

A.S. v Migotsky

2018 NY Slip Op 32927(U)

November 13, 2018

Supreme Court, New York County

Docket Number: 805283/2017

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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A.S., by and through his mother and natural guardian,
ANASTASIA THRASHER and ANASTASIA
THRASHER Individually,

Index No:
805283/2017

Plaintiffs,

**Decision
and
Order**

- against -

Mot. Seq.: 001

JOHN MICHAEL MIGOTSKY, M.D., IFFATH
HOSKINS, M.D., KATHERINE A. TAYLOR, M.D.,
NICOLE EDISON, M.D., NYU LANGONE MEDICAL
CENTER, NYU HOSPITALS CENTER and ROSH
MATERNAL-FETAL MEDICINE PLLC,

Defendants.

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

This is a medical malpractice action. Plaintiffs allege that Defendants were negligent in the prenatal care and post-natal care that they rendered to Plaintiff, Anastasia Thrasher ("Plaintiff-Mother") that caused Plaintiff-Infant A.S. ("Plaintiff-Infant") to sustain a perinatal stroke and brain injury.

Defendant John Michael Migotsky, M.D. ("Migotsky") moves to compel Plaintiffs pursuant to CPLR §§ 3101(a) and 3124 to provide authorizations to obtain Plaintiff-Mother's collateral source records for one year prior to Plaintiff-Infant's date of birth on July 15, 2016. Defendants Iffath Hoskins, M.D. ("Hoskins"), Nicole Edison, M.D. ("Edison"), NYU Langone Hospitals f/n/a NYU Hospitals Center s/h/a NYU Langone Medical Center ("NYU Langone"), and NYU Hospitals filed a Cross-Motion in support of Migotsky's motion. Defendant Katherine A. Taylor, M.D. ("Taylor") also filed a Cross-Motion in support of Migotsky's motion. Plaintiffs oppose the Motion and Cross-Motions.

Factual Allegations/Background

By way of background, on July 14, 2016, Plaintiff-Mother was admitted to Tisch Hospital, owned and operated by NYU Langone and NYU Hospitals, for the induction of labor. On July 14, 2016 through July 15, 2016, Plaintiff-Mother was under the care of Migotsky, Hoskins, Taylor and Edison while she was in labor. Plaintiff-Infant was born on July 15, 2016 at Tisch Hospital. Plaintiff-Infant suffered an acute stroke and right sided hemiplegia. Plaintiffs remained in the care of Defendants through July 23, 2016.

Pending Motion

Defendants served Discovery Demands on Plaintiffs in August 2017, asking among other things for authorizations to obtain Plaintiff-Mother and Plaintiff-Infant's collateral source records. On April 24, 2018, the parties attended a preliminary conference, where an Order was entered directing Plaintiffs to provide authorizations for collateral sources from the following medical care providers within 30 days: Aetna, Blue Cross/Blue Shield, Medicaid and Social Security. At the compliance conference on June 5, 2016, Plaintiffs' counsel took the position that this provision only applied to disclosure of Plaintiff-Infant's records, not those of Plaintiff-Mother. Defendants state that to date, they have not received the demanded authorizations to obtain Plaintiff-Mother's collateral source records.

Defendants contend that these records are necessary to determine what conditions the Plaintiff-Mother suffered which could have contributed to Plaintiff-Infant's stroke. Defendants contends that "[i]t appears the plaintiff-mother may have been experiencing additional medical issues during her pregnancy that could have had a significant impact on the infant-plaintiff's course," including a visit on June 15, 2016 to the NYU Emergency Department for shortness of breath and hyperventilation and a history of bulimia. (See Mitovksy Attorney's moving affirmation).

In opposition, Plaintiffs argue that they have already provided Defendants with authorizations for (1) the Plaintiff-Mother's gynecologist, Dr. Essig, who initially treated her; (2) for Plaintiff-Mother's visit to New York Presbyterian Hospital; and (3) for the genetics laboratories that Dr. Essig and Dr. Taylor referred her to visit. Plaintiffs state that they will also provide authorizations for Dr. Jacques H. Hacquebord, an orthopedist whom Plaintiff-Mother saw once during her pregnancy. Plaintiff contends that Plaintiff-Mother has therefore provided authorizations for her treatment during the in-utero period. Plaintiff

contends that Defendants “can point to nothing in the records which would lead a reasonable person to conclude that there was additional care during the gestational period to which they should be provided access.” Plaintiffs further contend that Defendants physicians were on notice of Plaintiff-Mother’s history of bulimia but never raised any issue that the fetus would be impacted as a result of that history. Plaintiffs further contend that the records of Defendant NYU, where Plaintiff-Infant was born, make no reference that the stroke suffered by Plaintiff-Infant was related to Plaintiff-Mother’s history of bulimia.

Legal Standards

CPLR § 3101[a] provides that, “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The Court of Appeals has held that the term “material and necessary” is to be given a liberal interpretation in favor of the disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity,” and that “[t]he test is one of usefulness and reason.” *Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]. Pursuant to CPLR § 3124, a party may move to compel compliance or a response if the opposing party “fails to respond to or comply with any request, notice, interrogatory, demand, question or order”.

Relevant medical records are to be made available to the opposing party when the party’s physical or mental condition is in controversy. *Del Gallo v City of New York*, 997 N.Y.S.2d 98, 98 [Sup. Ct. 2014]. “The physician-patient privilege, which may otherwise prohibit disclosure of information obtained by a physician treating a patient, is deemed waived by a litigant ‘when, by bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue.’” *Del Gallo v City of New York* 997 N.Y.S.2d at 98 (citation omitted). The party seeking the medical records has the burden of demonstrating that the physical or mental condition is in controversy. *Id.*

The First Department has held that an injured Plaintiff’s medical history during the period the Plaintiff was in utero is inseparable from the mothers, thus the mother’s medical records are discoverable to the opposing party. *In re New York Cty. DES Litig.*, 168 A.D.2d 44, 47 [1st Dept. 1991]. However, where the party seeking records that go beyond the gestation period, the party must show there is a waiver of the physician-patient privilege to warrant such disclosure. *Id.* at 805. The waiver of the physician-patient privilege is established when the plaintiff references the mother’s medical history and shows that the medical history beyond

the gestation period “is relevant to the issue in controversy and is material and necessary to the defense.” *Id.*

Discussion

Preliminarily, Plaintiffs have provided Defendants with authorizations for medical records for the in utero period of Plaintiff-Infant. Plaintiffs have provided authorizations for the Plaintiff-Mother’s gynecologist who initially treated her, for Plaintiff-Mother’s visit to New York Presbyterian Hospital, and for the genetics laboratories that Dr. Essig and Dr. Taylor referred her to visit. Plaintiff states that she will also provide authorizations for Dr. Jacques H. Hacquebord, an orthopedist whom Plaintiff-Mother saw once during her pregnancy. Plaintiffs therefore have made available Plaintiff-Mother’s medical records for the in utero period to the Defendants.


Defendants have not satisfied their burden of showing that the Plaintiff-Mother’s medical records beyond the gestation period are discoverable. Defendants have not demonstrated that the Plaintiff-Mother has waived the privilege by referencing the medical history and Defendants have also not demonstrated that the medical history beyond the in utero period “is relevant to the issue in controversy and is material and necessary to the defense.” *In re New York Cty. DES Litig.*, 168 A.D.2d 44, 47 [1991].

Wherefore, it is hereby

ORDERED that Defendant Migotsky’s Motion and Defendants Hoskins, Edison, NYU Langone, and NYU Hospitals’ Cross-Motion and Defendant Taylor’s Cross-Motion to compel Plaintiffs pursuant to CPLR §§ 3101(a) and 3124 to provide authorizations to obtain Plaintiff-Mother’s collateral source records for one year prior to Plaintiff-Infant’s date of birth on July 15, 2016 is denied.

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

Dated: NOVEMBER 13, 2018



Eileen A. Rakower, J.S.C.