Kowalski v Ritterband
2010 NY Slip Op 33952(U)
May 3, 2010
Sup Ct, New York County
Docket Number: 116846/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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ELAINA KOWALSKI and JOSEPH KOWALSKI,

Plaintiffs,

Index No. 116846/08

-against-

Decision and Order

DAVID C. RITTERBAND, M.D., and OPHTHALMIC CONSULTANTS/CORNEAL AND REFRACTIVE SURGERY ASSOCIATES, P.C.,

Defendants.

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

Plaintiffs bring this motion for an order, pursuant to C.P.L.R. § 3126, striking defendants' answer for failure to comply with this court's compliance conference order, dated December 8, 2009 (the "December Order"); permitting plaintiffs' expert to export defendants' electronic data; precluding defendants from introducing evidence and/or cross-examining the plaintiffs as to plaintiff Elaina Kowalski's informed consent; and precluding defendants from introducing evidence as to defendant David C. Ritterband, M.D.'s surgical certifications or any media advertising directed to plaintiffs. Defendants cross move for a protective order, pursuant to C.P.L.R. § 3103, precluding plaintiffs from obtaining disclosure of defendants' managed care agreements and employment agreements, and precluding plaintiffs from accessing defendants' equipment or computers. The parties appeared for a conference on March 2, 2010, during the pendency of the motion, and the court asked for further submissions, as detailed below.

This action sounding in medical malpractice and lack of informed consent arises from the care and treatment Dr. Ritterband rendered to Ms. Kowalski related to a LASIK eye surgery procedure performed on September 27, 2007. As of the dates of the motion and cross-motion, none

of the parties had been deposed. The parties are in the early stages of discovery and there has been no willful, contumacious behavior from either side. In fact, during the pendency of this motion, most of the disputed discovery has either been exchanged or resolved. Accordingly, the court declines to sanction, preclude evidence or testimony, or strike pleadings at this early phase. The outstanding discovery issues are resolved as follows.

There has been an ongoing dispute between the parties regarding the exchange of electronic records or data from Dr. Ritterband's OCULUS-Pentacam computer program, which apparently is a camera that captures measurements of the eye and then displays those measurements in a three-dimensional format. Plaintiffs wish to obtain the electronic data that pertains to Ms. Kowalski. Defendants have provided, in printed paper format, both black and white and color copies of the images. However, plaintiffs assert that they need the electronic images as they are stored on the computer, and they seek to have that data provided to them on a USB drive, a DVD, or a floppy disc. The December Order provided that within thirty (30) days of the order, defendants were to determine whether they had the technology to obtain the electronic data. Defendants failed to provide a response to plaintiffs within the thirty days, while continuing to object by correspondence that plaintiffs' demand was vague and overbroad. In response, plaintiffs moved to have their expert access defendants' computer in order to retrieve the data and export it onto a portable media storage device. At the parties' March 2, 2010 conference, the court asked for supplemental papers on this issue from plaintiffs' expert, explaining why the electronic data was needed as opposed to the printouts. Plaintiffs' expert (name redacted) sets forth that the colors of a printout can vary from printer to printer; that the printed data cannot be manipulated like the electronic data can; and that

there are many views of the image that might not be represented in a static printout. Defendants argue, in opposition, that plaintiffs have not demonstrated that the data exists nor that the electronic data would add anything relevant to the information contained in the printouts that plaintiffs already have. They maintain that they have been informed by some representative of the manufacturer, by e-mail, that there is no access to the "raw" image data. They also raise concerns regarding the licensing of the software. Dr. Ritterband submits his own affidavit, stating that he has already reviewed plaintiff's records and printed out all of the data available in order to provide plaintiffs with the information.

Pursuant to C.P.L.R. § 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof[.]" What is considered "material and necessary" is left to the discretion of the court. Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740, 745 (2000). The phrase "material and necessary" is "interpreted liberally" as meaning "relevant" or as permitting "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." Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968). However, the court may, on application of a party, issue an order "denying, limiting, conditioning or regulating" the material sought. C.P.L.R. § 3103(a). Protective orders are intended to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." Id.

The fact that Dr. Ritterband can pull up and review Ms. Kowalski's record indicates that the data exists, is accessible, and is exchangeable. Plaintiffs have demonstrated that the

electronic record bears on the controversy and may, indeed, be different or unique from that which is printed out in the static images generated by Dr. Ritterband. Moreover, defendants have not shown that exchanging the record would cause them prejudice. That plaintiffs may require special software to view the data, once they obtain it, is not defendants' concern. Whatever is maintained as plaintiff's electronic records on defendants' computer shall be exchanged by copying the file to a CD-ROM, DVD, floppy disc, USB drive, or a mutually agreeable portable media storage device. Should defendants not have the technological expertise to accomplish this task, plaintiffs' expert shall be permitted to access defendants' computers to copy the file and move the copy to a portable media storage device.

Next, the parties' dispute whether or not an informed consent document exists for the surgery that is the subject of this lawsuit. In the December Order, defendants were directed to "conduct [an] ongoing search for informed consent documentation, [and] affirm whether it exists within 20 days" of the date of the order. Defendants, only in their cross-motion and opposition to this motion, submitted an affidavit from their employee, Laila Saad, who sets forth that she has searched for the records but has been unable to locate the informed consent form. This response sufficiently complies with the December Order. The court will not, at this stage of the litigation, issue a broad preclusionary order with respect to the issue of informed consent, because there may be other methods of obtaining informed consent without a physical document. Defendants are directed to execute a good faith search for any documents, including the informed consent document, that are part of plaintiff's record but were not exchanged. Should any documents be discovered, defendants are directed to exchange copies of those documents with plaintiffs forthwith. If

defendants attempt to rely on any document that is within their possession but has not been timely exchanged, the court may, at that time, preclude them from offering into evidence documents that were requested by plaintiff but not produced. C.P.L.R. § 3126; See Perell v. Krause, 277 A.D.2d 213 (2d Dep't 2000); Bongiasca v. Bongiasca, 254 A.D.2d 217 (1st Dep't 1998), lv. dismissed, 93 N.Y.2d 1040 (1999); Fucci v. Fucci, 166 A.D.2d 551, 553 (2d Dep't 1990).

Defendants also seek a protective order with respect to any managed care and/or employment agreements between defendants, but since they have informed plaintiffs that no such documents exist, the court declines to issue a protective order at this time.

It appears that the balance of the discovery disputes have already been resolved by production of the requested discovery or a sufficient response. Any remaining discovery disputes shall be resolved at the parties' next status conference on May 4, 2010. Defendants shall exchange a copy of the electronic record before May 4. Should defendants fail to exchange that record before May 4, at the parties' next conference the court will order a time and date for plaintiffs' expert to retrieve the data from defendants' computer. The parties should proceed with depositions.

This constitutes the decision and order of the court.

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NEW YORK

Dated: May 3, 2010

JOAN B. LOBIS, J.S.C.