

Ortiz v Westchester County Healthcare Corp.

2012 NY Slip Op 33241(U)

July 2, 2012

Sup Ct, Westchester County

Docket Number: 52438/2011

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
YANETH ORTIZ and JUAN CARLOS ORTIZ,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 52438/2011
Motion Date: July 2, 2012
Seq # 1

WESTCHESTER COUNTY HEALTHCARE
CORPORATION and ARASH RAHI, M.D.,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for a protective order as to the records of plaintiff Yaneth Ortiz's prior pregnancy, or for an order compelling an in camera inspection of such records.

Order to Show Cause - Affirmation in Support - Exhibits
Affirmations in Opposition - Exhibits

Upon the foregoing papers and the proceedings held on July 2, 2012, the motion is determined as follows:

In this case, plaintiffs seek damages for personal injuries sustained by plaintiff Yaneth Ortiz in relation to a pregnancy that resulted in a stillbirth on or about July 17, 2010. Plaintiffs allege that defendants failed to properly diagnose and treat plaintiff Yaneth Ortiz's infection, and failed to perform a timely cesarian section which the infection made necessary. Ms. Ortiz was allegedly approximately 29 weeks pregnant at the time she was admitted to the hospital for the birth at issue, and had to ultimately undergo a hysterectomy as a result of the infection that developed.

On or about December 17, 2010, plaintiff Yaneth Ortiz testified at a 50-h hearing concerning, among other things, her prior pregnancy, without objection from her then counsel. Prior to the pregnancy at issue in this case, plaintiff Yaneth Ortiz gave birth to a son named Jason in or around 2006. Ms. Ortiz testified concerning the circumstances surrounding her first pregnancy, including that her son Jason was born via cesarian section because her health care providers advised that they could not wait for her to dilate. She also testified concerning medications and vitamins she took during her pregnancy with Jason, and concerning prenatal visits she attended during that pregnancy.

On or about July 18, 2011, defendants served on plaintiffs combined discovery demands, which sought authorizations for medical records of physician or other health-care provider, hospital, clinic or other health-care facility which may have examined or treated Ms. Ortiz in the five years prior to the alleged injuries.

On this motion, plaintiffs assert that defendants are not entitled to authorizations for the release of medical records related to Ms. Ortiz's prior pregnancy. Plaintiffs argue that records related to her prior pregnancy are privileged and irrelevant. Plaintiffs urge that the claims of negligence alleged in his action are limited to failure to treat an infection related to a pregnancy, but that plaintiffs have not placed Ms. Ortiz's prior pregnancy at issue. In addition, plaintiffs argue that the records sought by defendants implicate the privilege of their son Jason and that he has nothing to waive his physician patient privilege. Furthermore, plaintiffs aver that defendants have not proffered any explanation as to how the records from a prior pregnancy relate to whether the treatment of in infection during a subsequent pregnancy was negligent.

Defendants oppose the instant motion on the grounds that Ms. Ortiz's medical records related to her prior pregnancy are relevant and Ms. Ortiz waived the physician patient privilege when she testified at her 50-h hearing without objection about her prior pregnancy, and provided her medical history to physicians at Westchester Medical Center.¹ Defendants aver that Ms. Ortiz is a party plaintiff, not a representative one, and that by bringing suit based on her own damages, she has placed her medical history and prior medical health in issue. In addition, defendants assert that since this case concerns obstetrical care, her prior obstetric and gynecologic records are relevant. With respect to the physician patient privilege, defendants argue that Ms. Ortiz waived such privilege when she discussed the details of her prior pregnancy at her 50-h hearing, including that she attended prenatal visits, and that she was advised by her health care providers to have a cesarian section because she was not dilating quickly enough. Defendants also argue that she waived such privilege by providing information about her prior pregnancy to physicians at Westchester Medical Center upon her admission around such time as her alleged injuries took place. Defendants also state that in seeking Ms. Ortiz's medical records from her prior pregnancy, her son Jason's medical records and privilege are in no way implicated since upon birth, Jason had his own medical records, which defendants do not seek.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "to 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 Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to uncontrolled and unfettered disclosure" (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in

¹ Defendants submitted two separate affirmations in opposition to plaintiff's motion for a protective order, one on behalf of defendant Westchester County Health Care Corporation and another on behalf of defendant Arash Rahi, M.D.

the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Generally, a party must provide authorizations for the release of pertinent medical records when the party has waived the physician patient privilege by affirmatively placing her physical or mental condition in issue (CPLR 3121 [a]; *Vodoff v Mehmood*, 92 AD3d 773 [2d Dept 2012]). Where an infant’s mother is a representative of the infant, generally it has been held that she has not placed her own medical history in issue. While case law holds that the mother’s medical records pertaining to the period when the infant is *in utero* are discoverable, her other medical records are typically protected by the privilege. However, the physician patient privilege can be waived. Waiver occurs when the patient introduces testimony or documents concerning privileged information, or when the infant’s mother voluntarily discloses her medical history to medical personnel for the purpose of aiding in the mother’s treatment (*see Ritter v Good Samaritan Hosp.*, 11 AD3d 667 [2d Dept 2004]; *De Silva v Rosenberg*, 129 AD2d 609 [2d Dept 1987]; *Yetman v St. Charles Hosp.*, 112 AD2d 297 [2d Dept 1985]).

In this case, while plaintiffs assert that the medical records with respect to Ms. Ortiz’s prior pregnancy are protected by the physician patient privilege, the court finds that Ms. Ortiz waived such privilege as to her prior pregnancy. Ms. Ortiz testified at her 50-h hearing concerning her prior obstetrical and gynecologic history without objection from counsel, and revealed her past medical history to physicians at Westchester Medical Center in connection with the care she received at that hospital related to the injuries at issue. Defendants have also established that the material sought is both relevant and necessary to the defense of this action.

In view of the foregoing, it is


ORDERED that plaintiffs’ motion for a protective order as to the medical records from her prior pregnancy is denied on the basis that Ms. Ortiz waived the physician patient privilege; and it is further

ORDERED that plaintiffs are to provide authorizations to defendants for the release of Ms. Ortiz’s medical records related to her prior pregnancy on or before July 11, 2012; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on August 7, 2012 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
July 2, 2012


HON. JOAN B. LEFKOWITZ, J.S.C.

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