Palmer v Cervone
2015 NY Slip Op 31192(U)
July 6, 2015
Supreme Court, Suffolk County
Docket Number: 11-23187
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 11-23187

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-30-14 (#004)
MOTION DATE 10-31-14 (#005)
MOTION DATE 10-28-14 (#006 & #007)
ADJ. DATE 1-6-15
Mot. Seq. # 004 - MG
005 - XMotD
006 - XMD
007 - XMD

BOBBI-SUE PALMER,

Plaintiff,

- against -

AGOSTINO CERVONE, M.D., MARY JACOBS, R.N.F.A., PECONIC SURGICAL GROUP, P.C., EASTERN LONG ISLAND HOSPITAL and PECONIC BAY MEDICAL CENTER,

Defendants.

IRA M. PERLMAN, ESQ.
Attorney for Plaintiff
55 Bryant Avenue, Penthouse Suite
Roslyn, New York 11576

KERLEY, WALSH, MATERA & CINQUEMANI, P.C.
Attorney for Defendant Jacobs R.N.F.A.
2174 Jackson Avenue
Seaford, New York 11783

GABRIELE & MARANO, LLP
Attorney for Defendants Cervone, M.D. & Peconic Surgical Group
100 Quentin Roosevelt Blvd, P.O. Box 8022
Garden City, New York 11530

FUMUSO KELLY DEVERNA SNYDER
Attorney for Defendant ELIH
110 Marcus Boulevard
Hauppauge, New York 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Eastern Long Island Hospital, dated August 27, 2014, and supporting papers (including Memorandum of Law dated _); (2) Notice of Cross Motion by the defendant Agostino Cervone, M.D. and Peconic Surgical Group, P.C., dated October 10, 2014, and supporting papers; (3) Notice of Cross Motion by the defendant Mary Jacobs, R.N.F.A., dated October 10, 2014, and supporting papers; (4) Notice of Cross Motion by the defendant Eastern Long Island Hospital, dated October 20, 2014, and supporting papers; (5) Affirmation in Opposition by the plaintiff, dated November 17, 2014, and supporting papers; (6) Reply Affirmation by the defendant Eastern Long Island Hospital, dated November 17, 2014, and supporting papers; (7) Reply Affirmation by the defendant Agostino Cervone, M.D. and Peconic Surgical Group, dated November 25, 2014, and supporting papers; and now

BB

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendant Eastern Long Island Hospital for a protective order quashing the plaintiff's demand for a deposition of one of its administrators and suspending discovery in the matter is granted; and it is

ORDERED that the cross motion by the defendants Agostino Cervone, M.D., and Peconic Surgical Group, P.C., for, inter alia, a protective order quashing the plaintiff's demand for a deposition of an administrator of Eastern Long Island Hospital and compelling the plaintiff to provide ***Arons*** authorizations with less restrictions is granted to the extent that a protective order is granted denying the plaintiff a deposition of an administrator from Eastern Long Island Hospital and the requested documentation sought in the supplemental notice for discovery and inspection dated March 28, 2014, and is otherwise denied; and it is

ORDERED that the cross motion by the defendant Mary Jacobs, R.N.F.A., seeking summary judgment dismissing the complaint against her is denied, as moot; and it is further

ORDERED that the cross motion by the defendant Eastern Long Island Hospital for an order compelling the plaintiff to provide the requested HIPAA-compliant authorizations is denied.

The plaintiff Bobbi-Sue Palmer commenced this action against the defendants Agostino Cervone, M.D., Mary Jacobs, R.N.F.A., Peconic Surgical Group, P.C., Eastern Long Island Hospital and Peconic Bay Medical Center[1] to recover damages for medical malpractice and lack of informed consent. By her complaint, the plaintiff alleges, among other things, that the defendants were negligent in the performance of a laparoscopic cholecystectomy on February 10, 2009. The plaintiff further alleges that during the surgery at Eastern Long Island Hospital, Dr. Cervone clipped the common bile duct, which resulted in a bile duct transection and bile leakage, and subsequent surgeries to repair the transection.

Eastern Long Island Hospital now moves for a protective order quashing the plaintiff's demand for a deposition of one of its administrators. Specifically, Eastern Long Island Hospital argues that the demand for a deposition of an administrator regarding the criteria for a physician's privileges to perform surgery at the hospital is palpably improper and is not subject to disclosure under Public Health Law § 2085 and Education Law § 6527. In addition, Eastern Long Island Hospital asserts that it was not on notice that a single incision technique for a laparoscopic cholecystectomy would be performed by Dr. Cervone during the plaintiff's surgery on February 10, 2009. In support of the motion, Eastern Long Island Hospital submits copies of the pleadings, the parties' deposition transcripts, and the affidavits of Patricia Pispisa, Vice President of Patient Care Services of Eastern Long Island Hospital, and Courtney Meringer, Medical Staff Coordinator at Eastern Long Island Hospital. Eastern Long Island also submits uncertified copies of the plaintiff's medical records and its responses to the plaintiff's second supplemental notices for discovery and inspection dated March 28, 2014 and April 15, 2014.

---

[1] By stipulation dated October 2, 2012, the action was discontinued as against the defendant Peconic Bay Medical Center only.

Dr. Cervone and Peconic Surgical Group (hereinafter collectively referred to as the "Cervone defendants") cross-move for a protective order quashing a subpoena ad testificandum for a deposition of an administrator of Eastern Long Island Hospital. They also move against providing the plaintiff with responses to certain items contained in a notice of discovery and inspection dated March 28, 2014. In particular, the Cervone defendants argue that such requests are palpably improper, because information that is privileged and outside the scope of the lawsuit is being sought by the discovery requests. Additionally, the Cervone defendants seek to compel the plaintiff to provide authorizations pursuant to ***Arons v Jutkowitz***, 9 NY3d 393, 850 NYS2d 345 (2007), for Dr. Elisa Thompson and Mark Hanson, P.A. that do not include restrictions on their right to question said healthcare providers regarding the care and treatment rendered to the plaintiff prior to her 18th birthday. In support of the motion, the Cervone defendants submit copies of the pleadings, an excerpt of the plaintiff's deposition transcript, and the ***Arons*** authorizations containing the restrictions at issue. Eastern Long Island Hospital also cross-moves to compel the plaintiff to provide ***Arons*** authorizations without the restrictions at issue.

The plaintiff opposes the instant motions, arguing that, in light of the fact Dr. Cervone was unable to provide information regarding his training in the performance of single incision laparoscopic cholecystectomies or the number of such procedures he performed between 2008, when he began performing laparoscopic cholecystectomies using the single incision technique, and February 10, 2009 during his deposition testimony, the requested discovery is material and relevant. In addition, the plaintiff contends that Eastern Long Island Hospital is required to produce an administrator to testify as to what information Dr. Cervone was required to provide to the hospital's Credentialing Committee before he was granted privileges to perform single incision laparoscopic cholecystectomies, since Dr. Cervone was unable to recall any specific training in the technique of single incision laparoscopic cholecystectomies.

It is well settled that actions should be resolved on the merits whenever possible (***Careccia v Metro. Suburban Bus. Auth.***, 18 AD3d 793, 793, 796 NYS2d 678 [2d Dept 2005], *quoting* ***Cruzatti v St. Mary's Hosp.***, 193 AD2d 579,580, 597 NYS2d 457 [2d Dept 1993]; *see* ***O'Connor v Syracuse Univ.***, 66 AD3d 1187, 887 NYS2d 353 [3d Dept 2009], *lv denied* 14 NY3d 766, 898 NYS2d 92 [2010]). CPLR 3101 (a) states, in pertinent part, that there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof (*see* ***Cirale v 80 Pine Street Corp.***, 35 NY2d 113, 359 NYS2d 1 [1974]; ***Conte v Count of Nassau***, 87 AD3d 558, 929 NYS2d 741 [2d Dept 2011]). This provision has been liberally construed to provide disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Pub. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). The trial court has broad discretion to supervise discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice (*see* CPLR 3103(a); ***Andon v 302-304 Mott St Assocs.***, 94 NY2d 740, 709 NYS2d 873 [2000]; ***Congel v Malfitano***, 84 AD3d 1145, 924 NYS2d 129 [2d Dept 2011]). However, "the principle of "full disclosure" does not give a party the right to uncontrolled and unfettered disclosure" (***Buxbaum v Castro***, 82 AD3d 925, 925, 919 NYS2d 175, [2d Dept 2011], *quoting* ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 531, 845 NYS2d 124 [2d Dept 2007]).

Public Health Law § 2805-j requires hospitals to establish a coordinated program "for the identification and prevention of medical, dental and podiatric malpractice." As part of such program, hospitals must establish a quality assurance committee, whose responsibilities include reviewing services provided to patients in order to improve the quality of care provided by the hospital (Public Health Law § 2805-j [1]; *see* ***Logue v Velez***, 92

NY2d 13, 677 NYS2d 6 [1998]). Significantly, the documents, records and reports gathered by a hospital's quality assurance committee in connection with its responsibilities under Public Health Law § 2805-j and § 2805-k are exempt from the disclosure requirements of CPLR Article 31 (*see* Public Health Law § 2805-m; ***Logue v Velez***, *supra*). Similarly, Education Law § 6527 (3) exempts from Article 31 disclosure hospital proceedings and records related to the performance of medical review and quality assurance functions; records reflecting "participation in a medical and dental malpractice program;" and reports required by the Department of Health pursuant to Public Health Law § 2805-l (***Katherine F. v State of New York***, 94 NY2d 200, 204, 702 NYS2d 231 [1999]; *see* ***Logue v Velez***, *supra*; ***Marte v Brooklyn Hosp. Ctr.***, 9 AD3d 41, 779 NYS2d 82 [2d Dept 2004]; ***Bernholc v Kitain***, 294 AD2d 387, 741 NYS2d 736 [2d Dept 2002]).

However, these statutes do not protect statements by a physician participating in a quality assurance review who is a party to an action involving the medical care under review (*see* Education Law § 6527 [3]; Public Health Law § 2805-m; ***Santero v Kotwal***, 4 AD3d 464, 772 NYS2d 342 [2d Dept 2004]; ***Bryant v Bui***, 265 AD2d 848, 695 NYS2d 790 [4th Dept 1999]; ***Lakshmanan v North Shore Univ. Hosp.***, 202 AD2d 398, 610 NYS2d 528 [2d Dept 1994]), or documents prepared in connection with an investigation unrelated to the hospital's quality assurance review program or a malpractice prevention program (*see* ***Orner v Mount Sinai Hosp.***, 305 AD2d 307, 761 NYS2d 603 [1st Dept 2003]; ***Maisch v Millard Fillmore Hosps.***, 262 AD2d 1017, 692 NYS2d 536 [4th Dept 1999]). Further, a party claiming that hospital documents are protected by the privileges created by Education Law § 6527 (3) or Public Health Law § 2805-m must demonstrate that such records were prepared in accordance with the relevant statutes (*see* ***LaPierre v Jewish Bd. of Family & Children Servs., Inc.***, 47 AD3d 896, 850 NYS2d 595 [2d Dept 2008]; ***Kivlehan v Waltner***, 36 AD3d 597, 827 NYS2d 290 [2d Dept 2007]; ***Marte v Brooklyn Hosp. Ctr.***, *supra*). Thus, the burden of proving that records or other documentary evidence is exempt from disclosure under Public Health Law § 2805-m or Education Law § 6527 is on the party claiming the exemption (*see* ***Kivlehan v Waltner***, 36 AD3d 597, 827 NYS2d 290 [2d Dept 2007]; ***Marte v Brooklyn Hosp. Ctr.***, *supra*).

Here, Eastern Long Island Hospital and the Cervone defendants applications for a protective order to quash the plaintiff's demand for a deposition of an administrator from Eastern Long Island Hospital regarding the credentialing of a physician to be granted privileges at the hospital to perform a single incision laparoscopic cholecystectomy are granted. Dr. Cervone's initial and renewal applications for privileges at Eastern Long Island Hospital come within the definition of the materials that are made confidential by Education Law § 6527(3) and Article 28 of the Public Health Law. The affidavits of Patricia Pispisa, the Vice President of Patient Care Services of Eastern Long Island Hospital, and Courtney Meringer, the Medical Staff Coordinator at Eastern Long Island Hospital, who is a part of the medical executive committee that oversees the credentialing of physicians at Eastern Long Island Hospital, submitted in support of the protective order, establish that the documents contained in Eastern Long Island Hospital's file regarding Dr. Cervone's grant of privileges at its hospital were prepared as part of the hospital's medical quality and assessment review process. As such, the plaintiff is not entitled to the deposition of a person relating to those documents or files, since section 2805-m (2) of the Public Health Law exempts such documents from Article 31 disclosure requirements (*see* ***Meyer v Staten Is. Univ. Hosp.***, 106 AD3d 703, 965 NYS2d 512 [2d Dept 2013]; ***LaPierre v Jewish Bd of Family & Children Servs, Inc.***, 47 AD3d 896, 850 NYS2d 595 [2d Dept 2008]; ***Scinta v Van Coevering***, 284 AD2d 1000, 726 NYS2d 520 [2d Dept 2001]).

