

Cordista v Lerner

2012 NY Slip Op 30170(U)

January 12, 2012

Supreme Court, Suffolk County

Docket Number: 19251/2003

Judge: Joseph Farneti

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This opinion is uncorrected and not selected for official publication.

ORDERED that this motion by defendants, LEONARD R. HOFFMAN, D.D.S. and SCOTT SIEGEL, D.D.S., M.D. ("moving defendants"), for an Order, pursuant to CPLR 3126, dismissing plaintiffs' complaint, with prejudice, for failure to provide a demanded authorization for defendants to obtain plaintiff KATHLEEN O'CONNELL CORDISTA's pharmaceutical records from Caremark Prescription Services, or, in the alternative, compelling plaintiffs to provide an authorization for defendants to obtain plaintiff's pharmaceutical records from Caremark Prescription Services in response to the demand dated February 11, 2010, within thirty (30) days or risk automatic dismissal, and precluding plaintiffs from offering any evidence at trial regarding her condition as reflected in the records from Caremark Prescription Services, is hereby **GRANTED** to the extent set forth hereinafter; and it is further

ORDERED that this cross-motion by defendants, FREDERICK LERNER, D.M.D., FREDERICK LERNER, D.M.D, P.C., STUART BROWN, D.M.D. and STUART BROWN, D.M.D., P.C. ("cross-moving defendants"), for an Order, pursuant to CPLR 3126, compelling plaintiffs to provide an authorization to defendants to obtain plaintiff's pharmaceutical records as demanded, or, in the alternative, dismissing plaintiffs' complaint with prejudice, is hereby **GRANTED** to the extent set forth hereinafter.

The Court has received an affirmation in opposition to both motions at bar from plaintiffs.

This is a dental malpractice action. Plaintiffs commenced the action by the filing of a summons and verified complaint on or about July 24, 2003. Issue was joined on behalf of the moving defendants by service of a verified answer on or about August 28, 2003, and on behalf of the cross-moving defendants by service of verified answers dated October 7, 2003. All defendants have served demands upon plaintiffs for various discovery, including a Demand for a Bill of Particulars and demands for authorizations.

The moving defendants and the cross-moving defendants have now filed the instant applications seeking an authorization for defendants to obtain plaintiff KATHLEEN O'CONNELL CORDISTA's pharmaceutical records from Caremark Prescription Services, pursuant to defendants' demands dated February 11, 2010 and March 30, 2010. The cross-moving defendants have adopted the arguments presented by the moving defendants in support of their

application. The moving defendants allege that plaintiffs refused to provide such authorization, and confirmed their refusal in correspondence dated September 22, 2010.

In opposition hereto, plaintiffs indicate that they are willing to stipulate to withdraw any claim for loss of enjoyment of life, thereby waiving any right to recover for psychological injury. As such, plaintiffs contend that any information with respect to plaintiff's psychological or mental condition is not relevant herein. Plaintiffs have submitted an unsigned stipulation in support of their application.

CPLR 3101(a) provides for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). It is well-settled that by commencing the instant action to recover damages for medical malpractice, the physician/patient privilege held by MS. O'CONNELL CORDISTA was waived with respect to her relevant past medical history (*see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]; *Gill v Mancino*, 8 AD3d 340 [2004]; *McLane v Damiano*, 307 AD2d 338 [2003]; *DeStrange v Lind*, 277 AD2d 344 [2000]). Although CPLR 3101 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340 [2004]; *DeStrange v Lind*, 277 AD2d 344 [2000]). It has been held that "[i]f there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material in the prosecution or defense" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). Moreover, "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184 [1992], *cert denied sub nom Poole v Consolidated Rail Corp.*, 510 US 816 [1993]), and "[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" (CPLR 3101 [a]; *Northway Eng'g v Felix Indus.*, 77 NY2d 332 [1991]).

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed

issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (see *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (see *Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

On this record, it cannot be said that plaintiffs' conduct with regard to the subject authorization has been willful, contumacious, or in bad faith. The Court notes that plaintiffs have provided numerous other authorizations for plaintiff's health care providers, and this issue has been addressed at court conferences of this matter. As such, the Court finds that dismissal of plaintiffs' complaint is not warranted. However, although plaintiffs claim that defendants' demands seek irrelevant information, plaintiffs had not moved for a protective Order with respect to these discovery demands. The failure of plaintiffs to move for a protective Order, pursuant to CPLR 3122, within twenty (20) days after service of the demands forecloses all inquiry concerning the propriety of the demands, except as to demands seeking privileged matter under CPLR 3101, or demands that are palpably improper (see CPLR 3122, 3101; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [2006]; *Holness v. Chrysler Corp.*, 220 AD2d 721 [1995]; *Alaten Co. Inc. v Solil Management Corp.*, 181 AD2d 466 [1992]). A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues on the case (see *Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887 [2000]; *Titleserv, Inc. v Zenobio*, 210 AD2d 314 [1994]). Here, plaintiffs have not asserted privilege but rather relevancy, and under the circumstances presented, the Court does not find defendants' demands to be palpably improper.

In view of the foregoing, this motion and cross-motion are **GRANTED** to the extent that plaintiffs shall provide defendants with an authorization for defendants to obtain plaintiff KATHLEN O'CONNELL CORDISTA's pharmaceutical records from Caremark Prescription Services

within thirty (30) days of service upon plaintiffs of the within Order with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: January 12, 2012



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION