Skiboky Shaver Stora v City of New York
2014 NY Slip Op 31758(U)
July 3, 2014
Supreme Court, New York County
Docket Number: 117071/08
Judge: Lucy Billings

[* 1]

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

PRESENT: BILLINGS Justice PART 46

SHAVER STORA, SKIBOKY

- v -

THE CITY OF N.Y., ET AL.

INDEX NO. 117071/08

MOTION DATE

MOTION SEQ. NO. 09

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion to/for compel disclosure

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

FILED
JUL 09 2014
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☑ No

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

The court grants the motion by defendant Volunteers of America - Greater New York, Inc., to compel plaintiff's disclosure to the extent set forth in the accompanying decision and otherwise denies this defendant's motion. C.P.L.R. §§ 3122(a), 3124, 22 N.Y.C.R.R. § 202.21(d). The parties shall appear for a pretrial conference in Part 46 8/15/14 at 9:30 a.m., preparatory to the trial scheduled 9/15/14.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/3/14

LUCY BILLINGS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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SKIBOKY SHAVER STORA,

Plaintiff

- against -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, VOLUNTEERS OF AMERICA - GREATER NEW YORK, INC., FJC SECURITY SERVICES, INC., and MARCUS SERRANO,

Defendants

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Index No. 117071/2008

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Defendant Volunteers of America - Greater New York, Inc., moves by an order to show cause to compel plaintiff four years after filing the note of issue to provide authorizations "permitting the release of records" of plaintiff's medical treatment since the note of issue. Aff. in Supp. of Albert E. Risebrow ¶ 2. See C.P.L.R. § 3124. The records Volunteers of America (VOA) seeks are of ongoing treatment for plaintiff's injuries claimed in this action and of treatment for mental injuries that he sustained since the note of issue and that are similar to the injuries claimed in this action. VOA does not identify any new providers of treatment for the injuries claimed in this action, however, qualifying as "unusual or unanticipated circumstances" that developed after the note of issue to warrant additional disclosure, except insofar as plaintiff's one day of treatment in Atlantic City, New Jersey, was for a flare-up of

back injuries claimed here. 22 N.Y.C.R.R. § 202.21(d); Madison v. Sama, 92 A.D.3d 607 (1st Dep't 2012); Colon v. Yen Ru Jen, 45 A.D.3d 359, 360 (1st Dep't 2007); Schroeder v. IESI NY Corp., 24 A.D.3d 180, 181 (1st Dep't 2005). See Reply Aff. of Albert E. Risebrow ¶ 3.

I. MEDICAL RECORDS

VOA identifies Pierre Jean-Felix M.D., at Woodhull Medical and Mental Health Center, and Darren Mack M.D., at Kings County Hospital Center. VOA does not dispute that plaintiff disclosed these treatment providers and provided defendants authorizations for these providers' records before the note of issue. He now agrees to provide updated versions of the prior authorizations for the records of Dr. Jean-Felix, Dr. Mack, Woodhull Medical and Mental Health Center, and Kings County Hospital Center, in compliance with the Privacy Rule, 45 C.F.R. pts. 160, 164, under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. §§ 1320d - 1320d-9, within 20 days. See 45 C.F.R. §§ 164.502(a)(1)(iv), 164.508(c).

Since these treatment providers were disclosed before the note of issue, they are not "unusual or unanticipated circumstances" that developed after the note issue. 22 N.Y.C.R.R. § 202.21(d). Once defendants were aware of these providers' treatment, defendants possessed all the information necessary to decide whether to seek broader disclosure from these treatment providers, such as interviews of the physicians as well as their records. E.g., Rosenberg v. Scaringi, 279 A.D.2d 389,

390 (1st Dep't 2001); Tirado v. Miller, 75 A.D.3d 153, 161-62 (2d Dep't 2010). Defendants accepted the disclosure from plaintiff regarding these providers, however, as of when he filed the note of issue. VOA's lack of diligence or strategic decision in not seeking broader disclosure before the note of issue does not constitute "unusual or unanticipated circumstances." 22 N.Y.C.R.R. § 202.21(d); Madison v. Sama, 92 A.D.3d 607; Miller v. Metropolitan 810 7th Ave., 50 A.D.3d 474, 475 (1st Dep't 2008); Colon v. Yen Ru Jen, 45 A.D.3d at 359-60; Schroeder v. IESI NY Corp., 24 A.D.3d at 181. See Cuevas v. 1738 Assoc., L.L.C., 111 A.D.3d 416, 417 (1st Dep't 2013). To obtain broader disclosure from these previously disclosed treatment providers, defendants' remedy was to serve further disclosure requests, followed if necessary by a motion pursuant to C.P.L.R. § 3124 or § 3126, before the note of issue was filed. Melcher v. City of New York, 38 A.D.3d 376, 377 (1st Dep't 2007); Rosenberg v. Scaringi, 279 A.D.2d at 390; Tirado v. Miller, 75 A.D.3d at 162. Therefore defendants are entitled only to updated disclosure regarding these providers and not an expanded scope of disclosure.

Plaintiff also agrees to provide an authorization for records of his treatment at Atlantic Care Regional Medical Center May 16, 2012, in compliance with the Privacy Rule within 20 days. Although VOA's motion does not mention Atlantic City Hospital, he further agrees to provide a similar authorization for this facility.

VOA also identifies NY Psychotherapy and Counseling Center,

where plaintiff indicated in correspondence to the court he had been evaluated after his hospitalization and incarceration in New Jersey. Neither VOA nor plaintiff indicates whether this center was a new treatment provider since the note of issue or whether plaintiff disclosed this provider and forwarded an authorization for the center's records before the note of issue, but the evaluation itself recites that: "He has been attending nypccc x 4 mo." as of January 25, 2013. Risebrow Aff. Ex. F, at 7. In any event, in litigation regarding his hospitalization and incarceration in New Jersey plaintiff did claim new emotional distress, and here he again agrees to provide an up-to-date authorization for records of his treatment at NY Psychotherapy and Counseling Center in compliance with the Privacy Rule within 20 days. If he forwarded defendants an authorization for this provider's records before the note of issue, he now may provide an updated version of the prior authorization.

II. INTERVIEWS OF PHYSICIANS

VOA's motion does not seek authorizations permitting VOA to interview physicians who treated plaintiff at the identified facilities or elsewhere, but repeatedly seeks only "records." Risebrow Aff. ¶¶ 2, 16, 21, Ex. I; Risebrow Reply Aff. ¶ 3. Although the Affirmation in Support refers to "ARONS compliant authorizations permitting the release of records," Risebrow Aff. ¶ 2, assuming this reference is to Arons v. Jutkowitz, 9 N.Y.3d 393 (2007), this decision analyzes a myriad of the Privacy Rule requirements, including for the release of records. Therefore

this vague reference is a far cry from notice to plaintiff or the court that VOA sought to compel authorizations permitting it to interview specific physicians. C.P.L.R. § 2214(a) and (d); DaimlerChrysler Ins. Co. v. Seek, 82 A.D.3d 581, 582 (1st Dep't 2011); Reyes v. Sequeira, 64 A.D.3d 500, 508 (1st Dep't 2009); Arriaga v. Laub Co., 233 A.D.2d 244, 245 (1st Dep't 1996); McGuire v. McGuire, 29 A.D.3d 963, 964-65 (2d Dep't 2006).

Only in reply does VOA seek this expanded disclosure, a request that was to have been presented originally as part of VOA's motion, Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012), and, before the motion, a request that VOA's attorney was to have presented to plaintiff's attorney and attempted to resolve with him. 22 N.Y.C.R.R. § 202.7(a), (c), and (d). The correspondence on which VOA relies to meet this prerequisite to the motion nowhere mentions anything other than "authorizations permitting the release of records." Risebrow Aff. Ex. I. Nor does VOA's correspondence request anything, even records, from NY Psychotherapy and Counseling Center. Plaintiff's response, moreover, agrees to provide every authorization requested. Thus, as this decision illustrates throughout, VOA's motion as made was entirely unnecessary, and only after serving the motion did VOA manufacture new requests. Any requests made only in its reply must be denied based not only

on their omission from its motion, e.g., Arriaga v. Laub Co., 233 A.D.2d at 245, but also on the lack of any effort even to raise the issue with plaintiff before the motion. 22 N.Y.C.R.R. § 202.7(a) and (c). E.g., Molyneaux v. City of New York, 64 A.D.3d 406, 407 (1st Dep't 2009); Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 382 (1st Dep't 2005); Chervin v. Macura, 28 A.D.3d 600, 602 (2d Dep't 2006).

Particularly regarding interviews of treating physicians, "the filing of the note of issue denotes the completion of disclosure, not the occasion to launch another phase of it." Arons v. Jutkowitz, 9 N.Y.3d at 411. The "preferred time for such disclosure was before the filing of the note of issue." Shefer v. Tepper, 73 A.D.3d 447 (1st Dep't 2010). See Singh v. Singh, 51 A.D.3d 770, 771 (2d Dep't 2008). After the note of issue, "at that juncture in the litigation there is no longer any basis for judicial intervention to allow further pretrial proceedings absent 'unusual or unanticipated circumstances' and 'substantial prejudice' (22 N.Y.C.R.R. 202.21[d])." Arons v. Jutkowitz, 9 N.Y.3d at 411. See Tirado v. Miller, 75 A.D.3d at 162.

While the New Jersey medical facilities are new treatment providers since the note of issue, and NY Psychotherapy and Counseling Center also may be such a provider, even in reply, VOA makes no attempt to articulate any "substantial prejudice" from not interviewing physicians at these facilities once VOA obtains the records of their examination and treatment of plaintiff. 22

N.Y.C.R.R. § 202.21(d). VOA's lack of urgency in requesting authorizations to interview physicians who treated plaintiff at these facilities after VOA became aware of their treatment suggests that the interviews are not critical to VOA's defense. To show when VOA became aware of their treatment, VOA relies on plaintiff's correspondence mailed to VOA February 27, 2013. Yet it waited until it served its reply June 19, 2014, over 15 months later, to request authorizations for interviews and nowhere explains its delay.

Nothing indicates the New Jersey facilities examined or treated plaintiff before or after May 16, 2012, or NY Psychotherapy and Counseling Center before October 2012 or after January 2013, save its recommendations for weekly psychotherapy and for medication management. Now, over two years after plaintiff's brief visits to the New Jersey facilities, and 18-22 months after visits to NY Psychotherapy and Counseling Center, VOA does not suggest that any of these facilities' physicians will recall any more than their records already disclose. Reich v. Reich, 36 A.D.3d 506, 507 (1st Dep't 2007); Bustos v. Lenox Hill Hosp., 29 A.D.3d 424, 426 (1st Dep't 2006); Rosenberg v. Scaringi, 279 A.D.2d at 390.

Nothing indicates the New Jersey facilities' physicians even were aware of plaintiff's 2005 injuries claimed in this action, to explain how his May 2012 back pain related to his 2005 injuries. Thus, regardless of the lapse in time, it is questionable whether interviews of such physicians would be at

all useful to determining the connection between their examination or treatment in 2012 and plaintiff's condition resulting from his 2005 injuries. N. Lupe Development Partners, LLC v. Pacific Flats I, LLC, ___ A.D.3d ___, 2014 WL 2882851 (1st Dep't June 26, 2014); Phoenix Life Ins

inson Ins. Trust II, 70 A.D.3d 476, 477 (1st Dep't 2010); Monica W. v. Milevoi, 252 A.D.2d 260, 263-64 (1st Dep't 1999). In view of all the evidence from 2005 to 2014 regarding his 2005 injuries, including the complete records of his May 2012 hospitalization and ensuing psychotherapy, when a different psychiatrist may have evaluated or treated plaintiff at each visit, it is likewise questionable whether an interview of any psychiatrist would be any more useful than the psychiatrist's records. Reich v. Reich, 36 A.D.3d at 507; Bustos v. Lenox Hill Hosp., 29 A.D.3d at 426; Rosenberg v. Scaringi, 279 A.D.2d at 390. See Bermel v. Dagostino, 50 A.D.3d 303, 304 (1st Dep't 2008); Esteva v. Catsimatidis, 4 A.D.3d 210, 211 (1st Dep't 2004); Capati v. Crunch Fitness Intl., 295 A.D.2d 181 (1st Dep't 2002).

VOA of course is free to move to compel authorizations for interviews of specified physicians from Atlantic Care Regional Medical Center, Atlantic City Hospital, and NY Psychotherapy and Counseling Center. VOA nevertheless will need to explain its delay in seeking that relief, when the trial is scheduled to begin September 15, 2014; its efforts to resolve the relief sought, 22 N.Y.C.R.R. § 202.7(a) and (c); and its substantial

prejudice if it does not obtain that relief. 22 N.Y.C.R.R. § 202.21(d). In that light, plaintiff may decide to authorize a specified attorney for VOA expressly to interview identified physicians who treated plaintiff May 16, 2012, at the New Jersey facilities and during the period of his visits at NY Psychotherapy and Counseling Center since the note of issue. 45 C.F.R. § 164.508(c); Arons v. Jutkowitz, 9 N.Y.3d at 414. Finally, since the authorizations pursuant to 45 C.F.R. § 164.502(a)(1)(iv) encompass health information held or transmitted by a physician "in any form or medium, whether electronic, paper or oral," Arons v. Jutkowitz, 9 N.Y.3d at 413; see 45 C.F.R. § 160.103, defendants well may succeed in interviewing such physicians without authorizations for that express purpose. E.g., Poser v. Varnovitsky, 46 A.D.3d 1295, 1296 (3d Dep't 2007). See Straub v. Yalamanchili, 58 A.D.3d 1050, 1051-52 (3d Dep't 2009). In the event of any interview, VOA's identity and interest must be revealed, and the interview must be entirely voluntary and limited to the medical conditions claimed in this action. Arons v. Jutkowitz, 9 N.Y.3d at 410, 416 n.6; Muriel Siebert & Co., Inc. v. Intuit Inc., 8 N.Y.3d 506, 511-12 (2007); Niesig v. Team I, 76 N.Y.2d 363, 376 (1990); Porcelli v. Northern Westchester Hosp. Ctr., 65 A.D.3d 176, 185 (2d Dep't 2009).

III. EMPLOYMENT RECORDS

While also not sought in VOA's motion via the order to show cause, VOA refers to having sought from plaintiff an

authorization for records from his last employment at RAV Security ending in March 2008, which he did not reveal in his deposition testimony of his last employment, but did reveal in his litigation regarding his hospitalization and incarceration in New Jersey. Once again plaintiff agrees to provide an authorization for records of his employment at RAV Security, 42 West 28th Street, New York County, ending in March 2008, within 20 days.

IV. CONCLUSION

Consistent with plaintiff's agreement, the court grants the motion by defendant Volunteers of America - Greater New York, Inc., to the extent that plaintiff shall provide the authorizations specified above within 20 days after this defendant's service of this order with notice of entry, and otherwise denies its motion. C.P.L.R. §§ 3122(a), 3124; 22 N.Y.C.R.R. § 202.21(d). These authorizations are for the records of Dr. Jean-Felix, Dr. Mack, Woodhull Medical and Mental Health Center, Kings County Hospital Center, Atlantic Care Regional Medical Center, Atlantic City Hospital, and NY Psychotherapy and Counseling Center regarding their examination and treatment of plaintiff since the note of issue and records of RAV Security regarding his employment. Delay in serving this order with notice of entry shall not be a basis for delaying the trial scheduled to begin September 15, 2014.

As further agreed, the parties shall appear for a pretrial conference in Part 46 August 15, 2014, at 9:30 a.m. 22

N.Y.C.R.R. § 202.26. This decision constitutes the court's order.

DATED: July 3, 2014

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.