

Kennedy v Northern Westchester Hosp.
2014 NY Slip Op 32985(U)
July 7, 2014
Supreme Court, Westchester County
Docket Number: 50157/2013
Judge: Joan B. Lefkowitz
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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
DOUGLAS KENNEDY and MOLLY KENNEDY,

Plaintiffs,

-against-

NORTHERN WESTCHESTER HOSPITAL,
CARI LUCIANO, STEVE LUCIANO and
ANNA LANE,

Defendants.

-----X
CARI LUCIANO and ANNA LANE,

Plaintiffs,

-against-

DOUGLAS KENNEDY,

Defendant.

-----X
LEFKOWITZ, J.

DECISION & ORDER

Index No. 50157/13
Motion Date: July 7, 2014

Action No. 1

Seq. Nos. 4 & 5

Index No. 69514/12

Action No. 2

The following papers were read on separate motions by defendant Northern Westchester Hospital and by defendants Cari Luciano and Anna Lane in Action No. 1 for an order compelling the further depositions of plaintiffs Douglas Kennedy and Molly Kennedy, and directing plaintiffs to answer certain depositions questions which they were directed not to answer by their counsel on the ground of spousal privilege.

Seq. No. 4

Order to Show Cause - Affidavit in Support of David S. Poppick, Esq.

- Exhibits A-I

Memorandum of Law in Support

Affirmation in Opposition of Rebecca G. Newman, Esq. - Exhibits A-E

Seq. No. 5

Affirmation in Support of Anthony Venditto, Esq. - Exhibit A

Affirmation in Opposition of Rebecca G. Newman, Esq. - Exhibit A-E

Upon the foregoing papers and the proceedings held on July 7, 2014, it is ordered that the motions are decided as follows:

The present actions arise out of an incident which occurred at Northern Westchester Hospital (hereinafter "the hospital") on January 2, 2012, when Douglas Kennedy attempted to leave the hospital with his newborn baby against the requests of nurses Cari Luciano and Anna Lane and the resulting altercation between Douglas Kennedy and the nurses. In Action No. 1, plaintiffs Douglas Kennedy and Molly Kennedy (hereinafter "Kennedy plaintiffs") allege claims for assault, battery, negligence, personal injuries and defamation against Lane, Luciano and Luciano's husband. The claims against the hospital in Action No. 1 include the following claims: vicarious liability for defamation by Lane and Luciano; negligence per se; breach of duty to maintain the confidentiality of medical information pursuant to the Health Insurance Portability and Accountability Act ("HIPAA"); negligent hiring, supervision and retention; and violation of civil and/or constitutional rights to the custody of their infant son.

The Kennedy plaintiffs were each deposed on January 7, 2012. Douglas Kennedy testified about the subject incident, including that Dr. Timothy Haydock, a friend of the Kennedy's and an off-duty physician in the hospital's Emergency Department, was in Molly Kennedy's room when a discussion was held about taking the Kennedy's infant son outside for "fresh air." Douglas Kennedy also testified that both Molly Kennedy and Dr. Haydock agreed that it was a great idea. He then carried his infant son in his arms into the hallway and told one of the nurses that he wanted to take the baby outside, and the nurse responded "let's see if we can work something out" and that it would be best to put the baby in a bassinet. There was also a discussion about the security bracelet. He then went to Molly Kennedy's room and brought the bassinet to the nurses' station and removed the baby's security bracelet while the nurses discussed his request. He further testified that while he was waiting for "negotiations to end," nurse Lane told him he could not go outside with the baby and the conversation became confrontational. He then walked toward the elevator with his infant son in his arms. He was accompanied by Dr. Haydock. He testified that at the elevator, both Lane and Luciano prevented him from leaving the floor by holding the elevator doors open. Douglas Kennedy also testified that he then walked toward the stairs and Lane stood in front of the door to the stairwell. There was a physical altercation and he then returned with his infant son to Molly Kennedy's room. He did not remember if anyone else went into the room.

Douglas Kennedy further testified that he may have had a "brief exchange" with Molly Kennedy, and "said something about a crazy nurse" and conveyed that he did not make it outside. He denied describing the events to her that night. When asked if he ever described the events to Molly Kennedy, plaintiffs' counsel allowed him to answer as to when and where "without waiving any spousal privilege." Douglas Kennedy then testified that he "went into full detail later on that week and probably gave her other details that night and maybe the next morning." In response to the question "Did you give her details that night?," plaintiffs' counsel then instructed Douglas Kennedy not to disclose any specifics about any conversations, other than there was a conversation, the subject was the incident, and when it took place. Douglas Kennedy then testified that he had given her details the night of the incident and later in the week. Douglas Kennedy also testified that he made public statements about the incident.

Molly Kennedy testified that there was a discussion about taking their infant son outside on the night of the incident, and remembered thinking it was a great idea. She did not recall whether she said anything to Douglas Kennedy when he returned to her room, or whether she asked any questions. Molly Kennedy also testified that she discussed the hospital's response to the meeting regarding her HIPAA complaint with Douglas Kennedy. The following question regarding about the substance of the conversation was blocked by plaintiff's counsel on the ground of spousal privilege.

Defendants in Action No. 1 (hereinafter "defendants") now move to compel further depositions of the Kennedy plaintiffs since plaintiffs' counsel directed the Kennedy plaintiffs not to answer certain deposition questions based upon the spousal privilege set forth in CPLR 4502 (b). Defendants contend that plaintiffs' counsel improperly blocked the deposition questions since the questions did not concern confidential communications and were directly related to the chain of events and facts at issue in Action No. 1 which were affirmatively placed into controversy by the Kennedy plaintiffs' complaint. Defendants further contend that the incident and facts regarding it are not confidential since the subject incident occurred in the presence of several witnesses, was widely publicized in the media, was the subject of a criminal trial against Douglas Kennedy, and Douglas Kennedy publicly discussed the incident. Moreover, defendants contend that even if the spousal privilege applied, the Kennedy plaintiffs waived the privilege since they answered some questions about what they discussed with each other about the events.

Defendants also seek a further deposition of Molly Kennedy with respect to the Health Information Privacy Complaint filed on behalf of Molly Kennedy and her infant son with the U.S. Department of Health and Human Services Office for Civil Rights. Defendants contend that the Civil Rights Complaint was produced for the first time at Molly Kennedy's deposition and the hospital's attorney did not have an opportunity to review the document. Defendant hospital reserved the right to recall Molly Kennedy to answer questions about the document and the subjects include in it. Defendants contend that although plaintiffs have consented to further questions, plaintiffs' counsel is seeking to limit the questions to the four corners of the document.

Plaintiffs filed an affirmation in opposition. The affirmation in opposition, however, only details the efforts of the parties to enter into a stipulation as to the further depositions. Plaintiffs do not discuss defendants' contentions regarding plaintiffs' further depositions. Notably, plaintiffs fail to discuss or refute defendants' contentions that the conversations between plaintiffs regarding the subject incident and the Civil Right Complaint are not protected from disclosure by a spousal privilege or that any such privilege was waived by plaintiffs. The exhibits annexed to plaintiffs' opposition consist only of emails and proposed stipulations regarding plaintiffs' further depositions. Plaintiffs' counsel asserts that counsel for defendants Luciano and Lane indicated that they did not intend to review the revised stipulation until after the deadline for the present motion. In the affirmation in opposition, plaintiffs recognize that the issue of compelling dates for two witnesses on behalf of the hospital, namely Maria Hale and Joel Seligman, is not the subject of this motion, but nonetheless ask the court to so-order the draft stipulation. The draft stipulation provides for, with a reservation of rights as to spousal privilege, a further deposition of plaintiffs as to the following: (1) Molly Kennedy's Office of Civil Rights

Complaint, including conversations between plaintiffs regarding the complaints; (2) discussions between plaintiffs concerning the subject incident; (3) discussions between plaintiffs concerning the March 30, 2012 correspondence from the hospital to Molly Kennedy; and (4) discussions between plaintiffs immediately following the subject incident in Molly Kennedy's room. The draft stipulation limits the further depositions to four hours and provides that the hospital shall produce Maria Hale and Joel Seligman for depositions. Finally, plaintiffs request the court address the other outstanding deposition issues, including Douglas Kennedy's employment file and economic damages.

Pursuant to the Uniform Rules of the Trial Courts [22 NYCRR] § 221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR 3115 (see *Parker v Ollivierre*, 60 AD3d 1023 [2d Dept 2009]). Additionally, Uniform Rules of the Trial Courts [22 NYCRR] § 221.1(b) provides that “[s]peaking objections [are] restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.” “[G]enerally, the proper procedure is to allow a witness to answer all questions subject to objections which are reserved for trial in accordance with CPLR 3115” (*Walter Karl, Inc. v Wood*, 161 AD2d 704, 706 [2d Dept 1990]).

In the present case, plaintiffs' counsel has failed to demonstrate that the questions blocked at the plaintiffs' depositions were palpably improper and would cause significant prejudice. Notably, plaintiffs' counsel fails to even argue in opposition to the motions that a spousal privilege attached to plaintiffs' conversations regarding the subject incident or Molly Kennedy's Civil Rights Complaint.

CPLR 4502 (b) provides that a husband and wife shall not be required to disclose confidential communication made by one to the other during marriage. The burden of establishing that certain communications are privileged and protected from discovery under the spousal privilege is on the party asserting the privilege (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]). The issue of whether a spousal communication is confidential and subject to a privilege under CPLR 4502 (b) is a question of fact for the court (*People v Wilson*, 64 NY2d 634 [1984]; *People v Dudley*, 24 NY2d 410 [1969]). The privilege is not designed to protect the daily and ordinary exchanges between the spouses, but only those “which would not have been made but for the absolute confidence in, and induced by, the marital relationship” (*People v Wilson*, 64 NY2d at 636, quoting *People v Melski*, 10 NY2d 78, 80 [1961]). Such confidential communications are those communications which “[i]t cannot be supposed that both husband and wife would have been willing to discuss ... in the presence of other persons or would have consented to a repetition of the conversation by either party ...” (*Warner v Press Pub. Co.*, 132 NY 181, 186 [1892]; quoted by *People v Melski*, 10 NY2d at 81). Moreover, where spousal communications are made in the presence of others, the privilege is waived (*People v Scalise*, 70 AD2d 346 [3d Dept 1979]).

As noted earlier, plaintiffs have failed to meet their burden that the plaintiffs' conversations as to the subject incident were confidential and subject to the spousal privilege. In any event, in light of the fact that Douglas Kennedy conceded that he made public statements about the subject incident, and plaintiffs have failed to establish that the communications were not made in the presence of others, it cannot be said that those communications are entitled to protection from disclosure. Moreover, insofar as plaintiffs allege a claim against the hospital for violation of HIPAA as to Molly Kennedy, plaintiffs have waived any privilege which might attach to their communications with respect to her Civil Rights Complaint (*Prink v Rockefeller Ctr.*, 48 NY2d 309, 316-318 [1979]).

Plaintiffs' request in their opposition papers for relief with respect to other discovery issues is denied as those issues are not properly before this court for determination.

In view of the foregoing, it is

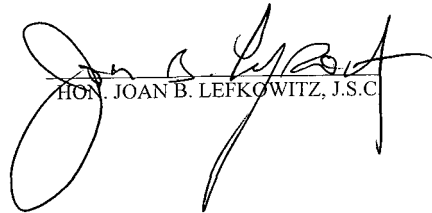
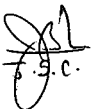
ORDERED that defendants' motions are granted and plaintiffs are directed to appear for a further deposition on or before August 1, 2014, and answer (1) all questions improperly blocked by plaintiffs' counsel and any follow up questions arising from those answers to those questions regarding plaintiffs' communications regarding the subject incident and Molly Kennedy's Civil Rights Complaint, and (2) questions regarding Molly Kennedy's Civil Rights Complaint; and it is further

ORDERED that plaintiffs' request for relief as to discovery issues set forth in their opposition papers are denied; and it is further

ORDERED that counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on ~~August 5~~, 2014 at 9:30 A.M.

July 16

Dated: White Plains, New York
July 7, 2014


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

TO:

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