

Tyson v City of New York

2012 NY Slip Op 30212(U)

January 27, 2012

Sup Ct, NY County

Docket Number: 111651/06

Judge: Barbara Jaffe

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SCANNED ON 1/31/2012

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 111651/2006

TYSON, JAMES

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 003

MODIFY ORDER/JUDGMENT

CAL # 142

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

tion to/for _____

_____ | No(s). _____

_____ | No(s). _____

_____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

JAN 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

Barbara Jaffe, J.S.C.
BARBARA JAFFE
J.S.C.

Dated: 1/27/12
JAN 27 2012

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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 5

-----X
JAMES TYSON FOR HIMSELF AND AS PARENT
AND GUARDIAN FOR DAVID NATHANIEL
TYSON, AN INFANT, AND KAREN TYSON,

Plaintiffs,

-against-

THE CITY OF NEW YORK, "JANE" AYALA AND
ISRAEL SOTO, INDIVIDUALLY AND AS
EMPLOYEES OF THE CITY OF NEW YORK,
DEPARTMENT OF EDUCATION,

Defendants.
-----X

BARBARA JAFFE, JSC:

For plaintiffs:
Mark H. Bierman, Esq.
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74 Trinity Place, Ste. 1550
New York, NY 10006
212-232-2055

Index No. 111651/06

Motion Date: 11/1/11
Motion Seq. No.: 003

DECISION AND ORDER

FILED

JAN 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

For defendants:
Lynn M. Leopold, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007

By notice of motion dated July 18, 2011, plaintiffs move for an order modifying a May 10, 2011 order to the extent of limiting and granting a protective order with respect to certain authorizations, and pursuant to 22 NYCRR 130.1 for an order imposing sanctions against defendants. Defendants oppose and, by notice of cross motion dated September 2, 2011, move pursuant to CPLR 3124 for an order compelling plaintiffs to comply with the May 2011 order.

I. PERTINENT BACKGROUND

Plaintiffs allege that on May 25, 2005, at Public School 57 in Manhattan, the infant plaintiff was suddenly and violently seized by defendant Ayala, a teacher at the school, who yelled and screamed at him and dragged and pulled him out of the school's library, causing him

to suffer injuries including but not limited to physical, emotional, and psychological pain. They contend that the infant plaintiff suffered, still suffers, and may in the future continue to suffer “great emotional pain, harm and injury and loss of enjoyment of life.” The infant plaintiff’s parents assert a claim for loss of his services. (Affirmation of Mark H. Bierman, Esq., dated July 18, 2011 [Bierman Aff.], Exh. A).

By notice for discovery and inspection dated August 16, 2010, defendants sought, as pertinent here, authorizations for the release of all records concerning any mental health services provided to the infant plaintiff. (*Id.*, Exh. B). By response dated September 28, 2010, plaintiffs objected to the demand. (*Id.*, Exh. C).

Defendants thereafter served a motion to compel the authorizations, which resulted in a order dated May 10, 2011 directing plaintiffs to provide authorizations for three years of psychological/psychiatric therapy and treatment records for all plaintiffs within 30 days, to be returnable to the court for an in camera inspection, over defendants’ objection, and with plaintiffs reserving all privileges. (*Id.*, Exh. F).

II. CONTENTIONS

Plaintiffs allege that the May 2011 order should be modified or limited to require authorizations related only to the infant plaintiff as defendants in their motion to compel did not seek the parents’ records and the parents assert no claims for emotional distress. Plaintiffs contend that the May 2011 order was signed only after conferencing the issue with me and that I had directed that the order provide only for the infant plaintiff’s records, and that defendants’ counsel improperly altered the order to require all of the plaintiffs’ records, which plaintiffs’ counsel did not notice until after the order was signed. Plaintiffs seek sanctions for the alteration

of the order, alleging an intentional and fraudulent effort to obtain immaterial and privileged documents in order to harass them, and they observe that defendants' counsel has refused to consent to modify the order. (Bierman Aff.).

Defendants allege that I directed authorizations for all of plaintiffs' treatment records, and deny having altered the order, observing that plaintiffs' counsel reviewed the order before signing it. Defendants also argue that the parents' treatment records are relevant and material as they testified at depositions that they and the infant plaintiff attended family therapy together since the infant was six years old, three years before the incident at issue, and that the focus of this therapy was the infant plaintiff's psychological issues. To the extent that the parents' records contain information not relevant to the infant plaintiff, defendants observe that the order directed that the records be produced for in camera review, thereby ensuring that only relevant and non-privileged information would be provided them. Defendants also allege that plaintiffs have not otherwise fully complied with the May 2011 order. (Affirmation of Lynn Leopold, ACC, dated Sept. 2, 2011).

In reply, plaintiffs reiterate their prior arguments, and assert that they have fully complied with the order. (Reply Affirmation, dated Sept. 20, 2011).

III. ANALYSIS

CPLR 3101(a) provides for full disclosure of all matters material and necessary in the prosecution or defense of an action, which 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." (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]). Thus, disclosure should be permitted

if the information sought is relevant to the action. (Siegel, NY Prac § 344 [4th ed]). Pursuant to CPLR 3124, a party may move to compel disclosure from another party that has not responded or complied with any discovery request.

“It is well settled that a party must provide duly executed and acknowledged written authorizations for the release of pertinent medical records under the liberal discovery provisions of the CPLR ... when that party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue.” (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]).

As it is undisputed that the parents and the infant plaintiff engaged in family therapy related to the infant plaintiff’s mental condition, such information is relevant, and defendants are entitled to any records containing such information, whether they are classified as the parents’ records or the infant plaintiff’s records. However, to ensure that the only information provided to defendants concerns the infant plaintiff’s mental condition, such records must be provided in camera.

Sanctions are unwarranted. Given this result, I need not address the parties’ contentions.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs’ motion for an order modifying the May 2011 order and for a protective order is granted only to the extent of directing plaintiffs, within 30 days of the date of this order, to provide authorizations for the release of any records related to treatment provided to the infant plaintiff for his mental condition in the three years prior to the incident, whether the treatment was classified under the parents’ name or the infant plaintiffs’ name, with the

authorizations to be returnable to this court; it is further

ORDERED, that plaintiffs' motion for sanctions is denied; and it is further

ORDERED, that defendants' motion to compel is granted to the extent of directing plaintiffs to comply with the May 2011 order to the extent that they have not already done so.

ENTER:

FILED

Barbara Jaffe, JSC

JAN 31 2012

BARBARA JAFFE

NEW YORK
J.S. COUNTY CLERK'S OFFICE

DATED: January 27, 2012
New York, New York

JAN 27 2012