

Stark v Nussbaum
2011 NY Slip Op 33171(U)
December 2, 2011
Supreme Court, Nassau County
Docket Number: 5160/10
Judge: Anthony L. Parga
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

001-MG
003-MD-----X
BROOKE STARK and BRIAN STARK,

PART 8

Plaintiffs,

INDEX NO. 5160/10

-against-

MOTION DATE: 10/31/11
SEQUENCE NO: 001, 003MONTE J. NUSSBAUM, M.D., MARK HARVEY,
M.D., and PRO HEALTH CARE ASSOCIATES,
LLP,

Defendants.

-----X	
Notice of Motion, Affs. & Exs.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3
Affidavit in Opposition.....	4
Notice of Motion, Affs & Exs.....	5
Affirmation in Opposition.....	6
Reply Affirmation.....	7
Affidavit in Opposition.....	8

Upon the foregoing papers, the motions by defendant Monte J. Nussbaum, M.D. and defendants Mark Havey, M.D., and Pro Health Care Associates, LLP for, *inter alia*, an order compelling both plaintiffs to provide authorizations for the legal files of the attorneys who represented them during their contested matrimonial proceedings, and for an order unsealing of the contents of the court file for the matrimonial proceedings and allowing defense counsel the right to access and copy same, are granted only to the extent directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action sounding in medical malpractice. It is alleged that the defendants' alleged departure from good an accepted medical practice led plaintiff Brooke Starke to sustain a self-inflicted gun shot wound to the face on November 25, 2008. Plaintiff Brooke Stark's first

cause of action is for pain and suffering, and her second cause of action is for lack of informed consent to the treatment with the drugs prescribed to her. Plaintiff Brook Starke alleges that the defendants failed to consider the risks to plaintiff Brooke Stark's mental health associated with her family condition and related stresses, failed to take a complete history regarding the plaintiff's family and marital situation and evaluate her risk for mental instability due to same, failed to take a complete history from the plaintiff's husband regarding her mood, emotional instability, and reactions to stress, among other allegations. Plaintiff Brian Stark claims loss of services, society, affection and consortium of his wife and deprivation of her services as the mother of their son in the care and rearing of their son from his date of birth on March 17, 2008 forward.

Subsequent to the happening of the plaintiff Brooke Stark's apparent attempted suicide on November 25, 2008, Brooke Starke commenced a divorce proceeding entitled, *Brooke Starke v. Brian Stark*, bearing Nassau County Index Number 202687/09. Said action was discontinued without an Order of Divorce on December 20, 2010. All defendants have moved for authorizations to obtain the legal files of the attorneys who represented both plaintiffs and for an unsealing of the matrimonial court file under the above-noted caption and index number. Defendants contend that the medical reports for Brooke Starke indicate that she was facing a multitude of issues prior to her apparent suicide attempt, including marital stressors and conflict, the couple's new baby, financial difficulties, and the plaintiff's drug and alcohol abuse. Defendants contend that the file from the matrimonial action is relevant to the determination of proximate cause and the culpable conduct of each plaintiff. In addition, defendants contend that the contents of the matrimonial file are germane to their defense of defendant Brian Stark's claims for the loss of the services of Brooke Stark as a wife and mother and plaintiff Brooke Stark's allegations that she lost custody of her infant son and was restricted to court-supervised visitations. Defendants argue that the contents of the file from the plaintiffs' divorce action will contain claims regarding the relationship between the plaintiffs and the custody and care of their son. The defendants argue that CPLR §3101 allows full disclosure of "all matter material and necessary in the prosecution or defense of an action" and contend that they are entitled to discover the contents of the plaintiffs' matrimonial file, as same is material and necessary to their defense.

In opposition, plaintiffs argue, *inter alia*, that the plaintiffs' matrimonial proceeding was

commenced after the subject incident and was ultimately discontinued and, as such, is not relevant to the claims made in the instant action and not material to the defense of this action by the defendants. Plaintiffs contend that they were married at the time of the subject incident and remain married today, although the Court notes that the deposition testimony of Brooke Stark indicates that the plaintiffs have remained separated since January 2009. Plaintiffs contend that there is no claim for damage to the marriage or marital relations, nor is there a claim for loss of future earnings of the spouses, so the contents of the matrimonial file are irrelevant to the defense of this action. Additionally, plaintiffs claim that what plaintiffs decided to do regarding their marriage subsequent to the November 25, 2008 shooting has no bearing on the issues in this action. Plaintiffs further argue that the plaintiffs' marital relationship can be sufficiently explored through the use of depositions of the plaintiffs, as well as through documentary evidence, and that the issue of whether marital discord was a proximate cause of the self-infliction of the gun shot wound does not end the inquiry into the defendants' negligence.

