

Mullen v Wishner

2010 NY Slip Op 33010(U)

September 30, 2010

Sup Ct, Suffolk County

Docket Number: 28687/2008

Judge: Joseph Farneti

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This opinion is uncorrected and not selected for official publication.

ORDERED that this motion by defendant HUNTINGTON MEDICAL GROUP (“HMG”) for an Order, pursuant to CPLR 2304, quashing plaintiff’s non-party witness deposition subpoena served upon Francine A. Isernia, is hereby **GRANTED** for the reasons stated hereinafter; and it is further

ORDERED that this cross-motion by defendant STEVEN G. WISHNER (“WISHNER”) for an Order, pursuant to CPLR 2304, quashing plaintiff’s subpoena served upon non-party witness Francine A. Isernia seeking her deposition testimony in the instant litigation, is hereby **GRANTED** for the reasons stated hereinafter.

The Court has received affirmations of counsel for plaintiff in opposition to both motions at bar, and has received a reply thereto from HMG.

This action arises from an eye surgical clearance consultation sought by plaintiff, ALLISON MULLEN, at the offices of HMG on October 9, 2006. The consultation was performed by defendant WISHNER, a physician duly licensed to practice medicine in the State of New York. According to plaintiff’s verified bill of particulars served in response to HMG’s demand, “[d]efendant improperly performed a physical examination of the client in order for her to gain clearance to have a minimal eye surgical [sic] performed. During said examination, defendant made unnecessary, unwanted and improper contact with plaintiff that would not have occurred during a proper examination.” HMG indicates that party depositions have not yet been conducted in this matter to enable HMG to determine what plaintiff alleges constituted the purported “improper” and “unnecessary” contact.

HMG has filed the instant application, by Order to Show Cause, seeking to quash a judicial subpoena *ad testificandum* served upon non-party witness Francine A. Isernia seeking her deposition in this matter (“subpoena”). WISHNER has filed the instant cross-motion seeking the same relief, and has proffered virtually the same arguments as HMG. Defendants inform the Court that Ms. Isernia is also a patient of HMG who was treated by WISHNER, although the examination of Ms. Isernia allegedly took place on February 16, 2007, after the subject examination of plaintiff herein. In sum, defendants assert the following: (1) the information that provided the basis for the subpoena was obtained by plaintiff’s counsel in violation of the attorney-client privilege between Ms. Isernia and the law firm of Cartier, Bernstein, Auerbach & Dazzo, P.C.,

plaintiff's former attorneys and also the attorneys with whom Ms. Isernia allegedly consulted with in connection with pursuing litigation against WISHNER; (2) the subpoena improperly compels Ms. Isernia to testify in violation of the physician-patient privilege between Ms. Isernia and HMG/WISHNER, and in violation of HIPAA protections; (3) the information sought from Ms. Isernia is collateral and irrelevant to the instant action as it pertains to an alleged incident that occurred after the date of the alleged negligence herein and did not involve plaintiff; (4) plaintiff has failed to demonstrate special circumstances warranting the deposition of Ms. Isernia; and (5) the subpoena failed to comply with the notice requirement of CPLR 3101 (a) (4).

In opposition, plaintiff argues that defendants have no standing to assert the attorney-client or physician-patient privilege on behalf of Ms. Isernia, and that Ms. Isernia could assert those privileges at her deposition, if so advised. Further, plaintiff argues that special circumstances exist here, as the information being sought regarding the examination of Ms. Isernia by WISHNER and any inappropriate touching that may have occurred cannot be obtained through any other means.

