

**Johnson v County of Nassau**

2012 NY Slip Op 33265(U)

August 6, 2012

Sup Ct, Nassau County

Docket Number: 9572/09

Judge: Michele M. Woodard

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

-----X  
EDDIE JOHNSON,

Plaintiff,

-against-

**Michele M. Woodard**  
**J.S.C.**  
TRIAL/IAS Part 8  
**Index No. 9572/09**  
**Motion Seq. No.: 02**

**DECISION AND ORDER**

THE COUNTY OF NASSAU, THE SHERIFF'S  
DEPARTMENT OF NASSAU COUNTY, and SHERIFF  
EDWARD REILLY,

Defendants.  
-----X

**Papers Read on this Decision:**

Plaintiff's Notice of Motion to Compel	02
Defendants' Affirmation in Opposition	xx
Plaintiff's Reply Affirmation	xx

Plaintiff Eddie Johnson (hereinafter "Johnson") moves by Notice of Motion for an order, pursuant to NY CPLR § 2308, compelling Defendants to comply with the Subpoena Duces Tecum that seeks the disclosure of the jail and medical records of nonparty Calvin Samuel a/k/a Calvin Samuels (hereinafter "Samuel"). Samuel was an inmate in Defendants' facility, Nassau County Correctional Center (NCCC), where he allegedly assaulted Johnson, also an inmate serving time in NCCC. Plaintiff also requests the Court to conduct an *in camera* inspection of Samuel's jail and medical records to determine which, if any, of the documents are discoverable.

**Facts**

Plaintiff contends that on October 16, 2005, while serving time as an inmate at NCCC, co-defendant Nassau County Sheriff's Department (hereinafter "Sheriff's Department"), by willful and negligent acts and omissions, failed to adequately supervise and protect him, thereby causing him to be involved in a physical altercation which resulted in him sustaining serious

physical injuries. Johnson claims that he sustained severe physical and psychological injuries resulting from an attack, assault, and battery by inmate Samuel. Johnson alleges that before this incident, Defendants had actual and constructive notice of the risk that Samuel posed to Plaintiff's life and safety but failed to take preventative measures.

Plaintiff initially commenced this negligence action in federal court due to a related federal law claim that provided grounds for federal supplemental jurisdiction. On June 20, 2008, Plaintiff sought to enforce Magistrate Arlene R. Lindsay's April 7, 2008 order for the disclosure of nonparty Samuel's medical and jail records in order to demonstrate his propensity towards violence and Defendants' knowledge of said propensity. The request noted Samuel's objection to releasing his records. On November 21, 2008, in response to Plaintiff's fourth motion to compel Samuel's records, Defendants acknowledged their possession of the requested records, objected to their disclosure on the grounds of privilege – or in the alternative, to redact them – and requested an *in camera* review to determine the records' discoverability. Magistrate Lindsay reviewed the records *in camera* and released certain documents as relevant. The parties then agreed to a Stipulation and Protective Order of Confidentiality (hereinafter "Stipulation"), with which Defendants complied by, *inter alia*, providing the discoverable parts of Samuel's records. The Stipulation also called for destroying or returning Samuel's records after the case terminated and upon written request. After discovery, Johnson consented to dismissing the federal cause of action. Hon. Roslynn R. Mauskopf dismissed the entire federal suit on April 24, 2009.

Plaintiff then commenced the within negligence suit on May 11, 2009. The Certification Order dated January 26, 2010 certified the case for trial and required Plaintiff to file a Note of Issue, in which the signer affirms, *inter alia*, "There are no outstanding requests for discovery." Plaintiff filed a second Note of Issue on December 3, 2010 after successfully moving to vacate

dismissal due to tardily filing the first Note of Issue. Exactly five months later, Plaintiff served a Notice to Admit upon Defendants, asking them to admit to the genuineness of the jail and medical records that Defendants provided to Plaintiff during discovery of the dismissed federal case. Plaintiff sought the records from Nassau University Medical Center, which responded by letter dated June 15, 2011 that since it no longer provided health services to NCCC, it could not provide medical records and directed Plaintiff's inquiry to the Sheriff's Department. Plaintiff served a second Notice to Admit, seeking the same admission, dated July 28, 2011; Defendants objected to both on grounds addressed below. Defendants refused to enter into a stipulation similar to the prior one in the federal suit as requested in Plaintiff's August 2, 2011 letter.

Plaintiff then sought a Judicial Subpoena, which Hon. Anthony L. Parga issued on September 1, 2011, to command Defendants to provide a certified copy of any and all of Samuel's non-redacted jail and medical records. Defendants refused to comply on grounds that: (1) purportedly, Plaintiff did not inform Hon. Parga of Samuel's prior refusal to release his records; (2) that the subpoena lacks both the required language and authorization from Samuels pursuant to CPLR § 3122(a)(2); and (3) honoring a defective subpoena for medical records could expose them to liability. In addition to these grounds, Defendants ask for the subpoena to be withdrawn on the grounds that: (4) they never provided Samuel's records in "this [state court] case"; (5) HIPAA regulations and patient-physician privilege preclude producing the medical records; (6) disclosure of both the medical and jail records would infringe on Samuel's privacy right; (7) a nonparty must consent to the release of his medical records (Samuels has already objected to this disclosure when the case was filed in federal court); (8) Samuels must first have notice about the discovery request before the Court rules on the issue; (9) the Stipulation called for destroying the records after the federal suit terminated (which was done); (10) the Stipulation

allowing for disclosure is inapplicable to this state case; (11) Plaintiff seeks further discovery after signing a Note of Issue that acknowledged the absence of outstanding discovery requests.

Plaintiff argues that: (1) Defendants must obey the Judicial Subpoena; (2) Defendants already disclosed these documents when the case was in federal court; (3) New York State law allows for other means to obtain nonparty medical records; (4) the Note of Issue contention is irrelevant because the Subpoena at issue is to obtain certified records for trial, not for discovery; (5) Defendants fail to explain why this Court should not conduct an *in camera* review; (6) jail records are not subject to HIPAA regulations; (7) NCCC is not a “medical provider” under 45 CFR § 160.103; and (8) the records are material, necessary, and relevant to Plaintiff’s case.

### Analysis

A nonparty’s “medical records are privileged and confidential and defendants may not divulge them absent an express waiver by [that nonparty],” *Moore v. St. John's Episcopal Hosp.*, 89 AD2d 618, 619 (2d Dept. 1982); *accord J.Z. v. S. Oaks Hosp.*, 67 AD3d 645, 645 (2d Dept. 2009); *Lee v. New York City Transit Auth.*, 257 AD2d 611, 611 (1999); *see also* CPLR § 4504, or “a showing that a compelling interest overrides the privilege,” *Exelbert v. State*, 140 AD2d 665, 665 (2d Dept. 1988); *see also Matter of Camperlengo v. Blum*, 56 NY2d 251, 255 (1982); *Matter of Jenkins v. Martin*, 99 AD2d 811, 811 (2d Dept. 1984); *Perry v. Fiumano*. Plaintiff has failed to show that a compelling interest overrides the patient-physician privilege. Therefore, Defendants have properly argued that Samuel must have notice in order to waive or maintain his privacy but not in that this procedure must be sought first; Plaintiff could alternatively follow CPLR §§ 3120, 3122 procedure. *See generally Campos v. Payne*, 2 Misc.3d 921 (Civ. Ct. Richmond Cty. 2003). Second, just as Defendants assert the inapplicability of the federal case to this case, so is Samuel’s objection to the release of his records. If Samuel objects again, the

“plaintiff is entitled to any nonmedical information in [Samuel’s medical] records, particularly such information as relates to any prior assaults or similar violent behavior, to aid plaintiff in establishing knowledge on the part of defendants.” *Moore*, 89 AD2d at 619; *accord Mayer v. Albany Med. Ctr. Hosp.*, 37 AD2d 1011, 1011 (3d Dept. 1971) (“Plaintiffs are entitled to all nonmedical data pertaining to prior [] or attempted assaults by the patient, including the time and place and surrounding circumstances . . . , the date the information came within the knowledge of defendant. . . . [, and] the length and number of times the patient was confined to the defendant’s institution.”); *J.Z.*, 67 AD3d at 646. Therefore, not all of Samuel’s medical records are necessarily barred from discovery. To determine which, if any, of his medical records are wholly or partly discoverable, “[t]he proper procedure is for the Supreme Court to conduct an *in camera* review of the assailant’s records, and determine if they contain information of a nonmedical nature relating to any prior assaults or similar violent behavior by the assailant that should be disclosed.” *Sohan v. Long Island Coll. Hosp.*, 282 AD2d 597, 598 (2d Dept. 2001); *accord J.Z.*, 67 AD3d at 645; *see also Brier v. State*, 95 AD2d 788 (2d Dept. 1983). Therefore, the Court does not address the issue of whether NCCC is a “covered entity” under 45 CFR § 160.103 such that it would be subject to HIPAA regulations because a nonparty’s privacy rights are still at issue, and the proper procedure for such matters is to conduct an *in camera* review.

Defendants also correctly aver that the subpoena is defective and that honoring it could expose them to liability. “Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or otherwise directed the production of the documents.” CPLR § 3122(a)(2). A subpoena without this language is defective on its face. *Campos*, 2 Misc.3d at

§ 3122(a)(2). A subpoena without this language is defective on its face. *Campos*, 2 Misc.3d at 925. Therefore, Defendants rightfully did not comply with the Judicial Subpoena.

Jail records are neither privileged, subject to HIPAA regulations, nor afforded the same degree of protection as medical records on the grounds of privacy rights. Therefore, they may be disclosed except for “sealed records arising out of any youthful offender adjudication” and material governed by the physician-patient privilege. *People v. Owens*, 188 Misc.2d 200, 203-04 (Sup. Ct. Monroe Cty. 2001). This is also in line with Public Officers Law § 87(2)(b), which Defendants cite in attempting to keep Samuel’s jail records undiscoverable. Curiously, despite Defendants’ argument for a nonparty’s privacy right to jail records, NCCC disclosed some of Samuel’s jail records but none pertaining to the time period in question.


Finally, Defendants’ Notice of Issue contention is unmeritorious. Signing the Notice affirms the lack of “outstanding” discovery requests, meaning those that have been made but not yet fulfilled. This was not the case at the time Plaintiff’s counsel signed the Notice of Issue.

Based on the foregoing, it is hereby

**ORDERED**, that the Court will conduct an *in camera* review of the medical and jail records that Plaintiff requests for production on August 29, 2012 at 11:00 a.m. in order to determine which, if any, documents may be disclosed in whole or after redactions.

This constitutes the **DECISION** and **ORDER** of the Court.

**DATED:** August 6, 2012  
Mineola, NY 11501

**ENTER:** 

**HON. MICHELE M. WOODARD  
J.S.C.**

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**ENTERED**  
**AUG 10 2012**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**