

Angel v Rubin

2015 NY Slip Op 31369(U)

July 17, 2015

Supreme Court, New York County

Docket Number: 805044/2013

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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VALERIE ANGEL, as the Administratrix for the Estate of
NEIL H. ANGEL and VALERIE ANGEL, Individually,

Plaintiffs,

Index No. 805044/2013

-against-

Decision and Order

MOSHE RUBIN, M.D., MOSHE RUBIN, M.D., PLLC
and FIFTH AVENUE SURGERY,

Defendants.

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JOAN B. LOBIS, J.S.C.:

In this medical malpractice and wrongful death action, plaintiff alleges that defendants Moshe Rubin, M.D., a gastroenterologist and Moshe Rubin, M.D., PLLC (“Dr. Rubin”) negligently treated his Crohn’s disease between April 15, 2010, and August 9, 2012. Allegedly, in particular, plaintiff-decedent (“Mr. Angel”) died from a gastrointestinal bleed on August 10, 2012, less than 24 hours after his August 9, 2012, visit to Dr. Rubin.

In the course of discovery, plaintiff provided Mr. Angel and the doctor’s email correspondence from April 2012 and the days immediately preceding Mr. Angel’s August 9, 2012, appointment. As is relevant here, on August 6, 2012, Mr. Angel wrote:

. . . So if you want to scope me again, please schedule it for as soon as possible. I even considered going into Flushing Hospital for exhaustion as an in-patient. Would that make it any easier for you to schedule the procedure quickly?

The next morning, Dr. Rubin wrote:

The next morning, Dr. Rubin wrote:

I can see you in the office today, tomorrow or we can admit you – whatever you prefer.

In response, Mr. Angel stated:

Is it your intention to scope me? Can we just schedule that w/o the office consult? With what I have told you about my symptoms, should I be admitted?

On August 7, Dr. Rubin informed him:

Neil I can't tell you that without seeing you in person/ you can come to the city or Queens late in the day/ if you feel too sick, come to my er and I will admit you

Through a series of other emails, the parties scheduled the August 9, 2012, appointment. In his notes for that appointment, Dr. Rubin wrote, "Check stat CBC will likely need to be admitted may need transfusion no evidence of dehydration on exam although baseline blood pressure is low we'll need colonoscopy. Does not want to go to er." Mr. Angel did not go to the hospital, but he subsequently was rushed to the hospital and, as stated, he died the following day.

Currently, Dr. Rubin moves for an order compelling discovery of "non-privileged communications, including phone records (home and cell), e-mails, and text messages limited to the 14 or 16 hour period after the decedent was seen by Dr. Rubin on August 9, 2012." At a

compliance conference on March 3, 2015, this Court informed counsel that it deemed this discovery irrelevant, but allowed him 10 days to make this motion. Dr. Rubin argues that his note for the August 9, 2012, visit shows that he advised Mr. Angel to go to the hospital but that Mr. Angel refused, and that Mr. Angel's communications from the visit to his death will shed light on this issue and refute Ms. Angel's testimony that Dr. Rubin not only did not tell him to go to the hospital but actively dissuaded him from doing so. Dr. Rubin states that the August emails show he offered to admit Mr. Angel to the hospital. Dr. Rubin states that the emails may resolve the question of why Mr. Angel did not go to the hospital, why he emailed to Dr. Rubin that he would not undergo a colonoscopy until the following week, why he told Ms. Angel, his wife, that the doctor was awaiting the blood tests before deciding whether he had to be admitted to the hospital, and why Ms. Angel 1) told a paramedic her husband had refused to be admitted to a hospital for six days, and 2) told an investigator that her husband had undergone a colonoscopy the day before he died. It also says the correspondence and cell phone records may reveal whether Mr. Angel went to work on August 9, 2012. Citing several cases, he argues that cell phone records are discoverable. He stresses that he seeks discovery limited to a 14-hour period, and that plaintiff has not sought a protective order. He concludes that plaintiff therefore should produce these records for "the 24-hour {sic} period prior to the decedent's death."

Plaintiff opposes the motion, claiming there is no merit to the demands at issue. First, she asserts that she already have provided the emails in dispute. Moreover, she argues, Dr. Rubin's demands for cell phone and text messages should be denied because he has not set forth a sufficient basis for the demand. Instead, he merely speculates that there may have been further communication and the communications may be relevant. Furthermore, at her deposition plaintiff

stated that her husband never texted her about his condition. The record of the cell phone calls, she notes, would only include information regarding whom Mr. Angel called and when, and would not answer any of the questions Dr. Rubin has posed. In such circumstances, she asserts, courts do not allow for the disclosure of cell phone records.

In reply, Dr. Rubin points out that he has acknowledged plaintiff's production of emails prior to August 9, 2012, but that he currently seeks additional emails, along with cell phone records, for the "12-14 hour period after the decedent left Dr. Rubin's office." He claims that plaintiff incorrectly relies on portions of her deposition testimony that either are irrelevant to the issue at hand or that contradict other evidence in this lawsuit. He states that plaintiff relies on inapplicable case law in support of her contention that there must be a reasonable basis for the discovery demand.

"There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" CPLR § 3101(a). Although discovery cannot be used to conduct "a fishing expedition when [a party] cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions," Chappo & Co., Inc. v. Ion Geophysical Corp., 83 A.D.3d 499, 500-01 (1st Dep't 2011), courts allow discovery as long as there is a sufficient basis for the request and it is not unduly burdensome to the nonmoving party. Using this liberal standard, Dr. Rubin has articulated a sufficient basis for his request. In particular, the doctor's notes on August 9, 2012, indicate that he advised Mr. Angel to go to the hospital and that Mr. Angel chose not to do so. Plaintiff, Mr. Angel's widow, challenges the doctor's notes on this critical issue, and as Mr. Angel is deceased neither party can obtain any elucidation from him. Moreover, the lawsuit

revolves in part around this critical issue. Similarly, the discovery already produced – that is, the emails and records prior to the August 9, 2012 visit – cannot illuminate the events that occurred during and after the visit.

In response, plaintiff has not articulated a sufficient reason for denying the request. She states the discovery is not necessary because she already has provided the materials in question. This is incorrect, as she mistakenly refers to the records prior to rather than after the August 9, 2012, visit. Thus, this objection is not pertinent. Moreover, Dr. Rubin tailored the demand to the issue at hand, does not seek privileged material, and is limited to the 14-hour period immediately following the August 9, 2012 appointment.¹ Plaintiff's additional contentions – including that the discovery is not useful and that plaintiff did not receive calls or messages from her husband – are insufficient to rebut Dr. Rubin's arguments.

As there is a sufficient basis for the request, the search is not burdensome, and plaintiff has not articulated a valid argument in support of denying the relief, it is

ORDERED that the motion is granted; and it is further

ORDERED that, within 30 days of the date of the filing of this order, plaintiff shall provide non-privileged home and cell phone records, along with e-mails and text messages, limited

¹ Dr. Rubin variously states that he seeks 14-16 hours, 14 hours, 24 hours, and 12-14 hours of records.

to the 14-hour period immediately after the decedent's August 9, 2012 appointment with Dr. Rubin.

Dated: *July 17, 2015*

ENTER:



JOAN B. LOBIS, J.S.C.