

Robins v Procure Treatment Centers, Inc.
2017 NY Slip Op 30801(U)
April 18, 2017
Supreme Court, New York County
Docket Number: 805644-2015
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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BARBARA ROBINS,

Plaintiff,

Index No. 805644-2015

-against-

DECISION/ORDER

Motion Sequence 003

PROCURE TREATMENT CENTERS, INC.,
PRINCETON PROCURE MANAGEMENT LLC,
PROCURE PROTON THERAPY CENTER,
PRINCETON RADIATION ONCOLOGY, OREN
CAHLON, MD, HENRY K. TSAI, MD, EUGEN B.
HUG, MD, BRIAN H. CHON, MD, ROBERT M.
CARDINALE, MD, DOUGLAS A. FEIN, MD,
DENNIS MAH, AVRIL BLAIR a/k/a AVRIL
O'RYAN-BLAIR, RAMONE PERALTA,
JACQUELYN COLLINS, LISA "DOE" (JANE DOE #1),
JOSE "DOE" (JOHN DOE #1), RAJ SHRIVASTAVA,
MD, THE MOUNT SINAI HOSPITAL AND IBI
PROTON THERAPY, INC. a/k/a IBI PROTON
EQUIPMENT,

Defendants.

-----X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Plaintiff's Notice of Motion, Affirmation & Collective Exhibits Annexed.....	<u>1, 2, 3</u>
Defendants' Notice of Cross Motion, Answering Affirmation & Exhibits Annexed.....	<u>4, 5, 6</u>
Defendants' Affirmation in Opposition.....	<u>7</u>
Plaintiff's Affirmation in Opposition and Reply Affirmation.....	<u>8</u>

In this action for medical malpractice, plaintiff Barbara Robins ("Plaintiff") seeks an order, pursuant to CPLR § 3124, compelling defendants Procure Treatment Centers, Inc.

("Procure") and IBA Proton Therapy, Inc. ("IBA," collectively "Defendants") to comply with outstanding discovery demands. Procure opposes Plaintiff's motion. IBA oppose, and cross-move for an order, pursuant to CPLR § 3103, issuing a protective order and striking the demands in the Notice of Discovery and Inspection ("D&I") of Plaintiff's counsel dated November 20, 2015 as to all items which are palpably improper. In response to IBA's cross-motion, Plaintiff withdraws certain demands and modifies others.

The instant action was commenced on September 15, 2015, whereupon Plaintiff filed a Summons and Verified Complaint in this Court, naming Defendants Procure and IBA, among others. IBA and Procure were served and interposed answers on October 16, 2015, and October 21, 2015, respectively. On November 20, 2015, Plaintiff served Notices for Discovery and Inspection on Procure and IBA which are the subject matter of the present motion and cross-motion. Responses to Plaintiff's D&I were due by December 10, 2015. Having received no responses from either IBA or Procure, on January 7, 2016, Plaintiff forwarded letters to defense counsel for IBA and Procure, requesting responses. On January 21, 2016, Plaintiff filed the present motion to compel discovery responses. On February 10, 2016, IBA filed a response to Plaintiff's D&I, and cross-moved for a protective order. Procure did not respond to Plaintiff's D&I, and opposes Plaintiff's motion here.

Plaintiff argues that her D&Is are proper in that they include demands for information pertinent to the jurisdictional motions currently before this Court. In opposition, Procure argues the motion is moot because discovery is automatically stayed pursuant to CPLR § 3214, and defective because Plaintiff failed to include an affirmation of good faith, pursuant to NYCRR § 202.7(a)(2).

A party moving to compel discovery is required to submit an affirmation that counsel for the moving party has made "a good faith effort to resolve the issues raised by the motion" with opposing party's counsel (Uniform Rules for Trial Cts [22 NYCRR] 202.7). To be deemed sufficient, the affirmation must state the nature of the efforts made by the moving party to resolve the issue with opposing counsel (22 NYCRR 202.7[c] ["The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held."]; see *Mironer v City of New York*, 79 AD3d 1106, 1107-1108 [2d Dept 2010]).

Here, Plaintiff's affirmation of good faith effort to resolve the dispute with Defendants does not substantively comply with the requirements of 22 NYCRR 202.7 (*Fulton v Allstate Ins. Co.*, 14 AD3d 380, 382 [1st Dept 2005] ["plaintiff [was] required to submit ... good faith affirmation pursuant to 22 NYCRR § 202.7, acknowledging that counsel had conferred with his or her adversary in good faith to resolve the issues"]; see also *Chichilnisky v Trustees of Columbia Univ. in City of N.Y.*, 45 AD3d 393, 394 [1st Dept 2007]). In the affirmation in support of the motion, Plaintiff's counsel stated there were good faith efforts to proceed with disclosure, and highlighted a letter requesting discovery that was sent to defense counsel for IBA and

Procure. However, there is nothing in the letter indicating that Plaintiff's counsel actually conferred with defense counsel in a good faith attempt to resolve the dispute (*see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471-72 [1st Dept 2013]; *see also Molyneaux v City of New York*, 64 AD3d 406, 407 [1st Dept 2009]; *Mironer*, 79 A.D.3d at 1107-1108 [affirmation of good faith submitted by the moving party was "insufficient, as it did not refer to any communications between the parties that would evince a diligent effort by the plaintiffs to resolve the discovery dispute"]). Accordingly, the motion to compel discovery is denied.

As to IBA's cross-motion seeking a protective order, pursuant to CPLR § 3103, IBA specifically objects to Plaintiff's demands under "General" numbered 1, 2, 3, 4, 5, 6, 10, 15, and 16. Under CPLR § 3103, "a court has discretion to, on its own initiative or on motion by the party opposing discovery, limit disclosure and issue a protective order 'to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice.'" (CPLR § 3103; *Probala v Rian Holding Co., LLC*, 26 Misc. 3d 1201[A], 2009 NY Slip Op 52614[U], *2 [Sup Ct, NY County 2009], citing *Pomeranz v Pomeranz*, 99 AD2d 407 [1st Dept 1984]). CPLR § 3101 requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR § 3101). Further, "the words material and necessary are to be interpreted liberally to require disclosure of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay the test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406-407 [1968]).

Under CPLR § 3122, however, a motion for a protective order is only timely served within twenty days of service of notice of the demand for discovery (CPLR § 3122). Further, "[t]he failure of a party to challenge the propriety of a notice for discovery and inspection pursuant to CPLR § 3120 within the time prescribed by CPLR § 3122 forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR § 3101 or requests that are palpably improper" (*Holness v Chrysler Corp.*, 220 AD2d 721, 721-22 [2d Dept 1995] citing *Muller v Sorensen*, 138 AD2d 683, 684 [2d Dept 1988]). "The burden of showing that discovery is improper, and an immunity exists prohibiting its disclosure, is on the party asserting it" (*Probala*, 2009 NY Slip Op 52614[U] *2, citing *Koump v Smith*, 25 NY2d 287, 294 [1969]; *Sage Realty Corp. v Proskauer Rose LLP*, 251 AD2d 35, 40 [1st Dept 1998]). Thus, because IBA's cross-motion for a protective order is untimely, IBA is only entitled to a protective order where it can demonstrate that Plaintiff's demands are palpably improper or where Plaintiff has requested privileged information.

Plaintiff, in her opposition to the cross-motion, withdrew demands numbered 1 and 2 as to all defendants, and 4 and 15 as to IBA. As such, the questions regarding the withdrawn demands are moot, and the Court declines to consider them. Plaintiff also modified demands numbered 3, 6, and 10. Lastly, Plaintiff asserts demand 16 is proper, but does not address IBA's objection to demand 5.

Under demand 3, Plaintiff initially demanded, "[a]ll correspondence, agreements, and

contracts, between or among IBA and/or PRO, Radiation Oncologists, and Procure, or any of them” (McHugh Aff. Ex. H at 4). IBA initially objected to demand 3 as “overbroad, vague, harassing and as seeking irrelevant information. Notwithstanding, and without waiving said objections, see annexed hereto as Exhibit ‘A’ the Service Agreement between IBA and Princeton and Exhibit ‘B’ the Purchase Agreement. All other requests in this item are objected to for the reasons stated.” Under the modified version, Plaintiff now seeks, “[a]ll correspondence, agreements, and contracts, between or among IBA and any of the defendants herein regarding the cyclotron at issue herein, and/or joint ventures between or among said defendants” (Plaintiff’s Reply Aff. Ex. A at 3). As it is currently written, even though Plaintiff seeks “all documents,” Plaintiff limits the documents to a specific subject matter – the cyclotron at issue – and therefore, the demand is not palpably improper, nor does it concern privileged information. As such, IBA is not entitled to a protective order with regard to demand 3 (*Zurich Ins. Co. v State Farm Mut. Auto. Ins. Co.*, 137 AD2d 401, 402 [1st Dept 1988] [“Although appellant’s discovery requests are framed in the broadest of terms, the documents sought relate to a specific subject matter and are therefore sufficiently identifiable]).

Next, IBA objects to demand 6. Initially Plaintiff demanded “[a]ll documents, correspondence, and communications of any sort between or among IBA and Defendants, or any of them and any one whatsoever, regarding Barbara Robins, her care, treatment, condition, bills, invoices, statements, and/or injury” (McHugh Aff. Ex H at 4). In their Affirmation in Support, IBA argues that demand 6 (although counsel for IBA mistakenly labels it “item # 7”), is an “omnibus, shotgun demand [and] is also overly broad and burdensome” (*Id.* at 8). Under the modified version, Plaintiff now seeks, “[a]ll documents, correspondence, and communications of any sort between or among IBA and Defendants, or any of them, and any one whatsoever, except for those items privileged under the attorney-client relationship, regarding Barbara Robins, her care, treatment, condition, bills, invoices, statements, and/or injury” (Plaintiff’s Reply Aff. Ex. A at 4). As it is currently written, the demand is not overbroad because the subject matter – Barbara Robins – is sufficiently identifiable, and thus IBA is not entitled to a protective order with regard to demand 6 (*Zurich*, 137 AD2d at 402).

IBA further objects to demand 10. Initially Plaintiff demanded “[a]ll filings with the SEC by IBA and/or any Corporate Defendant in the case, or group of Defendants in the case, or joint venture of any Defendants in the case, or any of them or their parents or subsidiaries” (McHugh Aff. Ex. H at 5). IBA objects on the grounds that filings with the SEC are “public records accessible to plaintiff’s counsel” (*Id.* at 9-10). Under the modified version, Plaintiff now seeks, “[a]ll filing with the SEC by IBA evincing joint venture with any Defendants in the case, or any of them or their parents or subsidiaries” (Plaintiff’s Reply Aff. Ex. A at 4). Here, to the extent any such documents exist, defendant should not be compelled to produce them, to the extent that they are available as a matter of public record (*Kusters v Leffe*, 30 Misc 3d 1237[A], 2011 NY Slip Op 50383[U] [Sup Ct, NY County 2011]; *Hualde v Otis Elevator Co.*, 235 AD2d 269, 270 [1st Dept 1997] citing *Penn Palace Operating v Two Penn Plaza Assocs.*, 215 AD2d 231 [1st Dept 1995]). Therefore, IBA is entitled to a protective order relieving it of its obligation to produce public documents filed with the SEC.

The Court now turns to demands 5 and 16 which IBA objects to and which Plaintiff contends are proper. Demand 5 seeks, “[a]ll statements of Barbara Robins, or any one on her behalf, in the possession of IBA, whether written or oral, including correspondence, consents, releases, or other documents signed by Barbara Robins, or which it will be claimed, were signed by Barbara Robins” (McHugh Aff. Ex. H at 4). In its response to the D&I, IBA states “[t]his answering defendant is not in possession of any statements of Barbara Robins or anyone on her behalf or any other documents responsive to this demand” (*Id.* at Ex. I, ¶ 5). The response is only partially responsive, and the subject matter of the demand – statements of, or documents signed by, Barbara Robins – is sufficiently identifiable so as not to be overbroad. As such, IBA has failed to demonstrate its entitlement to a protective order with regard to demand 5 (*Zurich*, 137 AD2d at 402).

Under demand 16, Plaintiff seeks “[a]ll financial or other reports, filings, spread sheets, shareholder disclosures, web pages, and other documents which reflect or memorialize the ownership share, whether by stock or otherwise, held by IBA in Procure, and/or the ownership share held by Procure in IBA” (*Id.* at Ex. H, 6). In its response, IBA objects to this demand “as overly broad, vague and burdensome” but goes on to note, “without waiving said objects, IBA states that upon information and belief, it has a fully diluted equity share of 1.43% in Procure Treatment Centers, Inc.” (*Id.* at Ex. I, ¶ 16). Plaintiff argues this demand is proper and not overly broad, as documentary evidence of any ownership interest IBA has in Procure would be an additional basis for jurisdiction over Procure in New York” (Plaintiff’s Rep. Aff. at 2). Again, the response is insufficient, as the demand seeks specific documents. Additionally, the demand is not overbroad as the subject matter – ownership share of IBA by Procure, or vice versa – is sufficiently identifiable (*Zurich*, 137 AD2d at 402). As such, IBA is not entitled to a protective order with regard to demand 16, and it is hereby

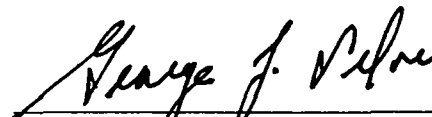
ORDERED that plaintiff’s motion to compel is denied; and it is further

ORDERED that defendant’s motion for a protective order is granted with respect to demand 10, and denied with respect to all other demands.

ORDERED that the parties are to appear for a preliminary conference on June 21, 2017 at 2:00 p.m. at Part 10, Room 422, 60 Centre St. New York, NY 10007; and it is further

ORDERED that Plaintiff is to serve a copy of this order, with notice of entry, upon Defendants within 20 days of entry.

Dated: *April 18, 2017*
New York County


George J. Silver, J.S.C.
GEORGE J. SILVER