

Arena v Shaw
2018 NY Slip Op 30182(U)
January 31, 2018
Supreme Court, New York County
Docket Number: 850095/2017
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X
GIANFRANCO ARENA, Administrator of the Estate of
CHRISTINE L. ARENA, and GIANGRANCO ARENA,
Individually,

Plaintiffs,

Index No.
850095/2017

**DECISION and
ORDER**

- against -

Mot. Seq. 001

LESTER NOAH SHAW, M.D.,

Defendant.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Gianfranco Arena ("Mr. Arena") commenced this medical malpractice action by Summons and Complaint on April 24, 2017 on behalf of himself and the estate of his late wife Christine L. Arena ("Ms. Arena") (collectively "Plaintiffs"). Plaintiffs allege that defendant Lester Noah Shaw, M.D. ("Dr. Shaw") departed from accepted standards of medical practice by prescribing medication to Ms. Arena who subsequently committed suicide. Plaintiffs also claim that Dr. Shaw failed to procure Ms. Arena's informed consent. Additionally, Mr. Arena claims loss of services and society. On October 3, 2017, Dr. Shaw interposed his Answer.

Presently before the Court is Dr. Shaw's motion for an Order pursuant to CPLR § 3126 striking Plaintiffs' complaint on the grounds that Plaintiffs have failed to provide outstanding discovery. Alternatively, Dr. Shaw moves to compel Plaintiffs' production of this discovery or preclude Plaintiffs from introducing evidence at trial. Plaintiffs oppose.

1. Documents produced in *Gianfranco Arena v. Riversource Life Insurance* (“Riversource”) (2:16-cv-05063-JLL-SCM)

Dr. Shaw seeks documents that Mr. Arena produced in the federal action entitled *Gianfranco Arena v. Riversource Life Insurance* (“Riversource”) (“Federal Court Action”) currently pending in the District Court of New Jersey.

In the Federal Court Action, Mr. Arena alleges that Riversource improperly refused to pay the death benefit of \$3.5 million upon Ms. Arena’s death on the grounds that Ms. Arena’s suicide within two years of issuance of the policy is a disqualifying event. Mr. Arena has produced over 17,000 documents in the discovery of the action. On September 28, 2017, Dr. Shaw received a subpoena to testify as a nonparty witness on October 10, 2017. On September 28, 2017, Dr. Shaw’s counsel sent a letter to Mr. Arena’s counsel requesting the documents that had been previously produced in the Federal Court Action. Dr. Shaw seeks to compel those same documents in his current motion. Dr. Shaw asserts that the documents sought bear on “Ms. Arena’s mental state at the time of her death and the comparison of this mental state before she began taking medication” prescribed by him. (see a copy of Mr. Arena’s memorandum submitted in opposition to Dr. Shaw’s motion to quash the subpoena filed in the Federal Court Action). Dr. Shaw contends that he “is entitled to discovery that shows Ms. Arena’s mental state before she began taking medication to argue, neither he, nor the medication, caused Ms. Arena to commit suicide.” Plaintiffs object to the request as being overly broad and a fishing expedition. Plaintiffs assert that included in those documents are Ms. Arena’s private emails, text messages, social media accounts and postings, and mortgage records over eight years – documents which were not relied on by Dr. Shaw when treating Ms. Arena and have no relevance to Dr. Shaw’s defense of Plaintiffs’ medical malpractice action.

“A trial court is vested with broad discretion in its supervision of disclosure.” (*MSCI Inc. v Jacob*, 120 A.D.3d 1072, 1075 [1st Dept 2014].) “There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: a party.” (CPLR 3101 [a] [1].) “Liberal discovery is favored and pretrial disclosure extends not only to proof that is admissible but also to matters that may lead to the disclosure of

admissible proof.” (*Twenty Four Hour Fuel Oil Corp. v. Hunter Ambulance Inc.*, 640 N.Y.S.2d 114, 114 [1st Dept 1996]).¹

Ms. Arena’s mental state before and during treatment by Dr. Shaw are relevant to both Mr. Arena’s claims in the Federal Court Action and Dr. Shaw’s defense to Mr. Arena’s malpractice claims. Here, where Mr. Arena has already willingly produced documents related to Ms. Arena’s mental state in one action and has placed them in the public arena without requesting any limitations or protections in the Federal Court, there is no reason these documents should not be turned over to Dr. Shaw.

2. Tax Records and Employment Records

Dr. Shaw also seeks to compel Plaintiffs to produce Ms. Arena’s tax returns and employment records. As for the demand for Ms. Arena’s tax returns, Dr. Shaw has failed to demonstrate why Ms. Arena’s tax returns are necessary in addition to Ms. Arena’s W2’s for 2010 through 2015 which Plaintiffs have already produced. Ms. Arena’s employment records, if not already produced in the Federal Court Action by Mr. Arena (and therefore must be disclosed to Dr. Shaw as indicated above), must be produced to Dr. Shaw unless Plaintiffs move for a protective order.

Wherefore it is hereby

ORDERED that the motion to compel is granted to the extent that Plaintiffs are directed to produce the documents that have been previously produced in the Federal Court Action to Dr. Shaw within 30 days; and it is further

¹ “The doctrine of judicial estoppel or the doctrine of inconsistent positions ‘precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed.’” (*Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 176 [1st Dept 1998]) (citations omitted). The doctrine is based “upon the principle that a litigant ‘should not be permitted ... to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise.’” (*Jones*, 243 A.D. 2d at 176).

ORDERED that Plaintiffs shall produce the requested employment records (if they have not already been produced in the Federal Court Action) within thirty days or move for a protective order; and it is further

ORDERED that the portion of the motion which seeks to compel Ms. Arena's tax returns is denied; and it is further

ORDERED that the parties are reminded to appear for their next compliance conference on April 23, 2018 at 71 Thomas Street, Room 205, at 9:30 AM.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JANUARY 31, 2018



Eileen A. Rakower, J.S.C.