In opposition, the plaintiff has failed to demonstrate that the questioning of an administrator of Eastern Long Island Hospital relating to the granting of privileges to Dr. Cervone to perform single incision

laparoscopic cholecystectomies is material and necessary to the prosecution of the action merely because Dr. Cervone testified at an examination before trial that he did not recall receiving specific training in the single incision laparoscopic cholecystectomy technique (*see* Education Law § 6527(3); ***Seaman v Wyckoff Heights Med. Ctr.***, 25 AD3d 596, 807 NYS2d 409 [2d Dept 2006]). Nor has the plaintiff shown that Eastern Long Island Hospital waived its privilege by sharing information regarding the documents contained in the reports with a disinterested third-party, or that Dr. Cervone made statements in regards to the subject of the instant action outside of or during a formal quality review process involving the subject of the instant matter (*see* Public Health Law § 2805-m(2); ***Klingner v Mashioff***, 50 AD3d 746, 855 NYS2d 628 [2d Dept 2008]; ***VanBergen v Long Beach Med. Ctr.***, 277 AD2d 374, 717 NYS2d 191 [2d Dept 2000]; ***Crea v Newfane Inter-Community Mem. Hosp.***, 224 AD2d 976, 637 NYS2d 843 [4th Dept 1996]; *cf.* ***Mong v Children's Hosp.***, 259 AD2d 1038, 688 NYS2d 353 [4th Dept 1999]). Moreover, the plaintiff has failed to show that the deposition of an administrator of Eastern Long Island Hospital will provide information and knowledge that has not already been ascertained from the individuals that already have been deposed (*see* ***Conte v County of Nassau***, 87 AD3d 559, 929 NYS2d 742 [2d Dept 2011]; ***Spohn-Konen v Town of Brookhaven***, 74 AD3d 1049, 902 NYS2d 391 [2d Dept 2010]). Indeed, the evidence in the record establishes that Eastern Long Island Hospital was not on notice of either the performance of an single incision laparoscopic cholecystectomy by Dr. Cervone on February 10, 2009, or that the claimed complications and alleged injuries sustained by the plaintiff were reported to Eastern Long Island Hospital by Dr. Cervone prior to the commencement of the subject action. Accordingly, the applications by Eastern Long Island Hospital and the Cervone defendants for a protective order quashing the plaintiff's demand for a deposition of an administrator from the hospital regarding Dr. Cervone's privileges at the hospital are granted.

Regarding the branch of the Cervone defendants' motion to deny the plaintiff's March 2014 demand for the production of all documents related to Dr. Cervone's performance of single incision laparoscopic cholecystectomies, including, but not limited to, journals, logs, billing records, and operative reports between 2008 and February 10, 2009, with the names and identifying information of the patients redacted, the physician-patient privilege shields from disclosure confidential information obtained by a licensed medical professional "in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity," unless the patient waives the privilege (CPLR 4504; *see* ***Dillenbeck v Hess***, 73 NY2d 278, 539 NYS2d 707 [1989]; ***Williams v Roosevelt Hosp.***, 66 NY2d 391, 497 NYS2d 348 [1985]). Since the information sought by the plaintiff undoubtably contains personal information regarding nonparty patients, such as medical and surgical procedures, and is overly broad, the plaintiff is not entitled to the information, nor is such information material and necessary to the issues in the instant action (*see* CPLR §§ 4504, 3101; ***Blyashuk v Dhaliwal***, 99 AD3d 1222, 951NYS2d 441 [4th Dept 2012]; ***Brandes v North Shore Univ. Hosp.***, 1 AD3d 551, 767 NYS2d 648 [2d Dept 2003]; ***Beck v Albany Med. Ctr. Hosp.***, 191 AD2d 854, 594 NYS2d 844 [2d Dept 1993]; *cf.* ***Cole v Panos***, 128 AD3d 880, __ NYS3d __ [2d Dept 2015]). Accordingly, the branch of the Cervone defendants' motion for a protective order denying the plaintiff access to all documents relating to Dr. Cervone's performance of single incision laparoscopic cholecystectomies between 2008 and February 10, 2009 is granted.

As to the cross motion by Eastern Long Island Hospital and the branch of the Cervone defendants' motion to compel the plaintiff to produce less restrictive ***Arons*** authorizations for the plaintiff's primary care physician, Dr. Elisa Thompson, and P.A. Mark Hanson, both of whom treated the plaintiff prior to her 18th birthday for gastroesophageal reflux disease ("GERD"), "a litigant is deemed to have waived the physician-patient privilege, when, in bringing...a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue," and is required to provide the defendant with authorization permitting

an interview with the plaintiff's treating physicians or other healthcare providers (*see* ***Arons v Jutkowitz***, 9 NY3d 393, 850 NYS2d 345 [2007]; ***Porcelli v Northern Westchester Hosp. Ctr.***, 65 AD3d 176, 882 NYS2d 130 [2d Dept 2009]; ***Braganza v Harding***, 50 AD3d 1078, 858 NYS2d 218 [2d Dept 2008]). Here, the plaintiff has instituted a cause of action for medical malpractice due to the alleged negligent performance of a single incision laparoscopic cholecystectomy, affirmatively placing her physical condition at issue. However, the plaintiff's testimony at an examination before trial that she was diagnosed with GERD when she was 14 years old cannot be deemed to be relevant to any issue in the subject medical malpractice action, since the plaintiff's claims hinge on the fact that Dr. Cervone negligently performed the laparoscopic cholecystectomy that she underwent on February 10, 2009, and not on any failure to diagnose or treat; nor is such condition material to any defense that either Eastern Long Island Hospital or the Cervone defendants may assert (*see* ***Davidov v Searles***, 84 AD3d 859, 923 NYS2d 180 [2d Dept 2011]; ***Thompson v Pibly Residential Programs, Inc.***, 69 AD3d 453, 892 NYS2d 395 [1st Dept 2010]). Thus, the plaintiff's diagnosis with GERD at the age of 14 does not directly relate or correlate to any specific physical condition that has been placed at issue in this action, and cannot serve as a basis for obtaining the plaintiff's medical records or information prior to her 18th birthday; and as a result, the date restrictions placed on the ***Arons*** authorizations for Dr. Thompson and P.A. Hanson that already have been executed by the plaintiff will not hinder either defendant in their defense of the matter (*see* ***Gumbs v Flushing Town Ctr. III, L.P.***, 114 AD3d 573, 981 NYS2d 394 [1st Dept 2014]; ***Chervin v Macura***, 28 AD3d 600, 813 NYS2d 746 [2d Dept 2006]; ***McLane v Damiano***, 307 AD2d 338, 762 NYS2d 814 [2d Dept 2003]).

Eastern Long Island Hospital's and the Cervone defendants' arguments regarding the attachment of the bill of particulars to the ***Arons*** authorizations is without merit, since notice of certain limitations may be placed on the authorizations as a way to help frame the issues in controversy in the action for the plaintiff's treating physicians (*see* ***Arons v Jutkowitz***, *supra*; ***Geico v Kaleida Health***, 82 AD3d 1671, 919 NYS2d 443 [4th Dept 2011]; ***Porcelli v Northern Westchester Hosp. Ctr.***, *supra*). Furthermore, "an attorney who approaches a nonparty treating physician must simply reveal the client's identity and interest, and make clear that any discussion with counsel is entirely voluntary and limited in scope to the particular medical condition at issue in the litigation" (***Arons v Jutkowitz***, *supra*). Accordingly, the applications by the defendants for an order compelling the plaintiff to execute less restrictive ***Arons*** authorizations are denied.

Lastly, the defendant Jacobs cross-moves for summary judgment on the basis that she did not depart from good and acceptable nursing practice while assisting Dr. Cervone during the performance of the single incision laparoscopic cholecystectomy on February 10, 2009. The defendant Jacobs further asserts that her actions during the procedure were not a proximate cause of any of the plaintiff's alleged injuries. In support of the motion, the defendant Jacobs submits copies of the pleadings, the parties' deposition transcripts, uncertified copies of the plaintiff's medical records, and the affidavit of her expert witness, Barbara Messina, R.N., Ph.D. The plaintiff has not submitted any evidence in opposition to the defendant Jacobs' motion.

The defendant Jacobs' motion for summary judgment in her favor is denied, as moot. On November 17, 2014, after the submission of the instant motions, the plaintiff executed a stipulation discontinuing her claim against the defendant Jacobs.

Dated: 2/6/15

PETER H. MAYER, J.S.C.