

Drummond v Blum
2017 NY Slip Op 33377(U)
February 8, 2017
Supreme Court, Bronx County
Docket Number: Index No. 21280/13
Judge: Douglas E. McKeon
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA-19A

-----X
JOYCE DRUMMOND,

Plaintiff(s)

- against -

INDEX NO: 21280/13

YOSSEF C. BLUM, M.D., JOHN CUELLAR,
M.D., and MONTEFIORE MEDICAL CENTER,

DECISION/ORDER

Defendant(s)

-----X

HON. DOUGLAS E. MCKEON

Plaintiff's motion for an order compelling defendants Yossef Blum, M.D., and Montefiore Medical Center to produce all metadata/audit trails of her electronic medical records including a showing of each change made in the record, when and by whom, and an order striking the answer of defendants for failing to provide the information previously is decided as follows.

This is a medical malpractice action wherein plaintiff alleges that defendants negligently performed hip surgery by striking a nerve and improperly positioning plaintiff thereby causing injury, including right nerve injury and right foot drop. Plaintiff also alleges defendants failed to inform her of risks and alternatives to the surgery. Plaintiff states that a review of the electronic chart maintained by Montefiore provided to plaintiff indicates that progress notes are printed mostly in

black ink, but some in blue ink, and that Dr. Blum dictated the operative report for the April 17, 2012 surgery on June 24, 2012 and electronically signed it on June 26, 2012.

Plaintiff argues that the metadata/audit trail sought by plaintiff is discoverable and that plaintiff is not limited to her chart which is not privileged. They claim that it is critical for the prosecution of plaintiff's causes of action for medical malpractice and lack of informed consent. Plaintiff further argues that, according to Montefiore's own rules and regulations, Dr. Blum should have dictated his report immediately following the surgery on April 17th but that the chart indicates it was dictated and signed two months later. In addition, there are discrepancies in the appearance of the operative report based on the difference ink color.

In opposition, defendants argue that plaintiff has already been provided a complete copy of her Montefiore record. Movants argue that the type of metadata plaintiff seeks here is not routinely provided unless the requesting party shows good cause and that forcing defendant to produce the audit trails will not advance plaintiff's informed consent claim as the records already contain the information plaintiff is seeking but will unduly burden Montefiore. They argue that the significant burden to defendants of producing the materials in question outweighs any benefit they will provide to plaintiff and that the motion should, therefore, be denied.

Initially, that portion of the motion seeking to strike defendants' answer is denied as there has been no showing that defendants willfully failed to provide

discovery. Defendants have engaged in a good faith effort to resolve this dispute by providing plaintiff with a significant portion of the materials plaintiff seeks and seeking to have plaintiff narrow her more broad discovery demands to now seeking the metadata records relating to the operative report and pre-operative progress notes.

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As for the argument plaintiff advances to support her claim that she has not been given a complete copy or that the records have been changed, defendants argue that the original records contain only black text on a white background and that any variation in the appearance of plaintiff's version of the records is not the result of any actions on defendants' behalf. The records as they are maintained by Montefiore contain no variation in color and the records produced by defendants contain no variation in color. Affidavits to that effect have been provided. Furthermore, the affidavit of Elizabeth Roman, the Chart Completion Manager at Montefiore, confirm that the only operative report that exists for the April 17, 2012 surgery is the only already in plaintiff's chart. Defendants have demonstrated that plaintiff has been provided with a complete copy of her Montefiore medical records and argue that forcing them to undertake an undue burden and expense of producing audit trails for no reason would be unfair. As they have demonstrated it would produce no relevant information as plaintiff is already in possession of the information she seeks which includes when and by whom the records were created and whether any changes were made to them. In reply, plaintiff argues that there

are two issues regarding the report. Plaintiff maintains that the original report dictated on the same day of surgery by Dr. Blum was never produced and is missing and that the operative report that was produced contained edits. The motion, at this time, is granted only to the limited extent of directing that defendants provide plaintiff with a further affirmation from Ms. Roman to explain: 1. Dr. Blum's testimony that sometimes a dictated report does not make its way into the chart and has to be re-dictated, whether it is possible that there was an original dictated report that is not, in fact, the report dictated on June 24, 2012; and 2. an explanation to what plaintiff describes as a change in fonts on the text of the operative report relating to the plaintiff's foot drop. While Ms. Roman has indicated that no amendments were made to the operative report, no explanation as to the different fonts was discussed. As such, an explanation is indicated and is to be provided within 45 days of the date of this order.

This action is scheduled for trial on April 24, 2017. This is a firm date, as this action is beyond standard and goals.

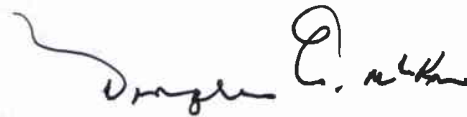
In perfect candor, the discovery that plaintiff seeks has little relevance to the facts to be determined at trial; in other words, whether the foot drop suffered by plaintiff during surgery was due to negligence and, to what extent, she continues to suffer from that injury. Apparently, defendants do not deny that a foot drop happened immediately after surgery. They argue that such an injury can happen in the absence of negligence and, in any event, the injury is almost fully resolved.

Moreover, plaintiff asserts an informed consent claim, which in essence relates to the adequacy of the information provided to plaintiff before she agreed to the surgery.

Under the totality of circumstances, suggestions of changes in the record really have little to do with the claims that require jury resolution.

So ordered.

Dated: *February 8, 2017*



Douglas E. McKeon, J.S.C.