

Donato v Nutovits

2016 NY Slip Op 32763(U)

April 7, 2016

Supreme Court, Westchester County

Docket Number: 70468/2012

Judge: Joan B. Lefkowitz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

FILED: WESTCHESTER COUNTY CLERK 04/08/2016 11:0

NYSCEF DOC. NO. 129

RECEIVED NYSCEF: 04/08/2016

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
KENNETH DONATO, SR., Individually and as
Administrator of the Estate of SOPHIE M. DONATO
a/k/a SOPHIE DONATO, deceased,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 70468/2012
Motion Seq. #3
Decision Date: Apr. 7, 2016

RONALD NUTOVITS, M.D., EMERGENCY
MEDICAL ASSOCIATION OF NEW YORK, P.C.
a/k/a EMERGENCY MEDICAL ASSOCIATES,
MATTHEW GOLKAR, M.D., DAVID L. BURNS,
M.D., THE WESTCHESTER MEDICAL PRACTICE,
P.C., and HUDSON VALLEY HOSPITAL CENTER,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order pursuant to CPLR 3124 to compel defendant Hudson Valley Hospital Center to tender the electronic hospital record and audit trail for plaintiff's decedent medical file and provide certain additional discovery sought in plaintiff's Notice of Discovery and Inspection dated December 10, 2015:

- Order to Show Cause, Affirmation in Support, Exhs. A-M
- Affirmation in Opposition, Exhs. A-D
- Supplemental Affirmation in Opposition
- Supplemental Letter in Support (NYSCEF Doc. 124)
- Supplemental Affirmation in Opposition, Exh. A (NYSCEF Doc. 126-127)
- Affirmations of Service

Upon the foregoing papers and oral argument held on February 8, 2016, this motion is determined as follows:

As most recently enumerated in the Decision and Order of this Court (Lefkowitz, J.) dated February 23, 2015, this wrongful death action sounding in medical malpractice alleges that decedent Sophie M. Donato a/k/a Sophie Donato presented at the emergency department of defendant Hudson Valley Hospital Center (hereinafter "HVHC") on December 29, 2010, complaining of abdominal pain, at and after which time, plaintiff alleges, HVHC and the personal and institutional co-defendants committed medical malpractice that proximately

resulted in decedent's death. Among the allegations are that decedent, while on "hold" in the emergency department awaiting a bed, was found at 8:45am on December 30, 2010, having suffered an apparent cardiac arrest; she was resuscitated, soon thereafter suffered two more cardiac arrests, and was pronounced dead that afternoon.

After extensive discovery, including defense tender by paper of plaintiff's medical file and depositions of the defendant medical providers, Court Attorney-Referee David Evan Markus, assigned to hear and report in this matter pursuant to CPLR 3104, held multiple conferences with all counsel concerning the ostensible completeness of plaintiff's medical file tendered by HVHC and plaintiff's demand to obtain the audit trail/log for such electronic medical record. By Notice of Discovery and Inspection dated December 10, 2015, plaintiff sought from HVHC the complete and unredacted copy of the audit trail/log for defendant's electronic medical record for December 29-30, 2010; copies of rules, regulations, policies or bylaws concerning the audit/trail log and its maintenance; copies of warnings, alerts and other computer cues of Cerner as part of such electronic medical record; copies of responses and entries in response to any such warnings, alerts or other computer cues; and the identification codes to identify or decipher who accessed decedent's electronic medical record. HVHC objected by further response dated December 30, 2015, asserting that these demands are irrelevant and constitute a fishing expedition by plaintiff, and that disclosure would be unduly burdensome. Pursuant to a briefing schedule, plaintiff now moves by Order to Show Cause for a CPLR 3124 order compelling HVHC to tender to plaintiff the audit trail/log of decedent's electronic medical record, as well as HVHC policies concerning such audit trail/log and the "warnings/alert/modal boxes generated by the electronic record." HVHC opposes plaintiff's motion; the other defendants submitted no papers in support or opposition hereto.

