

**Czyz v Scherl**

2017 NY Slip Op 31465(U)

July 10, 2017

Supreme Court, New York County

Docket Number: 805309/14

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

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SHERRI CZYZ as Administrator of the Estate of  
Stephen Czyz, Deceased, and SHERRI CZYZ,  
Individually,

Index No. 805309/14

**Decision & Order**

Plaintiffs,

-against-

ELLEN E. SCHERL, M.D., GOVIND NANDAKUMAR,  
M.D., KELLY GARRETT, M.D., THE ROBERTS  
CENTER FOR INFLAMMATORY BOWEL DISEASE,  
NEW YORK-PRESBYTERIAN HOSPITAL/WEILL  
CORNELL MEDICAL CENTER, WEILL CORNELL  
MEDICAL COLLEGE, and JOHN DOE, M.D. 1-10,

Defendants.

-----X  
**Hon. Martin Shulman**

In this medical malpractice and wrongful death action, plaintiffs move to compel defendants' compliance with two status conference orders and various discovery demands,<sup>1</sup> as well as to produce Sherief Ahmed (Ahmed), an employee of defendant Weill Cornell Medical College,<sup>2</sup> for an EBT. In the event this motion is granted and defendants fail to comply within 30 days, plaintiffs request an order striking defendants' answers. Defendants oppose the motion.

<sup>1</sup> Plaintiffs seek compliance with their Fifth and Sixth Notices for Discovery and Inspection and a legible copy of a prior discovery response served on June 30, 2015.

<sup>2</sup> Defendants' Supplemental Affirmation in Opposition dated March 17, 2017 annexes an affidavit from Ahmed stating that he is employed as a Privacy and Security Architect at Physician Organization Information Services of defendant Weill Cornell Medical College and is familiar with the use of this defendant's EPIC electronic medical record system.

Plaintiffs commenced this action by filing the summons and complaint on September 4, 2014.<sup>3</sup> They served their Fifth Notice for Discovery and Inspection on defendants on January 19, 2016 (Fifth Demand, Exh. A to Motion). At an April 12, 2016 status conference, the parties entered into an order directing defendants to respond to plaintiffs' Fifth Demand and provide a legible copy of the first page of a June 30, 2015 discovery response (*id.* at Exh. C) on or before April 29, 2016 (*id.* at Exh. B). Plaintiffs contend defendants failed to serve any response to the Fifth Demand and failed to provide a legible copy of the June 30, 2015 discovery response.

By notice dated May 25, 2016, plaintiffs noticed Ahmed's deposition for June 23, 2016 (*id.* at Exh. E). On June 14, 2016, plaintiffs served their Sixth Notice for Discovery and Inspection (Sixth Demand, Exh. F to Motion). Defendants again failed to serve a response. At a July 19, 2016 status conference the parties entered into another order directing defendants to respond to plaintiffs' Fifth and Sixth Demands and to provide the legible copy of the June 30, 2015 discovery response on or before August 19, 2016 (*id.* at Exh. I). The July 19, 2016 status conference order further directed that Ahmed's deposition be held by September 19, 2016. Plaintiffs contend that defendants again failed to serve any responses and failed to produce Ahmed.

In opposition, defense counsel denies engaging in any willful or contumacious conduct warranting a conditional order striking their answers. First, they contend that plaintiffs have misrepresented the events surrounding Ahmed's deposition since, after the July 19, 2016 status conference, plaintiffs' counsel advised defense counsel during

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<sup>3</sup> Plaintiffs amended the complaint on or about January 7, 2015 and again on January 8, 2016.

a telephone conversation that she needed to receive and review the audit trail<sup>4</sup> requested in plaintiffs' Fifth Demand prior to deposing Ahmed. On September 29, 2016, defendants served a CD containing the audit trail and a response to the Sixth Demand. Defense counsel thus concludes that plaintiffs' motion is now moot.

In reply, plaintiffs dispute that defendants are now in compliance with their demands and prior court orders, noting the following:

- defendants did not respond to the Fifth Demand's requests for metadata<sup>5</sup> not contained in the audit trail defendants provided, and also failed to respond to items 3 through 7 of the Fifth Demand;
- the audit trail defendants provided is merely a spreadsheet, rather than electronically stored data, and is unresponsive to the Fifth Demand;
- the spreadsheet data only goes up to August 26, 2013 for Dr. Nandakumar and August 22, 2013 for Dr. Scherl, and plaintiffs are entitled to information indicating whether alterations were made to the medical records thereafter;
- the spreadsheet does not indicate the manner in which the electronic medical record was reviewed, edited or altered on any specific date, which is unacceptable given defendant Scherl's testimony that she regularly cut, pasted and/or added to prior office notes;
- defendants fail to provide an affidavit of an individual with knowledge as to the method of retrieving the data, chain of custody of the data or the authenticity thereof; and

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<sup>4</sup> "The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's EHR ["electronic health record"]." *Gilbert v Highland Hosp.*, 52 Misc3d 555, 557, 31 NYS3d 397, 399 (Sup Ct, Monroe County, 2016).

<sup>5</sup> An "audit trail constitutes system metadata". *Vargas v Lee*, 2015 WL 3857323, at \*2 (Sup Ct, Kings County). As explained in *Vargas*, "[m]etadata, often referred to as 'data about data,' is electronically stored information (ESI) that describes the 'history, tracking or management of an electronic document' and includes the 'hidden text, formatting, codes, formulae, and other information associated' with an electronic document (citations omitted)."

- a legible copy of the June 30, 2015 discovery response still has not been provided.

During the pendency of this motion, the parties attempted to resolve the issues raised herein and defendants served additional discovery responses. On January 24, 2017 after hearing argument on plaintiffs' motion, this court granted both parties leave to submit supplemental papers for the purpose of updating the court as to which issues had been resolved. Defendants submitted a supplemental affirmation in opposition<sup>6</sup> responding to plaintiffs' reply as follows:

- defendants served a formal response<sup>7</sup> to the Fifth Demand on March 16, 2017 (Supp. Aff. in Opp., Exh. D);
- defendants provided an affidavit from Ahmed<sup>8</sup> in December of 2016, averring in relevant part that once the defendant physicians electronically signed their notes no further changes were made (*id.* at Exh. B);
- defendants provided a spreadsheet providing a printout of the audit trail "run" by Ahmed, which defense counsel contends may only be exported via the spreadsheet format provided (*id.* at Exhs. B and C);
- "plaintiffs' demands are vague, overly broad, unduly burdensome, seek material which is privileged in nature, are not based upon any evidentiary foundation or proof, are unreasonable, and are not reasonably calculated to lead to the discovery of admissible evidence" (*id.* at ¶9);
- plaintiffs fail to demonstrate that the disclosure of any electronic data beyond the audit trail would yield useful information;
- the requested audit trail does not provide information as to the timing and substance of plaintiff-decedent's care (*id.* at ¶10); and

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<sup>6</sup> Plaintiffs ultimately elected not to supplement their papers.

<sup>7</sup> Defendants' response consists of objections to each and every demand as "palpably improper, vague, overbroad and unduly burdensome."

<sup>8</sup> Although defendants initially agreed to produce Ahmed they now object to producing him for a deposition.

- defendant Scherl's deposition testimony does not justify production of the information plaintiffs seek (*id.* at Exh. A).

According to defendants, the only issues that remain unresolved are the disclosure of the metadata and other electronic materials demanded in the Fifth Demand and Ahmed's deposition.

#### Discussion

With respect to penalties for failure to comply with discovery procedures, CPLR §3126 provides in relevant part as follows:

If any party...refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

- (1) an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
- (2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses...; or
- (3) an order striking out pleadings or parts thereof,...or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad discretion of the trial court. *Zletz v Wetanson*, 67 NY2d 711 (1986); *Berman v Szpilzinger*, 180 AD2d 612 (1<sup>st</sup> Dept 1992). In *Stanfill Plumbing & Heating Corp. v Dravo Constructors, Inc.*, 216 AD2d 101 (1<sup>st</sup> Dept 1995), the First Department held that the lower court "did not improvidently exercise its discretion in dismissing the underlying action for the failure of plaintiff to comply with prior court-ordered discovery." The court

specifically found that it was proper to dismiss the plaintiff's complaint since the record revealed that the lower court had given the plaintiff ample opportunity to comply with discovery and the plaintiff repeatedly failed to comply. *Id.*

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 (1<sup>st</sup> Dept 1990); *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1<sup>st</sup> Dept 1996), *lv denied*, 88 NY2d 802 (1996) (disobedience of a series of court orders directing discovery warranted striking of pleading); *Berman v Szpilzinger, supra*.

At the outset, plaintiffs do not dispute that defendants' response to the Sixth Demand is adequate, and their motion is therefore denied to the extent it is premised upon that demand. Plaintiffs' motion to compel is granted with respect to the request for a legible copy of defendants' June 30, 2015 discovery response, as there is no indication whether defendants ever served same. Accordingly, defendants are directed to comply with this demand within 20 days of the electronic filing of this decision and order.

As to plaintiffs' Fifth Demand and defendants' response thereto, the audit trail spreadsheet that defendants produced sufficiently responds to items 1 and 2 of

plaintiffs' Fifth Demand. As defendants contend, these demands are vague.<sup>9</sup>

Nonetheless, defendants in good faith produced the audit trail spreadsheet.

Further, plaintiffs do not establish how disclosure of electronic data above and beyond the audit trail spreadsheet provided would yield relevant information, nor is any explanation provided as to why the spreadsheet is inadequate. Plaintiffs seek information pertaining to changes made to plaintiff-decedent's electronic medical records, including the dates and times thereof, yet the spreadsheet appears to include such information.<sup>10</sup> See *Vargas v Lee*, 2015 WL 3857323, at \*2 (Sup Ct, Kings County) (motion to compel disclosure of audit trail of defendant's electronic medical records [EMR] denied where plaintiff failed to distinguish audit trail's utility from that of the corresponding EMR).

As to items 3 through 7<sup>11</sup> of the Fifth Demand, plaintiffs' reply notes that defendants failed to respond to these requests. Defendants' supplemental affirmation does not address these demands, other than to include their belated response objecting to same. No explanation is given as to the basis of defendants' objections.

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<sup>9</sup> Items 1 and 2 of the Fifth Demand request production of "[a]ll documents, logs, or other tangible or ESI [electronically stored information] and any accompanying audit trails relating to all electronic medical [sic] records entered by [defendants Scherl and Nandakumar], relating to patient Stephen Cxyz." Bracketed matter added.

<sup>10</sup> As to plaintiffs' claim that the spreadsheet only includes data through August 2013, the spreadsheet included at Exhibit C of defendants' supplemental affirmation in opposition indicates data was provided through March of 2015.

<sup>11</sup> Items 3 through 7 request documentation pertaining to policies and procedures relative to defendants' computer systems, organization charts for defendants' information technology/services department(s), backup tapes of email and other electronic data related to this action, exact copies of hard drives and disks, CDs and DVDs related to this action.

Having reviewed items 3 through 7 of the Fifth Demand, this court concludes that items 3 and 4 are not improper, vague, overbroad or unduly burdensome and defendants are directed to produce the demanded items, to the extent they may exist, within 45 days of the electronic filing of this decision and order.

However, items 5 through 7 of the Fifth Demand are vague and potentially overbroad and unduly burdensome. Plaintiffs' motion to compel is denied with respect to these demands. Such denial is without prejudice to plaintiffs' service of a more narrowly tailored demand.

The branch of plaintiffs' motion pertaining to Ahmed's deposition is granted. Defendants have now changed their initial position and refuse to produce Ahmed based upon their belief that his affidavit and the audit trail they produced sufficiently respond to plaintiffs' demands. However, this court has already ordered defendants to produce Ahmed for a deposition (see July 19, 2016 Status Conference Order, Motion at Exh. I). Moreover, Ahmed's affidavit merely: (1) states that he has reviewed defendants Scherl and Nandakumar's entries in plaintiff-decedent's electronic medical records; (2) defines terminology used within the produced audit report, including the terms "edit" and "modification", which terms encompass changes made to a note's original content, including any deletions made to a patient's medical record; and (3) states that his review of the audit trail for plaintiff-decedent from October 2012 to the present indicates that defendants Scherl and Nandakumar made no "edits" or "modifications" to their visit notes for the plaintiff-decedent after they electronically signed the notes.

Ahmed's affidavit does not address the manner in which data was retrieved, its chain of custody or authenticity. See George Reply Aff. at ¶15. Given that Ahmed's

deposition has already been court ordered, plaintiffs should have the opportunity to pose any questions they may have as to the spreadsheet defendants provided. Accordingly, plaintiffs' motion to compel is granted to the extent that Ahmed's deposition is to be completed on or before September 15, 2017.

Finally, plaintiffs request sanctions and costs incurred in connection with the instant motion. Defendants do not deny their noncompliance and/or late compliance with two of this court's discovery orders, nor do they offer any excuse therefor. Particularly egregious is the fact that it took defendants approximately 14 months to respond to items 3 through 7 of the Fifth Demand, only to serve objections to each and every demand. It is difficult to fathom why defendants' conclusory objections to the demands could not have been served within 20 days, as the CPLR mandates. Although this court declines to grant a conditional order of dismissal, in the event the discovery directed in this decision and order is not complied with in accordance with the time limits herein, plaintiffs' counsel shall, on notice to defense counsel, submit a proposed order imposing sanctions, together with an affirmation and supporting time records, directly to chambers, detailing the time expended and costs incurred in connection with this motion.

For all of the foregoing reasons, it is

ORDERED that plaintiffs' motion is granted in part and denied in part as set forth herein.

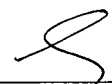
Counsel for the parties are directed to appear for a further status conference on August 1, 2017 at 9:30 a.m., at 60 Centre St., Room 325, New York, New York, at which time the filing date for plaintiffs' note of issue shall be extended.

NYSCEF DOC. NO. 82

RECEIVED NYSCEF: 07/11/2017

The foregoing constitutes this court's decision and order.

Dated: New York, New York  
July 10, 2017

  
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Hon. Martin Shulman, J.S.C.