

**O'Brien v Sullivan, Papain, Block, McGrath &
Cannavo, P.C.**

2011 NY Slip Op 32031(U)

July 20, 2011

Supreme Court, New York County

Docket Number: 111220/06

Judge: Judith J. Gische

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

PRESENT: Gische
Justice

PART 10

O'Brien, Marion

INDEX NO.

111220/06

MOTION DATE

- v -

MOTION SEQ. NO.

07

Sullivan, Papain, Block

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for

Grand Subpoena

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JUL 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

Dated: 7/20/11

J. Gische
HON. JUDITH J. GISCHE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

**Supreme Court of the State of New York
County of New York: Part 10**

-----x
MARION O'BRIEN and MARION O'BRIEN
EXECUTRIX OF THE ESTATE OF THOMAS
O'BRIEN,

Decision/Order
Index No.: 111220/06
Seq. No.: 007

Plaintiff,

-against-

SULLIVAN, PAPAIN, BLOCK,
MCGRATH & CANNAVO, P.C.,

Present:
Hon. Judith J. Gische

J.S.C.
FILED

Defendant.
-----x

JUL 21 2011

Pursuant to CPLR 2219(a) the court considered the following ~~NEW YORK~~ papers on this motion: COUNTY CLERK'S OFFICE

PAPERS	NUMBERED
Pltfs' OSC w/DM affirm, exhs	1
Def's opp w/ KJG affirm, FVF affid, exhs	2
Pltfs' reply w/DM affirm, exhs	3

Upon the foregoing papers the decision and order of the court is as follows:

This is a legal malpractice action arising out of defendant's representation in an underlying personal injury and product liability action arising from a hip implant surgery. Plaintiff brings this order to show cause to stay the non-party depositions of plaintiff's treating physicians (Dr. Koenig and Dr. Xenophontos); quash defendant's non-party subpoenas served on Dr. Koenig and Dr. Xenophontos (the "subpoenas"); and compel defendant to comply with discovery demands. Defendant opposes the motion. The reader is presumed to be familiar with the facts of this case, as they have been set forth in prior decisions. They will not be repeated herein.

[* 3]

Quash Subpoena

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.” Although the mandatory requirement of CPLR § 3101(a)(4) is to include the requisite notice on the face of the subpoena or in a notice accompanying it; lack of notice does not constitute grounds to quash where defendant’s opposition to quash makes a sufficient showing. See Velez v. Hunts Point Multi-Service Center, Inc., 29 A.D.3d 104, 111 (1st Dept. 2006). It is not the norm, however, to seek the deposition of a treating physician, and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment. Ramsey v. New York Univ. Hosp. Ctr., 14 A.D.3d 349 (1st Dept. 2005).

Here, it is undisputed that defendant failed to provide notice for why disclosure was requested, thereby making the subpoenas procedurally invalid. However, defendant has illustrated that the testimony of Dr. Koenig and Dr. Xenophontos is necessary to the defense of this action. Defendant maintains that it needs to question plaintiff’s physicians regarding a “Physician Declaration Form,” which is directly related to whether or not plaintiff is entitled to certain damages in the instant action. Defendant seeks to determine, *inter alia*, why the physicians completed the forms in the manner they did and whether they spoke with anyone prior to completing the forms.

Depositions of treating physicians are permitted where “necessary to prove a fact unrelated to diagnosis and treatment.” Ramsey v. New York Univ. Hosp. Ctr., *supra* at 350. Plaintiff’s motion to quash is denied and the doctors must appear for their

depositions on **September 14, 2011** or at such other date that the parties and witnesses shall mutually agree upon. Although plaintiff concedes that the physicians signed the forms, plaintiff nonetheless argues that Dr. Koenig and Dr. Xenophontos should not be deposed as this is an "inconvenience." There is, however, no sworn affidavit by the doctors and no further explanation is provided. This reason is rejected.

Compel Disclosure

Plaintiff also moves to compel defendant to comply with its discovery demands dated January 7, 2009. Specifically, plaintiff seeks documents bearing bates stamp numbers DEF5779 through DEF5785, which were withheld by defendant based on attorney-client privilege and material prepared in anticipation of litigation (the "documents"). The documents have been identified by defendant as a memorandum dated 4/8/03, authored by "TJD" regarding the "Sulzer hip cases." Plaintiff argues that any attorney-client privilege was waived by her in this legal malpractice action, since she is the client. Plaintiff also contends that the information sought was not prepared in anticipation of this litigation.

Frank V. Floriani ("Floriani"), a partner of defendant, was deposed. Floriani testified at his deposition that Brian O'Leary was the associate assigned to plaintiff's case and he is no longer with the firm. Floriani testified that he notified the firm's malpractice carrier, but cannot recall whether, when he filed that notice of claim, he asked one of attorneys at the firm to prepare a memorandum in anticipation of the instant litigation. Floriani further testified, "we weren't preparing any kind of defense, we were trying to get these claims in as fast as possible." Plaintiff maintains that Floriani's

testimony indicates that the information sought was not prepared in anticipation of litigation, but defendant contends that plaintiff's motion should be denied because the documents contain opinions, legal analyses, and recommendations of counsel and the documents contain confidential information regarding eleven other clients.

CPLR § 3101(a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "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-Begin Collier Publ. Co., 21 N.Y.2d 403, 406 (1968).

There are three categories of matters protected from disclosure. They are privileged matters which are absolutely immune from discovery (CPLR 3101[b]); attorney's work product, also absolutely immune; and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR 3101[d][2]; Spectrum Systems Intern. Corp. v. Chemical Bank, 78 N.Y.2d 371 [1991]). Since defendant claims the materials demanded by plaintiff are protected, they have the burden of establishing the immunity of that information from discovery. Volpicelli v. Westchester, 102 A.D.2d 853 (2d Dept 1984).

The court has reviewed documents *in camera* and has determined that they are protected by an absolute privilege that applies to pending and/or contemplated litigation. Any statement, whether written or oral, is absolutely privileged, if it may be considered pertinent to anything "possibly or plausibly" relevant, "with the barest

rationality" to litigation. Martirano v. Frost, 25 N.Y.2d 505 (1969); Joseph v. Larry Dorman, P.C., 177 A.D.2d 618, 619 (2d Dept. 1991]; see also Oguagha v. Ropes & Gray, 830 N.Y.S.2d 660 (1st Dept. 2007). Although the privilege will not protect a gratuitous statement that is wholly "outside the cause," there is clear appellate authority that trial courts should broadly construe what constitutes an out-of-court communication relating to pending or contemplated litigation. Caplan v. Winslet, 218 A.D.2d 148 (1st Dept. 1996); Lemberg v. John Blair Communications, Inc., 258 A.D.2d 291 (1st Dept. 1999). The absolute privilege has also been applied to statements by non-attorneys, such as accountants and the parties themselves. Joseph v. Larry Dorman, P.C., *supra*.

Here, the documents contain an overview of the case status, the attorney-author's recommendation about whether to notify the firm's malpractice insurance carrier, a general case history, and a client list containing brief descriptions and values of the involved parties. The court finds that when the documents were drafted, the attorney-author was contemplating litigation against the firm based on malpractice. Within two days, upon receiving the documents, Floriani contacted the firm's malpractice carrier. The "overview section" contains the attorney's opinions about what he learned from reviewing plaintiff's file, expectations for what will happen in the future, and recommendations for how to proceed. Given the broad interpretation given by the Courts to what constitutes pending or contemplated litigation, the documents are protected. Furthermore, although not dispositive, the top of the documents are marked "confidential."

In view of the foregoing, plaintiff's motion is denied. The parties are directed to appear for a compliance conference, as previously scheduled, for **September 29, 2011**

* 7]
at 9:30 a.m. in Part 10, 60 Centre Street, Room 232.

Conclusion

In accordance herewith it is hereby:

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that Dr. Koenig and Dr. Xenophonos must appear for their depositions on **September 14, 2011** or at such other date that the parties shall mutually agree upon; and it is further

ORDERED that parties are directed to appear for a compliance conference, as previously scheduled, for **September 29, 2011 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232**; and it is further

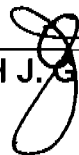
ORDERED that defendants are directed to pick up the materials provided for *in camera* review from chambers (Room 519) on or before **August 19, 2011**; and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the court.

Dated: New York, New York
July 20, 2011

FILED
JUL 21 2011
NEW YORK
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SO ORDERED:


HON. JUDITH J. GISCHE, J.S.C.