

**Mullen v Wishner**

2016 NY Slip Op 31822(U)

April 12, 2016

Supreme Court, Suffolk County

Docket Number: 28687/2008

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 28687/2008

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_  
ALLISON MULLEN,

Plaintiff,

-against-

STEVEN G. WISHNER and HUNTINGTON  
MEDICAL GROUP,

Defendants.  
\_\_\_\_\_

ORIG. RETURN DATE: JUNE 18, 2015  
FINAL SUBMISSION DATE: JULY 30, 2015  
MTN. SEQ. #: 011  
MOTION: MD

ORIG. RETURN DATE: JUNE 18, 2015  
FINAL SUBMISSION DATE: JULY 30, 2015  
MTN. SEQ. #: 012  
MOTION: MD

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**NON-PARTY:**  
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Upon the following papers numbered 1 to 12 read on these motions \_\_\_\_\_  
FOR A JUDICIAL SUBPOENA DUCES TECUM AND NON-PARTY DISCOVERY  
Notice of Motion and supporting papers 1-3; Notice of Motion and supporting papers 4-6;  
Amended Notice of Motion 7; Affirmation in Opposition 8; Affirmation in Opposition 9;  
Reply Affirmation 10; Reply Affirmation 11; Other So-Ordered Stipulation dated 6/18/15-  
12; it is,

**ORDERED** that this motion (seq. #011) by defendant, STEVEN G. WISHNER ("WISHNER"), for an Order:

(1) declaring non-party witness, MAVIS AGUILAR, to have waived her physician-patient and HIPAA confidentiality and privacy rights with regard to care and treatment provided by WISHNER and co-defendant, HUNTINGTON MEDICAL GROUP, P.C. ("HMG"), and permitting co-defendant to provide counsel for WISHNER, with a copy of her medical records maintained by said practice; or, alternatively

(2) granting a "So-Ordered" Subpoena and directing non-party witness, MAVIS AGUILAR, to execute an authorization permitting counsel for defendants to obtain a copy of her medical records maintained by HMG; or, alternatively

(3) precluding all evidence regarding non-party witness, MAVIS AGUILAR, from the trial of this action, including preclusion of MAVIS AGUILAR from testifying at the trial of this action,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

**ORDERED** that this amended motion (seq. #012) by HMG for an Order:

(1) deeming non-party witness, MAVIS AGUILAR, to have waived her physician-patient privilege with regard to care and treatment provided by HMG and thereby permitting HMG to provide its defense counsel, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP with a copy of her patient file so that HMG may fully and properly prepare its defense in this matter; or, in the alternative

(2) granting a "So-Ordered" Subpoena directing MAVIS AGUILAR to execute a HIPAA-compliant, OCA-approved authorization in the forms annexed to HMG's moving papers as Exhibit "F" so that HMG may fully and properly prepare its defense in this matter; or, in the alternative

(3) precluding MAVIS AGUILAR from testifying at the time of trial of this action; and

(4) holding in abeyance the non-party deposition of Fred Weinstein, a former Chief Executive Officer of HMG, pending a decision on those portions of this motion involving the waiver of MAVIS AGUILAR's physician-patient privilege,

is hereby **DENIED** for the reasons set forth hereinafter. The Court has received opposition to both applications at bar from plaintiff ALLISON MULLEN.

By So-Ordered Stipulation dated June 18, 2015, the parties agreed to hold in abeyance the non-party deposition of Fred Weinstein pending a decision on the instant motions.

### BRIEF FACTUAL AND PROCEDURAL HISTORY

This action, commenced on or about July 31, 2008, arises from an eye surgical clearance examination sought by plaintiff ALLISON MULLEN at the offices of HMG on October 9, 2006. On that date, plaintiff presented to the offices of HMG and underwent a physical examination performed by WISHNER, a physician employed by HMG. The crux of plaintiff's allegations is that WISHNER made improper physical contact with plaintiff and improperly ogled her during said physical examination.

Plaintiff had initially asserted three causes of action sounding in negligence and gross negligence; violation of New York's Human Rights Law; and civil assault, all stemming from the examination. By Order dated October 13, 2011, this Court granted a motion by plaintiff to amend her pleadings to assert additional causes of action sounding in negligent hiring, training, supervision, retention, and *respondeat superior* against HMG. Within that same Order, the Court granted a cross-motion to dismiss by WISHNER to the extent of dismissing plaintiff's cause of action for assault.

### PRIOR ORDER

On or about October 27, 2011, plaintiff served a demand for the employment file of WISHNER upon HMG. On or about November 10, 2011, HMG responded to plaintiff's demand, but refused to provide the entire employment file. Subsequent thereto, HMG provided the employee file, which contained, among other things, a complaint by a husband of a female patient whose name was redacted, alleging that WISHNER made her completely

undress during an examination for complaints of headaches and back pain that occurred on or about January 14, 2004. After the patient disrobed, WISHNER allegedly made her bend over. At WISHNER's deposition conducted on March 21, 2012, WISHNER was unable to completely respond to the questions posed concerning this prior allegation of similar misconduct.

Plaintiff then filed a motion to compel defendants to provide the name and last known address of the non-party female patient. By Order dated April 14, 2014 ("Prior Order"), the Court found that the prior complaint made by the non-party's husband about his wife is relevant to plaintiff's claims of negligent hiring, training, supervision, retention, and *respondeat superior* against HMG. The Court directed the defendants to provide plaintiff with the name and last known address of the subject non-party witness within thirty (30) days of service of the Prior Order upon defendants with notice of entry. The non-party witness name and address were provided in accordance with the Prior Order, and the non-party witness deposition was taken on October 10, 2014.

### DEFENDANTS' INSTANT MOTIONS

Defendants now move for the relief as indicated above. During the course of her deposition, the non-party witness was not represented by counsel, nor was the witness advised to consult with an attorney. This Court, in its Prior Order, included the following caveat, "***the non-party witness may assert the physician-patient privilege with respect to specific information sought by plaintiff in the future, if so advised.***" It is not clear from the deposition record that the Court's caution was in any way communicated to the non-party witness by the attorneys of record in this case. At page 87, line 3, Mr. Verschell stated, "[a]nd I advised her she has the right to counsel." To which the non-party witness responded at page 87, line 7, "[y]es, you did." This colloquy took place after the witness had been examined by plaintiff's counsel. The witness was thereafter examined by counsel for the defendants.

The first consideration is whether the non-party witness' medical condition is in controversy. The Court of Appeals has held:

where the mental or physical condition of a party is in controversy, a notice may be served pursuant to CPLR 3121 (a) requiring that the party submit to a medical examination or make available for inspection relevant

hospital and medical records. The initial burden of proving that a party's physical condition is "in controversy" is on the party seeking the information and it is only after such an evidentiary showing that discovery may proceed under the statute

(*Dillenbeck v Hess*, 73 NY2d 278, 286-287 [1989] [citation omitted]). As to the evidence, an affidavit must be sworn to by a person having knowledge of the facts, an affidavit by an attorney should be disregarded unless he happens to have personal knowledge of the facts. Probative evidence must show that medical records are material and necessary to the action (see *Koump v Smith*, 25 NY2d 287 [1969]; *Cardillo v Hillcrest Gen. Hosp.-G.H.I. Group Health, Inc.*, 134 AD2d 229 [2d Dept 1987]; *Hunter v Richmond Univ. Ctr.*, 32 Misc 3d 1228[A] [Sup Ct, Richmond County 2011]).

Where, as here, the records and medical information concern a *non-party*, the nature of the inquiry is different. The non-party, according to her deposition testimony, suffered a similar inappropriate examination by WISHNER. The defense argues that any physical examination of the non-party witness performed by WISHNER was medically indicated and appropriately performed. The defense further argues that to provide proof of the efficacy of the examination as performed, the medical history of the non-party witness is required. The records are required for the purpose of showing the nature of previous physical complaints communicated to the physician, and notations contained in the medical records and findings related thereto. A non-party witness need not disclose privileged medical information communicated to her physician, but must reveal facts, relevant medical incidents or facts concerning herself or her children (see *Williams v Roosevelt Hosp.*, 66 NY2d 391 [1985]). A witness at a deposition may refuse to tell her communications to her doctor, although she must disclose matters of fact (see *Bolos v Staten Island Hosp.*, 217 AD2d 643 [2d Dept 1995]).

Moreover, there are circumstances where a privilege may be deemed *impliedly waived*, such as where clients voluntarily testify to otherwise privileged matter, publicly disclose same, and/or permit the attorney to testify or reveal confidential material (*Jakobleff v Cerrato, Sweeney and Cohn*, 97 AD2d 834 [2d Dept 1983]). In a somewhat similar analysis concerning the compulsion of the release of the names and addresses of other clients of a psychologist whose names are statutorily protected, where those clients voluntarily provided letters to assist the psychologist in the defense of a malpractice action, the act of their volunteering served as a waiver of the statutory protection as it concerned

the release of their names (*Gendal v Billotti*, 12 Misc 3d 1189[A] [Sup Ct, Suffolk County 2006]). However, the Court is unaware of any reported case wherein a non-party witness, subpoenaed to testify, has been compelled to waive her physician-patient privilege as it concerns specific confidences shared with her physician, or a compulsory execution of a HIPPA authorization for the witness' medical records under facts similar to these. Here, the non-party witness testified pursuant to subpoena, and her testimony consisted of the facts and circumstances surrounding her examination. She was never advised of her privilege or given a copy of the Court's Prior Order. Counsel's claim that she was told she could consult with an attorney in no way specifically addressed the waiver of the privilege. In the absence of that affirmative waiver or any indication that she was advised of the possibility of waiver, it would be an inappropriate precedent to hold a lay person to that level of understanding.

The Second Department has taken the view that:

[t]he protection afforded by the statute runs to communications between physician and patient and covers information acquired while the physician was attending the patient in a professional capacity and which information is necessary to enable the physician to act in that capacity. The general test of what constitutes "information" includes "not only communications received from the lips of the patient but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearance and symptoms" (*Edington v Mutual Life Ins. Co. of N.Y.*, 67 NY 185, 194, *supra*). On the other hand, the privilege "is not intended to prohibit a person from testifying to such ordinary incidents and facts as are plain to the observation of any one without expert or professional knowledge" (*Klein v Prudential Ins. Co. of Amer.*, 221 NY 449, 453; *see, also, People v Newman*, 32 NY2d 379; Richardson, *Evidence* [Prince, 10th ed], § 432). Therefore, both the physician and patient may be called upon to testify as to such matters if the testimony is otherwise admissible

(*Hughson v St. Francis Hospital*, 93 AD2d 491, 498-499 [2d Dept 1983]).

This action is not to recover for the actions of WISHNER as it concerned the non-party witness. It is WISHNER's actions of which HMG was made aware that impacts on the retention cause of action, among others. Under the circumstances of this case, it would appear that HMG was put on notice concerning the actions of WISHNER prior to the occurrence of the actions *sub judice* in this case.

Therefore, it cannot be said that the non-party witness waived her physician-patient privilege concerning either conversations with the defendants or records of her treatment. Her testimony involves certain actions taken by WISHNER in an office examination. Whether the exploration of any further information is collateral or objectionable on other grounds must await the development of the record at trial and the outcome of any appropriate *in limine* applications made at or before trial.

Accordingly, these motions by WISHNER and HMG are **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: April 12, 2016

  
\_\_\_\_\_  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION