

DeRiggi v Kirschen

2010 NY Slip Op 33599(U)

December 17, 2010

Supreme Court, Nassau County

Docket Number: 20753/08

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

**JASON DeRIGGI, as Administrator of the Estate of
PATRICIA DeRIGGI, ELIZABETH DeRIGGI, an
Infant, by and through her father and natural
guardian, JASON DeRIGGI, VICTORIA DeRIGGI,
an Infant, by and through her father and natural
guardian, JASON DeRIGGI, and JASON DeRIGGI,
Individually,**

Index No. 20753/08

Motion Submitted: 11/3/10
Motion Sequence: 002

Plaintiff(s),

-against-

**NEIL KIRSCHEN, ISLAND MEDICAL PAIN
MANAGEMENT SERVICES, P.C., d/b/a PAIN
MANAGEMENT OF LONG ISLAND, THOMAS
KUBANICK, SOUTH NASSAU COMMUNITIES
ANS, TIMOTHY CHEN, SOUTH SHORE HEART
ASSOCIATES, P.C., LUKE LiCALZI, HENRY
PARTRIDGE, SOUTH NASSAU COMMUNITIES
HOSPITAL, NEW YORK SPINAL IMPLANTS
CORP., and HYDROCISION, INC.,**

Defendant(s).

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

This motion by the defendants New York Spinal Implants Corp. and HydroCision, Inc. for an order pursuant to CPLR §§ 3120, 3124 requiring the plaintiffs to produce the plaintiff Jason DeRiggi's computer for the purpose of copying its hard drive to enable the moving defendants to ascertain whether he and/or his wife the decedent Patricia DeRiggi visited HydroCision's web-site prior to Mrs. DeRiggi's surgery on July 10, 2008 or, in the alternative, an order pursuant to CPLR § 3126 precluding the plaintiff Jason DeRiggi from testifying that he or the decedent did so is denied.

The plaintiffs in this action seek to recover for the wrongful death of Patricia DeRiggi. She died on July 10, 2008 at the age of 30 during percutaneous disk decompression surgery, an out-patient procedure used to treat lower back pain. The surgery was performed by the defendant Neil Kirschen of the defendant Island Medical Pain Management Services at the ambulatory surgery unit of defendant South Nassau Communities Hospital. The cause of death listed on Mrs. DeRiggi's death certificate by the Nassau County Medical Examiner's office is intra-abdominal hemorrhage due to the perforation of her left common iliac vein during percutaneous disk decompression to treat lower back pain.

The plaintiffs allege that the defendant Dr. Kirschen who was instructed and qualified by HydroCision and/or New York Spinal Implants in the use of the Spine Jet HydroDisectomy system actually directly assisted and supervised by an employee of HydroCision or New York Spinal Implants during Mrs. DeRiggi's surgery. Plaintiffs allege that Mrs. DeRiggi's left common iliac vein was perforated twice during the surgery and that the defendants failed to timely diagnose and treat those perforations. They also allege that the defendants HydroCision and/or New York Spinal Implants, the manufacturer and/or distributor of the Spine Jet HydroDisectomy System used in the procedure, were negligent in their design, manufacture and distribution of it as well as in misrepresenting the risks affiliated with it, failing to warn and failing to provide proper and adequate instruction and training on its use. The plaintiffs have advanced causes of action sounding in medical malpractice, products liability and negligent training and supervision.

At his examination-before-trial, Jason DeRiggi testified that he and his wife visited HydroCision's website prior to her surgery and read that the procedure "felt like a bee sting and nothing more." Based on that testimony, HydroCision and New York Spinal Implants presently seek discovery of the DeRiggi's computer's hard drive to ascertain whether the DeRiggis in fact visited that website.

HydroCision and New York Spinal Implants have submitted an affidavit by Robert Knudsen, a forensic computer analyst, in support of their application. Knudsen attests that "in order to obtain the information of whether or not Mr. DeRiggi visited HydroCision's website prior to July 10, 2008, it is necessary for us to harvest a forensic, bit-level copy of

the hard drive by either removing Mr. DeRiggi's computer to our lab for processing or for us to copy the hard drive from Mr. DeRiggi's computer on site so that we can take the copy of the hard drive to our lab for analysis." He explains that a forensic image of the computer's hard drive is necessary because new data can overwrite or alter existing data such as websites visited rendering data inaccurate; a "forensic bit-level image affords a forensic technician the ability to search for information that may not be readily accessible on the live system; and, this procedure has been accepted by courts as the process allows original evidence to be preserved and does not alter any data while an accurate search is performed." He represents that he can complete his analysis within 24-36 hours after imaging and that he is "willing to sign a nondisclosure and confidentially agreement regarding [his] company's examination of Mrs. DeRiggi's hard drive" and that he is "willing to stipulate that the only individual who will look at the hard drive is the analyst from [his] company assigned to the case." He represents "that the only information [his company] will provide to [the many defendants' attorneys] concerning the hard drive is a 'yes' or 'no' response to whether Mr. DeRiggi's system was used to visit HydroCision's website prior to July 10, 2008, and that the copy of the hard drive [it] make[s] will not be shown or given to anybody outside of [its] company."

In opposition, the plaintiffs note that Mr. DeRiggi testified at his examination-before-trial that he and his wife "did not download or save any information on the computer regarding what they saw on the website." Moreover, they represent that the computer is regularly used by not only Mr. DeRiggi, but people who regularly assist him in caring for his children, i.e., his mother, father and brother for their consumer transactions, banking, personal e-mails, school work, etc. More importantly, he uses the computer almost exclusively to communicate with his lawyer.

The plaintiffs' expert Michael G. Kessler is a Digital Forensic Certified Practitioner, an Access Data Certified Forensics Computer Examiner, a Fellow of the American College of Forensic Examiners and a Certified Forensic Accountant. He attests that "[t]he data may have once existed and has since been overwritten to where it no longer exists on the hard drive. Thus, there is no definite opinion or testimony that could be offered by Mr. Knudsen to show that the website was never visited." He explains that "[w]hen a computer user navigates to, and views websites, temporary Internet files including cached web pages, images, and cookies, are created and stored on the computer's hard drive within the user's profile. The reason for this storage and caching of information is if the user returns to the website, the page will load quicker by accessing this stored information and not have to re-download it again. However, these stored files are temporary and are subject to being overwritten." Thus, "[t]he continued usage of the computer since July 10, 2008, presents a high probability that a significant amount of data residing on that hard drive back in July 2008, including the temporary Internet files and cookies, will be overwritten." Thus, "even if an Internet history examination does not reveal data to support a visit to a particular website, any such examination is highly inconclusive." Thus, Kessler attests that "there is

no way to determine that Mr. and/or Mrs. DeRiggi never visited the HydroCision website” via an analysis of the DeRiggi’s computer.

The defendants HydroCision and New York Spinal Implants do not dispute that their inquiry will in fact ultimately be inconclusive, i.e., it cannot and will not definitely establish that Mr. and/or Mrs. DeRiggi did not view HydroCision’s website prior to Mrs. DeRiggi’s surgery, even if their analysis yields a “no” answer. The moving defendants even acknowledge that any such evidence would be circumstantial but they nevertheless seek to leave it to a jury to determine its weight and probative value.

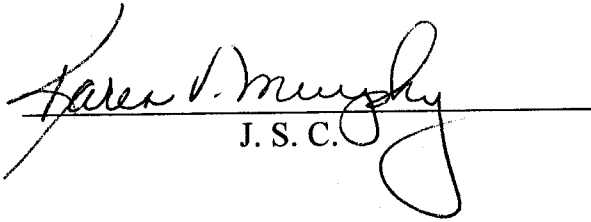
CPLR § 3101 requires full disclosure of all nonprivileged matter which is material and necessary to the defense or prosecution of an action. Courts are vested with broad discretion in determining what is “material and necessary.” (*Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968); see also, *Andon ex rel. Andon v. 302-304 Mott Street Associates*, 94 N.Y.2d 740, 731 N.E.2d 589, 709 N.Y.S.2d 873 (2000); *Cabellero v. City of New York*, 48 A.D.3d 727, 853 N.Y.S.2d 165 [2d Dept., 2008]). “The phrase ‘material and necessary’ should be ‘interpreted liberally to require disclosure, upon request, of 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.’” (*Freil v. Papa*, 56 A.D.3d 607-608, 869 N.Y.S.2d 117 [2d Dept., 2008] quoting *Allen v. Crowell-Collier Pub. Co.*, *supra*). Nevertheless, a party does not have the right to “uncontrolled and unfettered disclosure.” (*Gilman & Ciocia, Inc. v. Walsh*, 45 A.D.3d 531, 845 N.Y.S.2d 124 (2d Dept., 2007); see, *Barouh Eaton Allen Corp. v. International Business Machines Corp.*, 76 A.D.2d 873, 429 N.Y.S.2d 33 [2d Dept., 1980]). Interpreting “material and necessary” (CPLR 3101[a]) liberally doesn’t “mean that litigants have carte blanche to demand production of whatever . . . they speculate might contain something hopeful.” (*Vyas v. Campbell*, 4 A.D.3d 417, 418, 771 N.Y.S.2d 375 [2d Dept., 2004]). “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” (*Vyas v. Campbell*, *supra*, at p. 418, quoting *Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 A.D.2d 420, 421, 541 N.Y.S.2d 30 [2d Dept., 1989]).

“[C]ourts have been loathe to sanction an intrusive examination of an opponent’s computer hard drive as a matter of course.” (*Schreiber v. Schreiber*, 29 Misc.3d 171, 904 N.Y.S.2d 886 (Supreme Court Kings County 2010), citing *Melcher v. Apollo Medical Fund Management, LLC*, 52 A.D.3d 244, 245, 859 N.Y.S.2d 160 (1st Dept., 2008); *Samide v. Roman Catholic Diocese of Brooklyn*, 5 A.D.3d 463, 465, 773 N.Y.S.2d 116 (2d Dept., 2004); *In re Maura*, 17 Misc.3d 237, 247, 842 N.Y.S.2d 851 [Surrogates’s Court Nassau County 2007]).

It is undisputed that an examination of the DeRiggi's computer will not definitively establish that the DeRiggis did not view HydroCision's website prior to Mrs. DeRiggi's surgery nor has it been demonstrated that an examination of the computer would even establish a strong likelihood that they did not. Regardless, the defendant has failed to establish that the information sought, even if it could be obtained from the hard drive is material and necessary to the defense of this action. In contrast, the risks associated with the proposed fishing expedition are many, including but not limited to, the likely violation of the right to the confidentiality of attorney-client communications. Discovery of the plaintiff Mr. DeRiggi's computer hard drive is accordingly denied.

The foregoing constitutes the Order of this Court.

Dated: December 17, 2010
Mineola, N.Y.


J. S. C.

ENTERED
DEC 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE