

Perez v Wendell Terrace Owners Corp.

2013 NY Slip Op 34167(U)

June 25, 2013

Supreme Court, Nassau County

Docket Number: 7659/11

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

VICTOR PEREZ,

Plaintiff,

- against -

WENDELL TERRACE OWNERS CORP.,

Defendant.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 7659/11
Motion Seq. Nos.: 01, 02
Motion Date: 05/13/13
05/13/13

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 01), Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 02) and Affirmation</u>	<u>2</u>
<u>Affirmation in Opposition to Cross-Motion and in Reply</u>	<u>3</u>
<u>Affirmation in Opposition to Cross-Motion</u>	<u>4</u>
<u>Reply to Plaintiff's Affirmation in Opposition</u>	<u>5</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant moves (Seq. No. 01), pursuant to Judiciary Law § 756 and §2-b(3), for an order punishing non-party CVS Caremark Corporation ("CVS") for contempt for its failure to comply with the January 18, 2013 and February 21, 2013 Judicial So Ordered Subpoenas; and moves that non-party CVS be given the legal opportunity to cure the defect by providing complete copies of all of the CVS Caremark Pharmacy records from July 6, 2004 to the present relating to plaintiff.

Non-party CVS opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3103, for a protective order preventing defendant from seeking disclosure of confidential protected patient information from non-party CVS and for an order quashing plaintiff's (*sic*) Subpoenas. Defendant and plaintiff opposes the cross-motion.

Counsel for defendant argues, "[t]he history of your affiant's attempts to have CVS Caremark produce the pharmacy records of the plaintiff, VICTOR PEREZ, from 7/6/04 to the present is well known to this Honorable Court. However, to recap, the plaintiff's attorney served an authorization on your affiant's office to permit the obtaining of pharmacy records. Thereafter, the authorization was sent to CVS Caremark by the insurance company third-party adjuster office of F&L Claims. Thereafter, F&L Claims received a letter from CVS Caremark stating that they would not comply with the request for records because the authorization was not checked off to include Alcohol/Drug Treatment, Mental Health Information and HIV Health-Related Information.... [see Defendant's Affirmation in Support Exhibit A.] Thereafter, a conference was held before your Honorable Justice and the refusal of CVS Caremark was discussed. Your Honorable Justice indicated that she would sign a So Ordered Subpoena to be sent by this office to CVS Caremark. This So Ordered Subpoena was signed and So Ordered by your Honorable Justice on January 18, 2013....[see Defendant's Affirmation in Support Exhibit B.] This subpoena was sent by your affiant's office to CVS Caremark to the attention of the Privacy Office dated January 22, 2013 and was received by CVS Caremark Privacy Office on January 29, 2013....[see *id.*] Thereafter, your affiant's office received a letter from CVS Caremark dated January 31, 2013 from O.T. Sompaseuth from CVS Privacy Office, Legal....[see Defendant's Affirmation in Support Exhibit C.] This letter reiterated the previously stated position of CVS

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that they would not honor the So Ordered Subpoena because the part of the authorization of Drug and Alcohol records, HIV/AIDS records and Mental Health Records was not 'acknowledged'. Upon receipt of this letter, your affiant called O.T. Sompaseuth and spoke to said person and to a unit manager by the name of Gloria regarding their refusal. Your affiant was advised that if we sent a newly So Order Judicial Subpoena which was not limited as the prior subpoena was, that all the records for the date in questions would be sent to Honorable Justice Scher (*sic*). Therefore, your affiant presented a new So Ordered Subpoena to your Honorable Justice for signature and the Subpoena was signed and So Ordered on February 21, 2013....[*see* Defendant's Affirmation in Support Exhibit D.] Thereafter, the new So Ordered Judicial Subpoena was sent by a letter on February 28, 2013 to the CVS Caremark Privacy Office to the attention of 'Gloria' as advised by 'Gloria.'...[*see id.*] Thereafter, your affiant attempted to contact Gloria the following week and was told that she was away. On March 12, 2013, your affiant received a return call from Gloria in which she advised that they required a 'Court Order signed by a Judge' or an authorization with the Drug and Alcohol Records, etc. section checked off. Your affiant advised Gloria in a number of attempted ways that the So Ordered Subpoenas that they have received were, in fact, Orders signed by a Judge. Gloria insisted that the So Ordered Subpoena was not a Court Order and, therefore, they would not provide the records."

In opposition to the motion, counsel for non-party CVS argues that the motion should be denied because it does not comply with either CPLR § 5104 or New York Judiciary Law § 756. Counsel contends, "CPLR § 5104 clearly states, 'any interlocutory or final judgment or order, or any part thereof...may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses to or willfully

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neglects to obey it, by punishing him for a contempt of court.'...The defendant's motion papers do not comply with the technical requirements of New York Judiciary Law § 756. The motion papers must include the following language, 'Warning: Your Failure to Appear in Court May Result in Your Immediate Arrest and Imprisonment for Contempt of Court.'...The Second Department has held that failure to include this required language constitutes a jurisdictional defect that deprives the court of the authority to enter a contempt order. [citation omitted]. In this case, it is clear there is no court order for CVS to be held in contempt of. No order was sent by certified mail to CVS and the defendant has given CVS no notice of a court order. Therefore, CVS cannot be held in contempt. Further, the defendant did not serve its motion papers with the proper jurisdictional language as required by New York Judicial Law § 756 and the Second Department. Therefore, defendant's motion to dismiss for contempt should be denied."

In support of the cross-motion (Seq. No. 02) for a protective order preventing defendant from seeking disclosure of confidential protected patient information from non-party CVS and for an order quashing defendant's Subpoenas, counsel for non-party CVS submits that "[t]he defendant is not entitled to plaintiff's pharmacy records where plaintiff has not specifically authorized the release of records regarding HIV/Aids Treatment, mental health treatment or alcohol and drug abuse treatment. These three categories are protected under New York's Mental Health Law and Public Health Law as well as under Federal law. If CVS is forced to produce these records without a court order or proper authorization, it will be in violation of those laws. New York Public Health Law § 2785 entitled 'Court Authorization for Disclosure of Confidential HIV Related Information' states that a court may grant an order upon application for disclosure of confidential HIV related information if there is a compelling need for disclosure and a clear and imminent danger to public health. In addition, the individual concerning whom

confidential HIV related information is sought shall be given adequate notice of the application for such an order. See N.Y. Pub. Health Law § 2785(1). To date, Respondent (*sic*) has not been provided with any evidence through a Court Order in the underlying action that there is a compelling need for disclosure.”

Counsel for non-party CVS adds, “it is impossible for CVS, as a pharmacy, to know the reasons certain medications were prescribed. There are a number of medications that could be used for treatment of the above discussed categories [alcohol/drug treatment records, mental health information or HIV/AIDS information] but may also be used for other reasons. Since CVS is not the prescribing physician, it is not in a position to know the reason for the plaintiff’s prescriptions. Therefore, the defendant’s attempt to disclaim records pertaining to HIV/AIDS, alcohol and mental health were futile.”

Counsel for non-party CVS further argues that “CVS is required to withhold any records that could fall into the three protected categories unless it receives a valid authorization that specifically authorizes the disclosure of those records or a court order for their disclosure. It is clear that the plaintiff has not authorized such disclosure. A ‘So Ordered’ subpoena is not a court order. A hearing is required in order to demonstrate defendant’s need for the records with notice to the plaintiff. On review of the papers provided by the defendant, there is no evidence the plaintiff has been put on notice of defendant’s various requests including the So Ordered Subpoenas and there is no evidence provided by the defendant that a court hearing ever took place of (*sic*) motion practice engaged in. In the absence of a court order that CVS produce the records in question or a valid authorization from the plaintiff, CVS respectfully requests that this Court enter a Protective Order pursuant to CPLR § 3103 preventing the defendant from obtaining discovery of these federally and state protected records.”

In opposition to the cross-motion, counsel for defendant argues, “[y]our affiant would respectfully submit that the attorney for CVS Caremark Corporation is under another misconception. Said attorney continually states in papers that there is no subject Court Order. Said attorney states: **‘it is clear that there is no Court Order to be held in contempt.’** Specifically, the CVS attorney states: ‘A So Ordered’ subpoena is not a Court Order.” Your affiant would surely strongly disagree with this statement and is reasonably certain that this Honorable Court and the Honorable Justice Scher (*sic*) would join me in this disagreement. The attorney for CVS opines: ‘A hearing is required in order to demonstrate the defendant’s need for the records with notice to the plaintiff.’ As previously stated in my prior affirmation, there were many ‘hearings’ before this Honorable Court wherein the defendants (*sic*) need for the records has been demonstrated. Furthermore, said attorney states that a hearing must be with notice to the plaintiff. The attorney for CVS has no standing in this case to argue with respect to notice to plaintiff. It should be noted that the plaintiff’s attorneys have not submitted any affirmation in opposition to the subject motion.”

Counsel for plaintiff also submitted opposition to the cross-motion in which he argued, “[n]on-party CVS Caremark Corporation is correct in their assertion that the Defendant is not entitled to plaintiff’s protected health records. However neither defendant nor your Affiant is claiming that CVS should release these protected records. In fact, upon defendant’s first attempt at service of the subpoena dated January 18th, 2013, the subpoena specifically stated that the records released ‘Not to include drugs that could potentially be used to treat HIV/AIDS, DRUG/ALCOHOL & MENTAL HEALTH’ When non-party CVS Caremark Corporation failed to provide the records at that time, defendant then served non-party CVS Caremark Cooperation with a subpoena which stated that the records should be sent to this Honorable

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Court for an *in-camera* review....It is clear that, much to their credit, the defense attorneys in this matter are attempting to fully comply with the applicable HIPPA laws, and that nobody, particularly your Affirmant, is seeking to have plaintiff's confidential records regarding HIV/AIDS, DRUG/ALCOHOL & MENTAL HEALTH released at this time."

Counsel for plaintiff adds, "[t]he statement of counsel for non-party CVS Caremark Corporation that 'it is impossible for CVS, as a **pharmacy**, to know the reasons certain medications were prescribed. There are a number of medications that could be used for treatment of the above discussed categories but may also be used for other reasons. Since CVS is not the prescribing physician, it is not in a position to know the reason for the plaintiff's prescriptions,' (**Emphasis Added**), is simply incredulous at best. It is completely reasonable that such a large chain of pharmacies as CVS would have a pharmacist available to review the medications in the chart, and who should know, by the very virtue of his or her training and experience, what the medications are used for. The refusal to take the time to process the records by searching for and redacting the medications that are covered by the privilege is simply an issue of not wanting to spend money to further their statutory obligations of protecting this extremely sensitive and privileged information....It is the position of Your Affirmant that the non-party CVS Caremark Corporation's cross-motion should be denied because CVS is attempting to unjustly force Plaintiff into waiving his rights and disclosing highly personal and sensitive information that is protected wholly and purposefully by the federal HIPPA laws. It is noted that CVS is also violating Plaintiff's constitutional right to privacy. [citation omitted]....It is the position of Your Affirmant that CVS Caremark Corporation's main reasoning for asking the Plaintiff to waive their rights in regards to the disclosure of their most sensitive personal and medical information is simply to avoid the extra cost of employing a qualified pharmacist, (of which the presumably

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have in droves on payroll in their numerous pharmacies nationwide), to discern which prescriptions are meant for any or all of the three most intensely protected classifications of mental health, substance abuse, and HIV/AIDS. Once again it should be noted that neither party to the within action is seeking release of any records regarding the plaintiff's 'HIV/AIDS, DRUG/ALCOHOL & MENTAL HEALTH' conditions. It is incumbent upon non-party CVS CAREMARK CORPORATION to review the records and provide the records with the privileged and confidential information redacted."

In reply to plaintiff's opposition to the cross-motion, counsel for non-party CVS argues, "[t]he plaintiff himself could easily solve the issues in this matter without producing any protected health information by simply going through his prescription record and identifying what is or isn't a medication he took for mental health treatment, alcohol treatment or HIV/AIDS treatment. Instead, the plaintiff seeks to needlessly place the burden on CVS to analyze his own prescription records, somehow determine the reason for the treatment behind each medication, and risk possible violation of federal and state law if it happens to be incorrect in its determination....Despite plaintiff's assertions that it is 'incredulous' that CVS would not know the reason behind a medication, it is impossible for CVS to know the specific reason a physician prescribes a particular medication. CVS does not have the underlying medical records, CVS does not know the patient's history, CVS does not know if the patient is using other pharmacies or other physicians, and CVS does not know the patient's full clinical picture. This is why CVS relies on a physician's judgment....It is patently ridiculous that the plaintiff stats that CVS 'would have a pharmacist available to review the medications in the chart and who should know, by the very virtue of his or her training and experience, what the medications are used for.' This misstates the duty and knowledge of pharmacists. For instance, when someone fills an antibiotic

prescription at a pharmacy, the pharmacy does not know why a patient receives an antibiotic - whether it be for a skin infection, a throat infection or genital infection. The pharmacy does not know why a patient receives a steroid - whether it is for a bronchial disorder, an inflammation disorder or an allergic disorder. The plaintiff's argument is even more ridiculous when one considers how easy it would be for the plaintiff to accomplish the task of going through his own pharmacy records."

The Court will first address defendant's motion (Seq. No. 01), pursuant to Judiciary Law § 756 and §2-b(3), for an order punishing non-party CVS for contempt for its failure to comply with the January 18, 2013 and February 21, 2013 Judicial So Ordered Subpoenas. New York State Judiciary Law § 756 reads, in pertinent part, that "[a]n application to punish for a contempt punishable civilly may be commenced by notice of motion returnable before the court or judge authorized to punish for the offense,.... The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type:

**WARNING:
YOUR FAILURE TO APPEAR
IN COURT MAY RESULT IN
YOUR IMMEDIATE ARREST
AND IMPRISONMENT FOR
CONTEMPT OF COURT."**

Defendant's instant motion fails to contain this statutorily required language and is thus defective on its face. Accordingly, defendant's motion (Seq. No. 01), pursuant to Judiciary Law § 756 and §2-b(3), for an order punishing non-party CVS for contempt for its failure to comply with the January 18, 2013 and February 21, 2013 Judicial So Ordered Subpoenas and for an order that non-party CVS be given the legal opportunity to cure the defect by providing complete

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copies of all of the CVS Caremark Pharmacy records from July 6, 2004 to the present relating to plaintiff is hereby **DENIED**.

The Court will now address non-party CVS's cross-motion (Seq. No. 02), pursuant to CPLR § 3103, for a protective order preventing defendant from seeking disclosure of confidential protected patient information from non-party CVS and for an order quashing defendant's Subpoenas. The Court finds that non-party CVS has made compelling arguments as to why it is entitled to a protective order with respect to the subject subpoenaed records. Non-party CVS has demonstrated that the records sought by defendant, in the way the So Ordered Subpoenas were worded, are protected under New York Mental Health Law and Public Health Law, as well as under Federal Law. Non-party CVS has shown that "New York Mental Health Law and the CPLR state that the clinical records of patients or clients maintained by facilities licensed or operated by the Office of Mental Health or the Office of Persons with Developmental Disabilities may only be released pursuant to an order of a court of record... This may be done after a finding by the Court that the interests of justice significantly outweigh the need for confidentiality." While the Court agrees with counsel for defendant that a So Ordered Subpoena does indeed constitute a "court order", the subject subpoenas are not the type of court order that is required in the New York Mental Health Law or CPLR. Furthermore, while counsel for defendant believes that the conferences held with the court concerning the issuance of the subject So Ordered Subpoenas constitute "hearings," there were never any actual hearings held before this Court, with respect to said Subpoenas, where the issue of whether the interests of justice significantly outweigh the need for confidentiality were litigated and determined.

The Court finds merit in non-party CVS's argument that "it is impossible for CVS, as a pharmacy, to know the reasons certain medications were prescribed. There are a number of

medications that could be used for treatment of the above discussed categories [alcohol/drug treatment records, mental health information or HIV/AIDS information] but may also be used for other reasons. Since CVS is not the prescribing physician, it is not in a position to know the reason for the plaintiff's prescriptions. Therefore, the defendant's attempt to disclaim records pertaining to HIV/AIDS, alcohol and mental health were futile."

Additionally, the Court also is not in a position to know the reason why certain medications were prescribed to plaintiff. The Court does not possess the requisite knowledge to know which particular prescribed drugs could fall under the protected categories of alcohol/drug treatment records, mental health information or HIV/AIDS information. Providing the Court with a list of medications prescribed to plaintiff would shed absolutely no light on what these medications are or what they were prescribed to treat. Accordingly, requesting the Court conduct an *in camera* review of plaintiff's CVS records to determine which records the Court deems proper for the defendant to see is not a reasonable request.

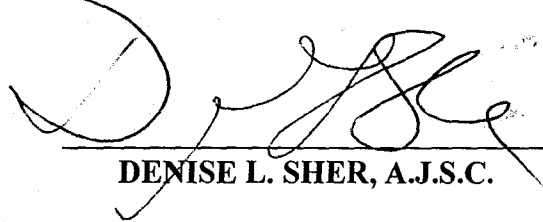
The Court does not find merit in the arguments made in plaintiff's opposition to the cross-motion. Said opposition was based upon pure speculation as to what plaintiff's counsel believes should be the role of non-party CVS and not the actual role that the pharmacists are trained and competent to perform.

Therefore, non-party CVS's cross-motion (Seq. No. 02), pursuant to CPLR § 3103, for a protective order preventing defendant from seeking disclosure of confidential protected patient information from non-party CVS and for an order quashing defendant's Subpoenas is hereby **GRANTED.**

It is further ordered that the parties shall appear for a Certification Conference on July 2, 2013, at 9:30 a.m., in IAS Part 33 of the Nassau County Supreme Court, located at 100 Supreme Court Drive, Mineola, New York.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 25, 2013

ENTERED
JUN 27 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE