

**Matter of Plastic Surgery Group P.C. v Comptroller
of the State of N.Y.**

2016 NY Slip Op 33091(U)

July 1, 2016

Supreme Court, Albany County

Docket Number: 776-2016

Judge: Christina L. Ryba

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This opinion is uncorrected and not selected for official publication.

Decision and Order appealed from

ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of THE PLASTIC SURGERY
GROUP P.C.,

Petitioner,

-against-

THE COMPTROLLER OF THE
STATE OF NEW YORK,

Respondent.

DECISION/ORDER
Index No. 776-2016
RJI No. 01-16-120047
Hon. Christina L. Ryba, JSC

APPEARANCES:

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FILED
2016 FEB 11 11:10 AM
CLERK OF COURT

RYBA, J.,

On February 4, 2016, respondent New York State Comptroller's Office served a subpoena duces tecum upon petitioner The Plastic Surgery Group PC in the context of respondent's audit to review payments made by the State for services provided by petitioner to patients who were members of the New York State Health Insurance Program's Empire Plan. The subpoena duces tecum demanded the production of certain documents relating to petitioner's billing practices including all documents, account records and ledgers listing certain identifying information for Empire Plan members such as

patient names, dates of services and descriptions of medical procedures. Petitioner declined to comply with the subpoena duces tecum on the ground of patient confidentiality and requested that respondent withdraw the subpoena. Respondent refused, prompting petitioner to commence this proceeding seeking an order quashing the subpoena duces tecum and issuing a protective order on grounds that the subpoena seeks the production of patient information protected from disclosure by the Health Insurance Portability and Accountability Act (“HIPAA”), is not accompanied by written authorizations from the patients consenting to the release of their medical records, and seeks over broad and irrelevant information. Respondent served an answer to the petition and cross moves for an order compelling petitioner’s compliance with the subpoena duces tecum. Petitioner opposes the cross motion.

It is well settled that a subpoena duces tecum must be issued pursuant to legitimate authority and may seek only relevant and reasonably specific information that is not unduly burdensome (see, Matter of A’Hearn v Committee on Unlawful Practice of Law of N.Y. County Lawyers’ Assn., 23 NY2d 916, 918 cert. denied 395 US 959 [1969]; Roemer v Cuomo, 67 AD3d 1169, 1170 [2009]). A motion to quash a subpoena duces tecum should be granted where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry (see, AnheuserBusch, Inc. v Abrams, 71 NY2d 327, 331 [1988] [internal quotation marks and citations omitted]; Matter of Abbruzzese v New York Temporary State Commn. on Lobbying, 43 AD3d 518, 519 [2007]). The person challenging a subpoena duces tecum bears the burden to establish that the information sought is irrelevant or that the subpoena is otherwise improper (see, Hogan v Cuomo, 67 AD3d 1144, 1145 [2009]).

Here, petitioner contends that respondent lacks authority to demand compliance with the subpoena duces tecum by virtue of CPLR 3122 (a) (2), which is intended to guard patient information

protected by HIPAA and states in relevant part:

A medical provider served with a subpoena duces tecum, other than a trial subpoena issued by a court, requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that written the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or has otherwise directed the production of the documents.

Here, it is undisputed that the subpoena duces tecum at issue requested the production of identifying information from patient records and was not accompanied by patient authorizations or otherwise authorized by the Court in advance. It is also undisputed that the subpoena duces tecum did not contain the conspicuous bold-faced language required by the statute. Accordingly, the Court concludes that petitioner has sufficiently established that the subpoena duces tecum fails to satisfy the statutory requirements of CPLR 3122 (a) (2) and is therefore deficient on its face.

However, respondent contends that the requirements of CPLR 3122 (a) (2) are inapplicable here in light of the broad subpoena power granted to the Comptroller's Office by State Finance Law § 9 for audit purposes and in view of the fact that the Comptroller's Office qualifies as a "health oversight agency" entitled to production of otherwise protected patient health information under HIPAA (45 C.F.R. § 164.512 [d]). While the Court acknowledges that respondent was previously found to qualify as a "health oversight agency" within the meaning of HIPAA in Matter of Signature Health Center LLC v Hevesi (13 Misc 3d 1189, 1193 [2006]), that decision is not binding precedent and, in any event, is factually distinguishable in that it addressed respondent's status with respect to audits of the Medicaid program. Inasmuch as there is no clear precedent for finding that respondent is a "health oversight agency" for the purpose of issuing subpoenas for petitioner's patient records in this case, and as the Court

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is not persuaded that respondent is otherwise exempt from complying with the requirements of CPLR 3122 (a) (2), the petition to quash the subpoena duces tecum is granted. It necessarily follows that respondent's cross motion to compel compliance with the subpoena duces tecum is denied.

For the foregoing reasons, it is

ORDERED that the petition is granted, without costs, and it is further

ORDERED that the cross motion is denied.

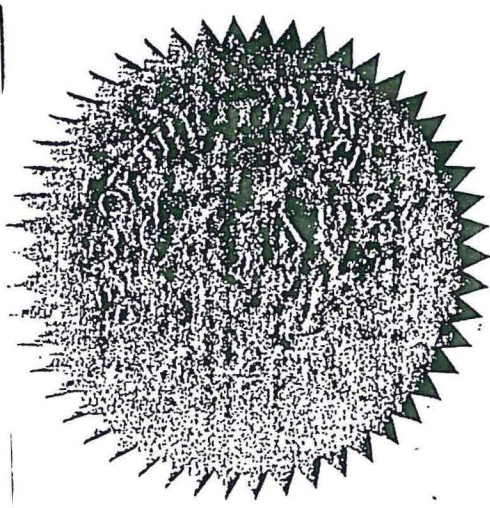
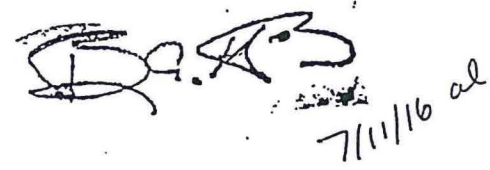
This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendants. The below referenced original papers are being transferred to the Albany County Clerk. The signing of this Decision and shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

ENTER.

Dated: July 1, 2016



HON. CHRISTINA L. RYBA
Supreme Court Justice



STATE OF NEW YORK }
COUNTY OF ALBANY CLERK'S OFFICE } SS.:

I, BRUCE A. HIDLEY, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy decision & order with the original thereof filed in this office on the 11th Day of July 2016 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 15th day of July 2016