CPLR 3101 (a) (4) provides that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action by a non-party "upon notice stating the circumstances or reasons such disclosure is sought or required" (CPLR 3101 [a] [4]). What is material and necessary is in the "sound discretion" of the trial court and includes "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Andon ex rel. Andon v 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). The Second Department has previously equated the catch-all provision of CPLR 3101 (a) (4) with the more stringent requirements of CPLR 3101 (d) (1) (iii), by requiring that the moving party show adequate special circumstances to warrant disclosure (see *Attinello v DeFilippis*, 22 AD3d 514 [2005]; *Lanzello v Lakritz*, 287 AD2d 601 [2001]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]). Special circumstances are shown by establishing that the information sought is not only relevant, but also cannot be obtained through other sources (see *Tannenbaum v Tenenbaum*, 8 AD3d 360 [2004]; *Murphy v Macarthur Holding B.*, 269 AD2d 507 [2000]). Whether "special circumstances" have been shown to exist in a particular case is a question committed to the sound discretion of the court to which the application for discovery is made (see *Brady v Ottaway Newspapers*,

63 NY2d 1031 [1984]; *Dioguardi v St. John's Riverside Hosp.*, 144 AD2d 333 [1988]). A subpoena served on a non-party is facially defective and unenforceable if it neither contains, nor is accompanied by a notice stating the circumstances or reasons such disclosure is sought or required (*Kooper v Kooper*, 74 AD3d 6 [2010]).

Notwithstanding the foregoing, the Second Department held, in a case decided after submission of the instant motions, that although many of its decisions continued to apply the "special circumstances" standard to obtain discovery from a non-party despite the 1984 amendment to CPLR 3101 (a) (4) eliminating such language, "[w]e hereby disapprove the further application of the 'special circumstances' standard in this context. We, nevertheless, look behind that language in our cases and find underlying considerations which are appropriate and relevant to the trial court's exercise of its discretion in determining whether a request for discovery from a nonparty should go forward or be quashed" (*Kooper v Kooper*, 74 AD3d 6, 8 [2010]). The Second Department further held that "[w]e decline, here, to set forth a comprehensive list of circumstances or reasons which would be deemed sufficient to warrant discovery from a nonparty in every case. Circumstances necessarily vary from case to case" (*id.* at 17). However, the Second Department emphasized that "[i]nclusion of the language 'circumstances or reasons such disclosure is sought or required' from a nonparty indicates that something more than mere relevance is required if the discovery request is challenged" (*id.* at 18).

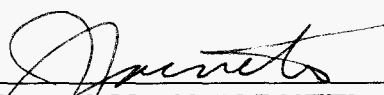
On this record, the Court finds that plaintiff has failed to demonstrate such circumstances to warrant disclosure from Ms. Isernia in the form of her deposition. Initially, plaintiff has not addressed defendants' contention that plaintiff obtained information regarding Ms. Isernia through an improper breach of an attorney-client privilege between Ms. Isernia and plaintiff's former attorneys. In any event, the Court finds that the information sought is not relevant to plaintiff's claims herein. Plaintiff has asserted three causes of action, to wit: negligence and gross negligence; violation of New York's Human Rights Law; and civil assault, all stemming from the consultation with WISHNER on October 9, 2006. The subpoena served seeks information relative to "an incident that occurred on February 16, 2007 at [HMG's premises]," which the Court finds irrelevant to plaintiff's claims of an alleged inappropriate touching by WISHNER on October 9, 2006.

Moreover, plaintiff, in opposition hereto, "freely admits" that the questioning of Ms. Isernia will deal directly with the examination performed by WISHNER and any inappropriate touching that may have occurred therein. The Court finds that such examination is protected by the physician-patient privilege and HIPAA privacy laws, and as indicated by an affidavit of Ms. Isernia submitted by HMG, she has not waived any such privilege. Of course, if the information sought is privileged, then it is not subject to disclosure, no matter how strong the showing of need or relevancy (see CPLR 3101 [b]; see also *Cirale v 80 Pine Street Corp.*, 35 NY2d 113 [1974]; *Vozzo v Cheruku*, 23 Misc 3d 1133[A] [Sup Ct, Kings County]). Finally, while plaintiff argues that the information sought may not be obtained through other sources, plaintiff acknowledges that such information could be explored at a deposition of WISHNER, although plaintiff contends that such testimony would be "self serving."

Accordingly, as plaintiff did not make a sufficient showing of the circumstances and reasons discovery from Ms. Isernia is warranted (*Kooper v Kooper*, 74 AD3d 6, *supra*), this motion and cross-motion to quash the subpoena are both **GRANTED**.

The foregoing constitutes the decision and Order of the Court.

Dated: September 30, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION X NON-FINAL DISPOSITION