The gravamen of plaintiff's argument is that according to plaintiff, HVHC tendered to plaintiff four versions of decedent's HVHC medical file, and nurse Myrna Bacdayan testified at her November 12, 2015, deposition that "the notes of the nurses are missing" (Pl. Aff. in Support, at para. 11). These ostensible differences and characterization of nursing notes as "missing" give rise to plaintiff's argument that the audit log/trail of decedent's electronic medical record is necessary to plaintiff's case. Plaintiff summarizes the four versions as follows:

- **Version 1:** Plaintiff asserts that before plaintiff commenced this action, HVHC tendered a first version of decedent's medical file bearing print date February 18, 2011, and comprising 83 pages. Plaintiff claims that included this pre-complaint submission were two pages, designated "17 of 20" and "18 of 20" and placed between pages 79 and 80, printed on January 24, 2011 (*see* Exhibit D, NYSCEF Doc. 106).
- **Version 2:** Plaintiff avers that HVHC followed this tender with a second version, bearing print date January 4, 2013, and comprising 117 pages (*see* Exhibit E, NYSCEF Doc. 107).
- **Version 3:** Plaintiff asserts that in response to plaintiff counsel questions about chart completeness arising from the first two tenders, HVHC supplied the chart a third time. That tender, bearing print date April 4, 2014, comprises 154 pages (*see* Exhibit F, NYSCEF Doc. 108).

- **Version 4:** Plaintiff further asserts that after Version 3 raised still further questions about chart completeness, plaintiff requested and HVHC supplied decedent's chart yet again. This tender, bearing print date October 29, 2015, comprises 159 pages (*see* Exhibit G, NYSCEF Doc. 109).

Plaintiff avers that the four versions of decedent's chart are materially different in ways that bear on the prosecution of plaintiff's claim that defendants failed to respond timely and appropriately to certain critical values of decedent's laboratory results. In relevant part, plaintiff avers as follows:

"For example, on Page 155 of 159 and Page 156 of 159 of the version of the electronic Hospital record printed on 10/29/2015, there are critical values for Potassium (5.8) at 12/30/2010 03:48 EST; CO2 (15) at 12/30/2010 03:48 EST; Potassium (6.2) at 12/30/2010 05:57 EST and CO2 (16) at 12/30/2010 05:57 EST. Exhibit "M." Notably, the "Result Comments" for the critical values at 5:57 a.m., state that "Results verified by repeat analysis. Called to and read-back by [Nurse Myrna Bacdayan] on 12/30/2010 06:29 cjb. ... Given the proximity of these critical values to when [decedent] was found at 8:45am on December 30, 2010 [without a pulse], and Nurse Bacdayan's sworn deposition testimony that the notes of the nurses are missing (Exhibit H), the warning/alert/modal box that was generated and the response thereto is relevant evidence and/or is reasonably calculated to lead to the discovery of information bearing on the claims herein" (Pl. Aff. Of Support, paras. 39-40).

Plaintiff further asserts that in response to deposition questioning, nurse Bacdayan testified that she couldn't find notes concerning what she believed to be a relevant patient interaction at HVHC: "I hate to say it, but the chart is missing; there's something missing in the chart - the notes of the nurses. Where are the notes of the nurses?" (Bacdayan Tr., at 83; Exhibit H, NYSCEF Doc. 110). The witness continued, "We usually have notes. Like the doctors - like the Progress Notes, Progress Notes are for doctors. But we have notes for the nurses, and I don't see that" (*id.*). Plaintiff also asserts that nonparty witness nurse Michael Fletcher testified that the printed version of the electronic record published to him at his examination before trial was "very confusing to follow" as to accessing the nursing notes, and that direct examination of the Cerner medical file software would allow direct examination of the nursing notes (Fletcher Tr., at 73; Exhibit I, NYSCEF Doc. 111). Plaintiff further asserts that the affidavit of Thelma Stewart, HVHC Director of Health Information Management, attached to Version 4, contradicts the testimony of nurse Bacdayan in the ostensibly material respect that according to Stewart, HVHC updated its electronic medical record software on January 7, 2014, causing a change in format but not content in decedent's electronic medical record; that Stewart personally reviewed the paper and electronic medical records; that the content is identical; and that the formatting differences concern only pagination (Exhibit J, NYSCEF Doc. 112). This affidavit specifically avers that "there are no additional nursing notes that are not already contained in the electronic medical records previously provided," and plaintiff asserts that this

statement conflicts with Bacdayan's deposition testimony that the nursing chart notes were missing. On the basis of the foregoing, plaintiff asserts that decedent's HVHC patient file tendered to plaintiff is incomplete, and that the four versions thereof that plaintiff cites give rise to a plausible inference that only an electronic tender with the audit file/log can determine the completeness of decedent's file.

Plaintiff further asserts that state law requires medical providers to allow patients and other qualified persons "access" to their medical records (10 NYCRR 405.10[a][7]) and to "inspect" the same (Public Health Law section 18[2]; see also 45 CFR 164.524[3][i]) – authorities that, plaintiff asserts, do not restrict "access" and "inspect[ion]" to the physical paper files.

Opposing plaintiff's motion, HVHC disputes that Bacdayan and Fletcher's deposition testimony offers any reasonable basis to suggest that decedent's medical records heretofore tendered to plaintiff are in any material way incomplete. As to Fletcher, HVHC asserts that Fletcher subjectively deeming the file "confusing" went to his impression of the new medical record format, and in any event does not suggest that the record was or is materially incomplete. As to Bacdayan, HVHC asserts that Bacdayan merely characterized nursing notes as missing: plaintiff does not suggest that Bacdayan testified that *her* notes were missing, or that notes she remembered seeing were missing. Rather, HVHC avers, "Bacdayan's testimony is that since was not able to locate the notes she thought she may have written in December 2010, she assessed them as missing. Nurse Bacdayan is mistaken in her assertion that there are notes missing from the medical chart and her statement does not translate into evidence of the existence of additional notes" (Def. Aff. in Opposition, at para. 9). As to the pagination differences, HVHC asserts that "after a diligent search by our office and the Hospital, it was determined that this issue was being caused by a software glitch pursuant to a software update performed on the Hospital electronic system. This information was relayed to plaintiff both in correspondence from our office dated October 22, 2015, and in [the Stewart Affidavit] (*id.*, at para. 10). As Stewart's affidavit attests that the only difference among the chart versions is the pagination, arising from the software installation, and that the content is the same, HVHC argues that plaintiff's demand is not reasonably calculated to lead to discoverable evidence." HVHC further asserts that plaintiff fails to meet the standard for disclosure of medical metadata, and that complying with plaintiff's demand would be unduly burdensome "considering the extensive resources, time and expense it would require to search for information."

As to plaintiff's regulatory points of law, HVHC's position is that these regulations go not to discoverability under CPLR article 31 but rather the definition of what constitutes confidential patient information and under what circumstances regulation allows or disallows its sharing absent a court order. Accordingly, HVHC asserts, these regulatory points of law do not support plaintiff's entitlement for a CPLR 3124 order compelling discovery.

After oral argument and at this Court's invitation, on March 17, 2016, HVHC counsel uploaded to NYSCEF a further affirmation (NYSCEF Doc. 126) attesting, among other things, that based on the attached affidavit of HVHC employee Nicholas Szymanski, the metadata materials that plaintiff seeks do not exist. Mr. Szymanski's affidavit (NYSCEF Doc. 127) states that he serves as HVHC's interim director of information services; that he personally researched

how to retrieve the metadata for decedent's medical file for the relevant dates in question; that he attempted to work with Cerner's account representative and director of health services to determine the availability of the information sought; that the audit trail and warning logs are "not information that is available ... because retrieval of such information would require a P2 Sentinel program, a monitoring tool, to have been in place during the time the medical record was initially created. This tool was not in place at [HVHC] in 2010," but rather was installed so as to make retrievable the audit trail for any medical record made on and after January 3, 2013. On this basis, Mr. Szymanski concludes, HVHC cannot comply with plaintiff's demand.

Analysis

CPLR 3101(a) provides for full disclosure of all matters material and necessary in the prosecution or defense of an action. The words "material and necessary" are to be "interpreted liberally to require disclosure, upon requests, of any facts bearing on the controversy which will assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010]). While entitlement to discovery in civil actions is construed liberally, "a party does not have the right to uncontrolled and unfettered disclosure" (*Foster*, at 1140; *Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). On a CPLR 3124 motion to compel discovery, the party seeking to compel disclosure bears the burden to "demonstrate that the ... discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]). The foregoing standards vest in the trial court broad discretion to supervise discovery and determine whether information sought is material and necessary in light of the issues in the matter (*see Andon v 302-04 Mott Street Assocs.*, 94 NY2d 740, 747 [2000]; *Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Whatever the potential discoverability of system metadata in this action, this Court is constrained to deny plaintiff's motion on grounds that the sought materials apparently do not exist or cannot be procured by defendant with reasonable diligence. The Szymanski affidavit makes clear that metadata retrieval requires that technical software such as P2 Sentinel software be installed and functioning at the time the underlying record is made. Because HVHC installed this technical software after the record dates for which plaintiff now seeks discovery of metadata, HVHC argues - and this Court is constrained to accept - that the sought metadata cannot be harvested. It is axiomatic that a party can prevail on a CPLR 3124 motion only to compel disclosure of materials that exist, not materials that do not exist. In this connection, it is of no moment for the purpose of the instant motion whether, as plaintiff implies, HVHC *should* have installed the technical retrieval software prior to the date of decedent's treatment so that the metadata for any record then made in decedent's medical file would be available for discovery. Neither is it relevant for the purpose of the instant motion whether the Public Health Law regulations fairly can be read to establish that obligation as a matter of law appurtenant to the date of decedent's treatment, and to create a remedy that plaintiff has standing to pursue. Any

remedy plaintiff may have in relation to such matters might be the proper subject of a spoliation motion before the trial court at the appropriate time, but is not the proper basis for the CPLR 3124 relief plaintiff now seeks. Accordingly it is hereby

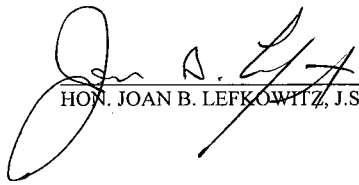
ORDERED that plaintiffs' motion is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this Decision and Order, with Notice of Entry upon counsel for all parties within seven days of entry; and it is further

ORDERED that counsel for all parties are directed to appear for a conference in the Compliance Part, Room 800 of this Courthouse, at 11:00 a.m. on Monday, May 2, 2016, at which time this action will be subject to certification for trial.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 7, 2016


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

TO:

Anthony Pirrotti, Jr., Esq.
Pirrotti & Glatt Law Firm PLLC
Attorneys for Plaintiffs
2 Overhill Road, Suite 200
Scarsdale, NY 10583
BY NYSCEF

Alexander Sikoscow, Esq.
Gerspach Sikoscow, LLP
Attorneys for Defendants Ronald Nutovits, M.D.
and Emergency Medical Association of NY, P.C
40 Fulton Street, Suite 1402
New York, NY 10038
BY NYSCEF

Kenneth J. Burford, Esq.
Schiavetti, Corgan, Diedwards, Weinberg & Nicholson, LLP
Attorneys for Defendants Matthew Golkar, M.D., David L. Burns, M.D. and The Westchester Medical Practice, P.C.
709 Westchester Avenue
White Plains, NY 10604
BY NYSCEF