At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 13th day of August, 2018.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

M.P. and J.P.,
Plaintiffs,
- against -

DANIEL DAVIDSOHN,
Defendants.

Index No.: 514932/2016

Motion Seq. # 4 & 5

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Notice of Motion, Affirmation & Exhibits	1
Memo of Law	2
Notice of Cross-Motion, Affidavit, Affirmation In Support & Opposition, Exhibits & Memo of Law	3
Affirmation in Opposition to Cross-Motion & In Reply	4
Reply Memo of Law & Exhibits	5

Upon the foregoing papers Defendant, DANIEL DAVIDSOHN , moves this Court for an Order pursuant to CPLR § 3103(a) and CPLR § 2201 respectively, issuing a protective order and (1) staying discovery in the case at bar while an appeal in this action is pending before the Appellate Division, Second Department, or (2)limiting discovery to Defendant's Statute of Limitations defense, or (3)staying depositions until document discovery is complete. Plaintiffs, M.P. and J.P., cross-move for an Order pursuant to Mental Hygiene Law (MHL) § 33.13 and CPLR §3124, respectively, (1) directing non-party, Ohel Children's Home and Family Services (Ohel) to "turn over all records relating to Defendant", (2)compelling Defendant's response to Interrogatories # 9 and # 19 and Document Demands # 3 and # 4, (3)directing Defendant to provide executed HIPAA releases to obtain "all related mental health records", (4) awarding sanctions pursuant to CPLR § 3126 for

Defendant's failure to appear for a deposition, and (5) awarding Plaintiffs' attorney fees and costs.

BACKGROUND

Plaintiffs brought the instant action seeking damages for injuries allegedly received as a result of numerous incidents of sexual abuse committed by Defendant throughout 1999. The within action was commenced on or about August 25, 2016. By order, dated March 23, 2017, this Court denied Defendant's motion to dismiss the complaint in its entirety without prejudice only as against Plaintiff, M.P., with leave to renew upon completion of discovery. Defendant filed a Notice of Appeal and moved to reargue the motion or in the alternative for an order staying this action until resolution of the appeal. That motion was denied in all respects by this Court on January 19, 2018 and the Appellate Division, Second Department also denied Defendant's motion for a stay pending a hearing and determination of the appeal.

Ohel's Records

Defendant contends that Ohel's records are privileged and therefore are not discoverable pursuant to CPLR § 4504. CPLR § 4504 provides in relevant part that:

> Unless the patient waives the privilege, a person authorized to practice medicine....shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity....The relationship of a physician and patient shall exist between a medical corporation, ... a professional service corporation,.... a university faculty practice corporation.

In support of the contention that Defendant waived privilege with regard to Ohel's records Plaintiffs submit the affidavit of Shlomo Nahmias , a relative of both Plaintiffs and Defendant. Mr.

Nahmias states that Defendant admitted to him and other family members that he sexually abused Plaintiffs. "[A]t Defendant's request I was appointed as a family "liaison" to monitor Defendant's progress and treatment at Ohel."[1] According to Mr. Nahmias he spoke to the person treating Defendant several times per month who sometimes relayed conversations he/she had with Defendant during treatment sessions. Further, Mr. Nahmias states that he also received documentation via mail from Ohel or the person treating Defendant.

Plaintiffs contend that Mr. Nahmias' affidavit demonstrates that Defendant waived the privilege afforded by statute. Physician-patient privilege can be waived if the party put his/her physical or mental condition in controversy or if the information was previously released to a third party. ***Klein v Levin, 242 AD2d 682, 683 (2d Dept 1997); Fox v Marshall, 91 AD3d 710 (2d Dept 2012); Neferis v DeStefano, 265 AD2d 464 (2d Dept 1999);Farrow v Allen, 194 AD2d 40(1st Dept 1993); Carrion v The City of New York, 2002 WL 523398 (SDNY).*** As stated by the Appellate Division, "even if the information was intended to remain confidential when it was communicated, once a patient puts the information into the hands of a third party who is completely unconnected to his or her treatment and is not subject to any privilege, it can no longer be considered a confidence and the privilege must be deemed to have been waived as to that information". ***Farrow v Allen, supra at 44, 46-47; Webdale v North General Hospital, 7 Misc3d 947 (S. Ct., NY Cnty 2005).***

However, a waiver is limited only to that information that was given to a third party and does not authorize wholesale discovery of the records maintained by Ohel regarding Defendant's

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[1] Annexed to Jonathan E. Neuman, Esq.'s Affirmation in Opposition to Defendant's Motion & in sSupport of Plaintiffs' Cross-Motion.

treatment. ***Del Gallo v City of New York, 43 Misc3d 1235 (A) (S. Ct. NY Co. 2014)***; ***Farrow v Allen, supra at 46-47***; ***People v Bierenbaum 301 AD2d 119 (1st Dept 2002)***. In the instant action Mr. Nahmias' affidavit is vague and factually insufficient to justify a waiver of the privilege afforded by CPLR § 4504. ***Andon ex rel. Andon v 302-304 Mott Street Associates, 94 NY2d 740,746 (2000).*** However, the physician-patient privilege does not protect the mere facts and incidents of a person's medical history. ***Williams v Roosevelt Hospital, 66 NY2d 391, 395 (1985); Neferis v DeStefano, supra at 466***. The privilege extends only to information relating to the nature of the treatment rendered and the diagnosis made, but not to the fact that the party was a patient or how many times he/she was seen by the physician. ***Williams v Roosevelt Hosp., supra at 396-397; Hughson v St. Francis Hosp. of Port Jervis, 93 AD2d 491, 499 (2d Dept 1983).***

Defendant also contends that in any event Ohel's records are not relevant to Plaintiffs' claims. Courts have consistently held that any matter which may lead to the discovery of admissible proof as to matters alleged in the complaint is discoverable, as is any matter which bears upon a defense, even if the facts themselves are not admissible". ***Cajamarca v Osatuk, 2018 NY Slip Op 05133 (2d Dept July 11, 2018).*** The facts and incidents of Defendant's treatment at Ohel are relevant to, or may lead to admissible proof with respect to the issues raised in the complaint. ***Id., citing Bigman v. Dime Sav. Bank of N.Y., FSB, 153 A.D.2d 912, 914, (2d Dept 1989)***. Defendant's remaining contentions regarding the discovery of Ohel's records are without merit. Accordingly, Plaintiffs are entitled to information regarding the facts and incidents of Defendant's treatment at Ohel.

Stay & Modication of the Discovery Schedule

Defendant seeks a stay of discovery pending the resolution of an appeal to the Second Department that has now been perfected. This is the third time Defendant has requested this specific relief. A stay of discovery is tantamount to a stay of the action and therefore both the motion for a stay of the action and a stay of discovery are denied. Similarly, Defendant's request limiting discovery to only the Statute of Limitations defense, which is the issue before the Second Department, is also denied. Defendant also seeks an Order staying depositions until document discovery is complete. A party is entitled to "choose both the discovery devices it wishes to use and the order in which to use them." ***Nimkoff v Cent. Park Plaza Assoc., LLC, 123 AD3d 679, 680 (2d Dept 2014), citing Edwards–Pitt v. Doe, 294 A.D.2d 395, 396 (2d Dept 2002)***. Courts have generally required that parties complete one discovery device before invoking another. ***Vladimir Zlatnick, M.D., P.C., Assignee of Aminov v Govt. Employees Ins. Co., 2 Misc 3d 347, 351 (Civ. Ct., Queens Co., 2003), citing Giffords Oil Co. v Spinogatti, 96 AD2d 851 (2d Dept 1983), and NOPA Realty Corp. v Central Caterers, 91 AD2d 991, 992 (2d Dept 1983).*** Only when the first chosen discovery device does not satisfactorily yield information can a party utilize the other discovery device. ***Katz v Posner, 23 AD2d 774, 775(2d Dept 1965); Edwards-Pitt v Doe, supra at 397; Roman Catholic Diocese of Brooklyn, 16 AD3d 482 (2d Dept 2005)***.

Both parties have failed to comply with the Preliminary Conference Order dated January 10, 2018 and have failed to adequately respond to the document requests and interrogatories that were served upon them. Additionally, Plaintiffs' responses to the interrogatories do not comply with the requirements set forth in CPLR § 3133 (b). This Court finds that under the facts

and circumstances of the case at bar, judicial economy requires that a Judicial Hearing Officer be appointed pursuant to CPLR § 3104 to supervise disclosure in accordance with this Order. The parties remaining contentions are without merit. Accordingly, it is

ORDERED, that Defendant's motion is denied in part and granted to the extent that Depositions are stayed until document discovery is complete, and it is

ORDERED, that Plaintiffs' cross-motion is denied in its entirety, and it is

ORDERED, that a Judicial Hearing Officer is appointed to supervise disclosure in accordance with the terms and conditions as set forth above.

ENTER,

LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN