

Hossen v Rolston
2017 NY Slip Op 32137(U)
October 10, 2017
Supreme Court, New York County
Docket Number: 805356/2013
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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TANZIM HOSSEN, an infant under the age of fourteen
by his mother and natural guardian, SHAMIMA
HOSSEN, and SHAMIMA HOSSEN, individually,

Plaintiff,

Index No: 805356/2013

.-against-

Decision and Order

SANDRA ROLSTON, M.D.; ANIL A. KESAVAN, M.D.;
NEW YORK PRESBYTERIAN HOSPITAL - NEW
YORK WEILL CORNELL CENTER; MITAZ CORP.
d/b/a ALL CARE PHARMACY & SURGICAL and
SIBU CHAKRABARTI,

Defendants.
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Hon. Martin Shulman, JSC:

Pursuant to CPLR §3124, defendants Sandra Rolston, M.D.; Anil A. Kesavan, M.D.; Community Health Care Network, Inc.; New York Presbyterian Hospital - New York Weill Cornell Center; and Mitaz Corp. d/b/a All Care Pharmacy & Surgical (collectively, "defendants") move to compel plaintiffs to provide certain authorizations for the release of: (1) certain NYC Police Department records (i.e., a police report purportedly recording information about a 2015 domestic dispute between the infant-plaintiff's parents); (2) purportedly related NYC Administration for Children Services ("ACS") records; and (3) infant-plaintiff's parents' cell and land-line telephone records (collectively, "non-medical records").¹ Plaintiffs oppose the motions.

¹ Defendant Mitaz Corp., d/b/a as All Care Pharmacy ("Mitaz") brings its motion under motion sequence number 2, but designates it as a cross motion. This motion seeks identical relief resting on the co-defendants' supporting papers in motion sequence number 1. Motion sequences 1 and 2 are consolidated for disposition.

The underlying medical malpractice complaint alleges defendants' various departures from good and accepted medical and pharmaceutical practices in the care and treatment of the infant-plaintiff for Wilson's disease, a genetic disorder that prevents the metabolization of copper. Not properly treated, this disorder can lead to permanent brain and liver damage and trigger marked behavioral and psychiatric changes. Thus, it is alleged that defendants failed to timely and properly treat infant-plaintiff's Wilson's disease resulting in permanent neurological and cognitive damage manifested, among other ways, in infant-plaintiff's poor school performance. Defendants contend the information gleaned from the non-medical records "may provide *possible* alternative explanations as to the child's poor cognitive performance. Phone records may provide . . . [defendants] with documentary evidence that . . . [infant-plaintiff] was lost to follow up [care and treatment due to his parents being] unreachable [because of a disconnected telephone number] during the significant time period of 2011-2013." (emphasis and bracketed matter added)(Cooperman Aff. in Support of Motion at ¶34).

In opposition, Shamima Hossen, infant-plaintiff's mother and natural guardian ("Hossen") essentially attests to providing all relevant telephone contact information (e.g., see Hossen Opp. Aff. at ¶ 10 and Exhibit 3 to Sacks Opp. Aff.) and denies not being responsive to any calls, if and when made, to her and husband. She further questions the credibility of defendants' respective claims as to their unsuccessful attempts to contact either of infant-plaintiff's parents during the 2011-2013 period, especially without proffering any corroborative proof of logs or medical record entries and/or follow up letters to Hossen and her husband contemporaneously recording their

unsuccessful contact efforts (Hossen Opp Aff at ¶¶ 14-15). While conceding the occurrence of a domestic dispute with her husband and infant-plaintiff's father in 2015, Hossen categorically denies that ACS or any other New York City agency ever intervened due to any concern about child neglect or abuse, and none of infant-plaintiff's medical and counseling records contained any reference to suggest a linkage between her son's behavioral or cognitive deficits (which surfaced years before this domestic dispute) and this incident (Hossen Opp. Aff. at ¶¶ 8-9).

It is well settled that although "[a] plaintiff who commences a personal injury action has waived the physician-patient privilege to the extent that his physical or mental condition is affirmatively placed in controversy" (*Carter v Fantauzzo*, 256 AD2d 1189, 1190 [4th Dept 1998]; *Mayer v Cusyck*, 284 AD2d 937, 938 [4th Dept 2001]), the waiver of that privilege "does not permit discovery of information . . . unrelated to illnesses and treatments [in issue]" (bracketed matter added) (*Carter*, 256 AD2d at 1190). "The determinative factor is whether the records sought to be discovered are 'material and necessary' in defense of the action" (*Wachtman v Trocaire Coll.*, 143 AD2d 527, 528 [4th Dept 1988], quoting *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 457 [1983]; see CPLR §3101[a]), or whether the records "may contain information reasonably calculated to lead to relevant evidence" (*Zydel v Manges*, 83 AD2d 987 [4th Dept 1981]).

Here, as Hossen and her counsel correctly contend, defendants failed to establish that the records sought "relate[] to any physical or mental conditions affirmatively placed in controversy by" infant-plaintiff in this action against defendants

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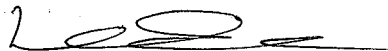
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(*Mayer v Cusyck*, 284 AD2d at 938). Contrarily, defendants' discovery motions rest on sheer speculation. Accordingly, defendants' motions are denied in their entirety. This constitutes this court's decision and order.

Counsel for the parties are directed to appear for a status conference on October 24, 2017 at 9:30 a.m., at 60 Centre St., Room 325, New York, New York.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
October 10, 2017



Hon. Martin Shulman, J.S.C.