

Miller v Stern
2018 NY Slip Op 31884(U)
August 6, 2018
Supreme Court, New York County
Docket Number: 800007/13
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Andrew Miller,

Plaintiff,

- v -

Index No.
800007/13

**DECISION
and ORDER**

Mot. Seq. 004

Dr. Dana Stern,

Defendant.
-----X

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

This is an action for medical malpractice involving a claim of improper prescribing of medication for treatment of genital warts, resulting in hyperpigmentation of the skin on plaintiff's genitals and other claimed injuries.

On April 29, 2013, plaintiff, Andrew Miller ("plaintiff"), commenced this lawsuit *pro se*. Plaintiff attached as Exhibit B to his complaint photographs of his genitals. The action was not commenced as an e-filed case. On January 10, 2017, plaintiff's mother, an attorney, filed a Notice of Appearance on his behalf. On November 22, 2017, plaintiff e-filed an amended verified complaint. The photographs were not included as an exhibit to the amended verified complaint.

Presently before the Court is plaintiff's motion (a) "to seal Exhibit B to the verified complaint filed April 29, 2013 (containing four photographs of plaintiff's genitals) ... or to redact Exhibit B;" (b) "to seal Exhibits C1-4, D1-5, and E1-6 to plaintiff's deposition (all containing photographs of plaintiff's genitals);" (c) for a "protective order ... to protect all photographs of plaintiff's genitals in defendant's possession ...;" (d) to amend the amended verified complaint e-filed on November 22, 2017 and to allow plaintiff to proceed anonymously; and (e) for an extension of time to file a notice of medical malpractice action.

Defendant opposes plaintiff's motion "to the extent that it seeks to place limitations on legitimate use of the photographs for purposes of this litigation,

including the patently overbroad request by the plaintiff that the photographs not be disclosed 'to anyone,' as well as the other overbroad, improper, prejudicial, and unnecessary aspects of the plaintiff's motion, and the request to amend the complaint to name the plaintiff as 'John Doe.'"

(a) Request to seal Exhibit B to the Verified Complaint

Plaintiff seeks to seal "four photographs of plaintiff's genitals" that plaintiff annexed as Exhibit B to the verified complaint that he filed on April 29, 2013. Plaintiff states in his affidavit, "When I filed the complaint, I did not understand that the photographs of my genitals, once filed, would be available to the public." (Plaintiff's Aff. ¶3). Defendant does not oppose the sealing of those photographs.

The sealing of court records is governed by 22 NYCRR § 216.1, which provides as follows:

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

As noted by the First Department in *Gryphon Dom. VI, LLC v. APP Intl. Fin. Co.*, 28 A.D.3d 322, 324 (1st Dept. 2006), New York Courts are reluctant to allow the sealing of court records, even when sought by both sides of the proceeding. "[A] court is always required to make an independent determination of good cause before it may grant a request for sealing." *Gryphon*, 28 A.D. 3d at 324. Sealing should only be ordered under "strictly limited circumstances" such as, *inter alia*, to protect the confidentiality of trade secrets or to preserve the privacy of an infant." *Gryphon*, 28 A.D. 3d at 324-325. "[N]either the potential for embarrassment or damage to reputation, nor the general desire for privacy, constitutes good cause to seal court records." *Mosallem v. Berenson*, 76 A.D.3d 345, 351 (1st Dept 2010). However, courts have also held that sealing is warranted where the issues raised were "of minimal public interest." *Feffer v. Goodkind, Wechsler, Labaton & Rudoff*, 152 Misc. 2d 812, 815-16 (Sup. Ct., N.Y. County 1991).

Since the subject photographs are “of minimal public interest” and in light of defendant’s consent, plaintiff’s request to seal Exhibit B to the verified complaint that he filed on April 29, 2013 should be granted.

(b) Request to seal additional photos

Plaintiff also seeks to seal: (1) photographs of his genitals that he produced to defendant on February 2, 2016 in response to defendant’s discovery demands and (2) photographs of his genitals that he produced to defendant on July 18, 2017. These photographs were marked for identification at plaintiff’s deposition. The exhibits have not been filed with the New York Court Clerk’s office. As such, there appears to be no basis for “sealing” these exhibits.

(c) Request for Protective Order

Plaintiff seeks a “protective order ... to protect all photographs of plaintiff’s genitals in defendant’s possession” Plaintiff seeks an order which requires defense counsel to keep the photographs confidential and “to not disclose the photographs to anyone.” Plaintiff’s request is overly broad since “[t]he defendant and the defendant’s attorneys have a right to see and use discovery, including photographs provided by the plaintiff, in connection with the defense of this matter.” As defendant correctly contends, “[T]he photographs relate to the condition of the plaintiff’s penis which the defendant treated and the plaintiff’s claimed injuries-matters at the heart of the alleged liability and claimed damages herein. These are appropriate and legitimate uses of the photographs which should not be the part of any protective relief.”

(d) Request to amend the verified complaint

Plaintiff seeks to amend the verified complaint e-filed on November 22, 2017 and to allow plaintiff to proceed anonymously. Defendant opposes this relief. Defendant argues that “[s]uch an amendment would be inflammatory and prejudicial to the defendant, creating or suggesting a special ‘aura’ about the plaintiff that could taint a jury’s perception of this matter and its assessment of the liability and damages issues.” Defendant further argues that it is “unnecessary and improper” because “plaintiff is not in a protected class and has no special privacy rights.” Defendant further argues that “the only reason for the stated privacy concern relative to how he is named in this action arises from the plaintiff’s own actions in filing photographs

of his genitals with the complaint (leading the plaintiff now to seek redaction or sealing relief stemming from his own actions)."

"[T]o obtain anonymity, there must be a showing that the privacy interest involved is substantial, so as to overcome the presumption of openness that attends judicial proceedings." *Doe v. Kidd*, 19 Misc. 3d 782, 788 (Sup. Ct. 2008) (citations omitted). Here, Plaintiff has failed to meet this burden, and his request to proceed anonymously is denied.

(e) Request to file a late Notice of Medical Malpractice Action ("Notice")

Rule §3406(a) provides, in pertinent part, that "[n]ot more than sixty days after issue is joined, the plaintiff in an action to recover damages for dental, medical or podiatric malpractice shall file with the clerk of the court in which the action is commenced a notice of dental, medical or podiatric malpractice action[.]" CPLR §3406(a). Rule §3406(a) authorizes an extension of time to file a notice for "good cause" and where there has been no prejudice. *Id.* (citing CPLR § 2004). Here, while the litigation has been ongoing for years and plaintiff fails to submit a proposed Notice in connection with his pending motion, Defendant has consented to the request for an extension. Defendant does not claim to be prejudiced by the delay. However, should plaintiff fail to file the Notice within 30 days, the action shall be dismissed.

Wherefore it is hereby

ORDERED that the portion of plaintiff's motion which seeks to seal Exhibit B of the verified complaint that plaintiff filed on April 29, 2013 is granted, and the Clerk is directed to seal said Exhibit B of the verified complaint accordingly; and it is further

ORDERED that the portion of plaintiff's motion which seeks to "seal" the photographs that plaintiff produced in discovery is denied; and it is further

ORDERED that the portion of plaintiff's motion which seeks a protective order concerning the photographs that plaintiff produced in discovery is denied; and it is further

ORDERED that the portion of plaintiff's motion which seeks to amend the amended verified complaint to proceed anonymously is denied; and it is further

ORDERED that the portion of plaintiff's motion which seeks to file a late Notice of Medical Malpractice Action is granted, and plaintiff is directed to file a Notice of Medical Malpractice Action no later than 30 days of the date of this Order. Should plaintiff to do so, the action will be dismissed; and it is further

ORDERED all parties are directed to appear for a compliance conference on September 11, 2018, in Part 6, 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: AUGUST 9, 2018


EILEEN A. RAKOWER, J.S.C.