y.C.R.R. § 130-1.1.

¹ A court-approved version of the Arons Authorization form, UCS-575, may be found on the court’s website at <http://www.nycourts.gov/forms/criminal/pdfs/HIPAA.pdf>.

The decision in Arons does not give defendants an unfettered right to an ex parte interview with a non-party treating physician, as the Moving Defendants contend. In Arons, the Court of Appeals acknowledged that prior to the enactment of HIPAA, defendants had engaged in a longstanding practice of "interviewing an adverse party's treating physicians ex parte, particularly in malpractice actions, although only after a note of issue was filed." Arons, 9 N.Y.3d at 410. However, with the enactment of HIPAA, defendants found they needed to obtain a plaintiff's authorization to conduct these interviews. See id. at 411. Arons emphasized that HIPAA does not supercede defense counsels' right to ask for an ex parte interview with a treating physician; rather, HIPAA only establishes certain prerequisites that must be met before the interview can take place (i.e., providing the treater with a HIPAA-compliant authorization). Id. at 415. However, Arons did not establish that an ex parte interview is mandatory; it only reaffirmed defendants' right to seek an ex parte interview. Nothing in Arons prevents patients from informing their treating physician that they prefer that their physician not participate in an ex parte interview with defense counsel.

While the court does not endorse the letter that plaintiffs' attorneys sent to Dr. Chang and the other treaters, it will not be the basis for sanctions. The language that the patient "insists on the strict maintenance of the right to confidentiality of his medical information by the physician as required by the federal HIPAA law, and will hold [Dr. Chang] accountable for any breach of this duty" is confusing and misleading. Upon seeing that language, the physician could conclude that the patient withdrew the authorization. In addition, plaintiffs have no basis to insist that their attorney must be present at any interview. However, the court does not find that the letter that plaintiffs' attorneys sent to Dr. Chang interfered with the Moving Defendants' rights under Arons.

For the most part, the letter recites the contents of the Arens Authorization and informs the physician that the patient would prefer that the physician not participate in a private interview. The letter conveys information that a plaintiff is entitled to tell his or her treating physician, and the court does not perceive any threat to the physician contained in this particular letter. The physician is as free to disregard this letter as much as the physician is free to disregard defense counsel's request for an interview. The Moving Defendants have not demonstrated that plaintiffs' counsels' act of sending the letter in question to Dr. Chang, or the other two physicians, amounts to sanctionable conduct. Accordingly, it is hereby

ORDERED that the motion and cross-motion are denied, and it is further

ORDERED that the parties shall appear for their previously scheduled pre-trial conference on October 12, 2010, at 10:00 a.m.

Dated: September 20, 2010



 JOAN B. LOBIS, J.S.C.

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