

A.M. v Holy Resurrection Greek Orthodox Church of Brookville, N.Y.
2018 NY Slip Op 31183(U)
June 12, 2018
Supreme Court, New York County
Docket Number: 156132/16
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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A.M. and E.M., both minors, by and through their parents
and natural guardians, EFTIHIA MIHOS and EVANGELOS
MIHOS,

Index No. 156132/16
Motion Sequence 006

DECISION AND ORDER

Plaintiffs,

-against-

HOLY RESURRECTION GREEK ORTHODOX
CHURCH OF BROOKVILLE, NEW YORK aka
GREEK ORTHODOX CHURCH OF THE HOLY
RESURRECTION, et al.,

Defendants.
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SHERRY KLEIN HEITLER, J.S.C.

Plaintiffs A.M. and E.M., both of whom are minors, allege through their parents Eftihia Mihos and Evangelos Mihos that non-party P.K., who is also a minor, assaulted A.M. inside a church operated by defendant Holy Resurrection Greek Orthodox Church of Brookville. Defendant Father Demetrios Kehagias, who at the time was present at the church, is P.K.'s father. Plaintiffs sued Holy Resurrection and Father Kehagias, among others, alleging that they negligently allowed P.K. to be on church grounds when they knew or should have known that P.K. had a propensity for violence.

Plaintiffs now move, pursuant to CPLR 3122(a)(2)¹, for a court-ordered subpoena directing non-party Dr. Pavlos Kymissis to produce "non-medical" documents and information in his possession relating to his psychiatric evaluation and treatment of P.K. Dr. Kymissis is alleged to

¹ CPLR 3122(a)(2) provides that a "medical provider served with a subpoena duces tecum, other than a trial subpoena issued by a court, requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or the court has issued the subpoena or otherwise directed the production of the documents."

have met with P.K. approximately one month before the assault alleged in this case. The motion is opposed by P.K. and by Father Kehagias. The other defendants have not taken a position with respect to this motion. Plaintiffs' request arises from a review of documents previously produced in this case, namely an alleged statement by Father Kehagias, memorialized in a Nassau County Police Department report, that he brought P.K. to Dr. Kymissis for treatment because of concerning behavior prior to the alleged assault. Plaintiffs argue that P.K.'s past acts, conduct, and behavior are relevant for liability purposes.

New York's disclosure rules are designed to promote liberal discovery (*see* CPLR 3101(a); *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 [1968]), but they are not absolute. There are robust protections afforded to communications between medical professionals and their patients pursuant to CPLR 4504, which codifies the physician-patient privilege.² *See also In re New York County*, 98 NY2d 525, 532 (2002) (noting the "broad construction" of CPLR 4504); *People v Rivera*, 99 AD3d 535, 535 (1st Dept 2012) (physician-patient privilege is "broadly construed"); *Desai v Blue Shield of Northeastern New York, Inc.*, 146 AD2d 264, 266 (3d Dept 1989). The physician-patient privilege was designed to encourage "the patient to seek medical treatment and to be frank in describing his or her symptoms to the physician so that the most effective treatment can be obtained." *Camperlengo v Blum*, 56 NY2d 251, 254-255 (1982); *see also Yellin v Anastasiow & Marino*, 2004 NYLJ LEXIS 1291, *9-10 (Sup. Ct. NY Co., Mar. 22, 2004, Bransten, J.) ("Courts have recognized that a particularly compelling rationale for confidentiality exists in a case involving a psychiatrist, since the very nature of psychiatric treatment renders privacy essential.")

² CPLR 4504 provides, in relevant part: "Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."

Counsel for P.K. and Father Kehagias argue that the records sought by plaintiffs in this case fall within the ambit of the physician-patient privilege and are therefore protected from disclosure. They also argue the information requested may be acquired through other means, i.e., by deposing P.K. and/or Father Kehagias.

Plaintiffs concede that they are not entitled to any information concerning P.K.'s medical treatment or diagnosis contained within Dr. Kymissis' records.³ However, they argue that they are entitled to any "intake or history" provided to Dr. Kymissis and his staff. In support, plaintiffs cite to a narrow line of cases that stand for the proposition that "non-medical" information contained within a hospital's patient files could be discoverable under limited circumstances. These circumstances are not present here. For example, in *Moore v St. John's Episcopal Hospital*, 89 AD2d 618 (2d Dept 1982), the plaintiff was a patient in defendant's hospital and was assaulted by another patient. The court determined that the plaintiff was entitled to inspect the assailant's hospital records to determine whether the hospital had knowledge of his violent propensity and whether the hospital did enough to ensure the safety of its other patients. *Id.* ("plaintiff is entitled to any nonmedical information in [the] hospital records, particularly such information as relates to any prior assaults or similar violent behavior, to aid plaintiff in establishing knowledge on the part of defendants."). Similarly, in *Mayer v Albany*, 37 AD2d 2011 (3rd Dept 1971), the plaintiff was visiting her father in a hospital's psychiatric ward when another patient assaulted her. She claimed that the hospital failed to properly supervise dangerous patients and sought disclosure of records pertaining to the assailant's propensities. The Third Department determined that the plaintiff was entitled to all nonmedical data pertaining to prior assaults or attempted assaults by the patient, including the time, place, and circumstances thereof. Plaintiffs also cite *J. Z. v South Oaks*

³ Affirmation of Jeffrey M. Herman, Esq. ¶ 7 ("While Plaintiffs are not entitled to any medical treatment or diagnostic information in discovery from a medical provider concerning an alleged nonparty perpetrator....")

Hospital, 67 AD3d 645 (2d Dept 2009). In that case, the court conducted an *in-camera* review of the assailant's hospital records, and determined that the plaintiff was entitled to "information of a nonmedical nature relating to any prior assaults or similar violent behavior" that occurred during their hospital stay. *Id.* at 646.⁴

Moore, *Mayer* and *South Oaks Hospital* each fall into a narrow fact pattern. In all three cases, an assault was committed in a hospital or other medical institution by a patient who was also under the care and supervision of that institution. The records in the possession of these institutions contained identifiable non-medical information such as incident reports that were maintained separately from the patients' medical records and could have been produced without disclosing their confidential medical information. Under these limited circumstances the plaintiffs were deemed to be entitled to non-medical records concerning their assailants' propensities and prior violent acts.

Were the request in this case analogous, and it is not, plaintiffs would be seeking records about P.K.'s alleged prior behavior from Holy Resurrection, the location where the alleged assault occurred. But that is not what is being sought. Here, unlike the records sought in *Moore*, *Mayer*, and *South Oaks Hospital*, plaintiffs seek records from a non-party minor's treating psychiatrist who has no connection to this case.

It is plaintiffs' burden on this motion to show their entitlement to Dr. Kymissis' records. The intake records sought by plaintiffs in this case must be presumed to have been created as part of Dr. Kymissis' role as P.K.'s treating psychiatrist and therefore linked to his psychiatric treatment. They were prepared by or at the behest of a licensed medical professional to attend to P.K. in a medical capacity. Again, the physician-patient privilege protects not only communications, but "any medical information acquired by the [psychiatrist] through the application of professional skill or knowledge". *Farrow v Allen*, 194 AD2d 40, 43 (1st Dept 1993) (quoting *Dillenbeck v Hess*, 73

⁴ See also *Thompson v Pibly Residential Programs, Inc.*, 69 AD3d 453, 454 (1st Dept 2010).

NY2d 278, n.4 ([1989]); *see also Ashford v Brunswick Psychiatric Center*, 1982 NY App. Div. LEXIS 19114, *2 (2d Dept 1982) (emphasis added) (“regardless of the theory of liability, CPLR 4504 shield’s the patient’s medical information (diagnosis, prognosis and *propensities*) from disclosure”).

In an abundance of caution, however, the court will review Dr. Kymissis’ records *in-camera* to determine whether any of his files fall outside of the scope of the privilege. There is no need for counsel for either P.K. or Father Kehagias to simultaneously prepare a privilege log.

Finally, this ruling does not preclude the taking of depositions for the purpose of clarifying these issues. *See Child C. v Fleming School*, 179 AD2d 460, 462 (1st Dept 1992).

In light of the foregoing, it is hereby

ORDERED that plaintiffs’ motion is granted to the extent that the court will conduct an *in-camera* inspection, and otherwise is denied; and it is further

ORDERED that, within 10 days of the date of entry of this order, plaintiffs shall submit to the court a proposed subpoena consistent with this order, on notice to all interested counsel.

This constitutes the decision and order of the court.

DATED:

June 12, 2018


SHERRY KLEIN HEITLER, J.S.C.