In addition, plaintiffs' argue that the legal files maintained by the plaintiffs' matrimonial attorneys are privileged and that the plaintiffs have not waived that privilege. They also contend that there is not a sufficient nexus between the matrimonial proceedings and the plaintiffs' claims herein to warrant the unsealing of the court records pursuant to Domestic Relations Law Section 235 (1).

While the matrimonial action was commenced subsequent to Brooke Stark's attempted suicide, the subject of said action was the dissolution of the marriage and custody of the plaintiffs' son. As such, the entirety of the plaintiffs' marriage was at issue in said action, including the time period before the subject attempted suicide. The state of the plaintiffs' marital relationship prior to plaintiff Brooke Stark's attempted suicide, as well as the question of the liability of the defendants and the culpable conduct of the plaintiffs, warrants the unsealing of the court records. (*See, Janecka v. Casey*, 121 A.D.2d 28, 508 N.Y.S.2d 451 (1st Dept. 1986)). The manner in which the Brooke Stark pursued her divorce proceeding, the grounds she alleged, the claims she made against plaintiff Brian Stark, the actions she took against him, the defenses Brian Stark claimed and the counterclaims interposed, if any, are germane to the issues and claims presented in the instant action and are material and necessary to the defense of this action. (*See, Janecka v. Casey*, 121 A.D.2d 28, 508 N.Y.S.2d 451 (1st Dept. 1986)). The state of the

plaintiffs' marriage has been put into issue by the plaintiffs in the instant action. Accordingly, there is a sufficient nexus between the matrimonial action and the instant action to warrant the unsealing of the court's file relating to the matrimonial action. (*Id.*) The shield afforded by section Domestic Relations Law 235 must give way to the disclosure of relevant evidence needed for the defense against the claims made herein, including records filed in the divorce proceeding that may provide evidence to rebut plaintiffs' contentions of liability and the extent of the plaintiffs' financial loss. (*Kodsi v. Gee*, 54 A.D.3d 613, 864 N.Y.S.2d 9 (1st Dept. 2008)).

Accordingly, pursuant to Domestic Relations Law §235(1), the Court's file for the matrimonial action entitled, *Brooke Stark v. Brian Stark*, bearing Nassau County Index Number 202687/2009, is hereby unsealed for the sole purpose of allowing counsel for all parties to the instant action to access and copy the documents maintained therein. Said documents shall be deemed "confidential" documents protected from disclosure, discussion, dissemination, or use by anyone except for counsel for the named parties hereto and consultants, experts, or investigators retained to assist in the preparation of the prosecution of this action or the defense of this action.

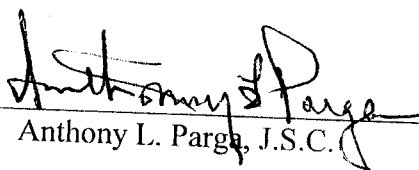
As the legal files maintained by the attorneys retained by the plaintiffs to represent them in their matrimonial action necessarily contain largely privileged material, defendants' request that this Court issue an order compelling plaintiffs to provide authorizations allowing defendants to obtain same is denied.

Counsel should endeavor to conduct the depositions, including further depositions of the plaintiffs, prior to the next scheduled conference date on March 12, 2012. Parties are reminded that the depositions should be conducted pursuant to 22 NYCRR §221, "Uniform Rules for the Conduct of Depositions," including 22 NYCRR §221.1, pertaining to "Objections at depositions."

Defendants Mark Harvey M.D. and Pro Health Care Associates, LLP's request for an order striking the portions of plaintiffs' complaint alleging loss of services, society, and consortium of the plaintiff Brooke Stark or precluding the plaintiffs' from offering proof at trial of the information sought by defendants' demands, pursuant to CPLR 3126, is denied.

This constitutes the decision and Order of this Court.

Dated: December 2, 2011


Anthony L. Parga, J.S.C.

ENTERED
DEC 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Cc: Sullivan Papain Block
McGrath & Cannavo, P.C.
1140 Franklin Avenue, Suite 200
Garden City, NY 11530

Sullivan & Sullivan
200 Garden City Plaza
Garden City, NY 11530

Law Office of Mitchell Angel, PLLC
170 Old Country Road, Suite 210
Mineola, NY 11501

Garson, DeCorato & Cohen, LLP
110 Wall Street, 10th Floor
New York, NY 10005