

Broadley v Matros
2018 NY Slip Op 33182(U)
December 11, 2018
Supreme Court, New York County
Docket Number: 805220/14
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK
COUNTYPRESENT:HON. JOAN A. MADDEN
*Justice*PART 11EDMUND BROADLEY,

Plaintiff,

INDEX NO. 805220/14
MOTION DATE: 12/6/18

- v -

MOTION SEQ. NO. 009

EVAN MATROS, M.D.,

Defendant,

The following papers, numbered 1 to _____ were read on this motion for contempt

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Plaintiff, appearing *pro se*, moves for an order holding non-party Memorial Sloan-Kettering Cancer Center (hereinafter "Memorial") in contempt for failing to comply with a judicial subpoena, compelling Memorial to comply with the demands for production of documents set forth in the subpoena and to certify such documents, and requiring Memorial to provide identifying information of attorneys who, on behalf of Memorial, moved to quash the subpoena, inferring that the motion constituted abusive litigation tactics. Memorial opposes the motion and cross moves to enjoin plaintiff from making further motions without prior court approval. Defendant also cross moves for an order enjoining plaintiff from filing any further motions in this action without prior court approval.

Background

This is an action for medical malpractice and lack of informed consent. Plaintiff's Bill of Particulars alleges that "the anterolateral thigh ("ALT") flap reconstruction surgery performed by [defendant] at [Memorial] on January 31, 2012 immediately following a radical resection of plaintiff's left groin synovial sarcoma was contraindicated, unnecessary, and improperly

performed." Plaintiff also asserts a claim for lack of informed consent "in that he would not have agreed to any surgical procedure on his leg that in any way posed a threat to his mobility."

Plaintiff also alleges that defendant failed to ensure that a "specifically requested type of urinary catheter" be used during the ALT flap surgical reconstruction.

Note of issue was filed on August 30, 2016. Defendant filed a motion for summary judgment on May 16, 2017.¹ The motion was submitted unopposed. Counsel for plaintiff then made a motion to withdraw as counsel. Before permitting counsel to withdraw, in its interim order dated October 12, 2017, the court required plaintiff's counsel, on or before October 30, 2017, to submit to the court:

1. An affirmation for in-camera inspection delineating his attempts to retain an expert and providing identifying information as to the experts he contacted, including their names, specialities, locations and affiliations; and

2. Subpoenas (at plaintiff's request) for (i) the operation manual for Memorial, (ii) any letters exchanged between plaintiff and the Memorial patient representative, together with any internal Memorial documents that were generated with respect to plaintiff's letters and/or communications with the patient representative, and (iii) defendant Dr. Matros' work schedule for the day before, the day of, and the day after plaintiff's surgery.

After, plaintiff's counsel complied with the interim order, and submitted the documents and the subpoena for the above-reference information to be so-ordered by the court, the court permitted him to withdraw. The court issued a judicial subpoena dated October 17, 2017, which required Memorial, in relevant part, to:

Produce and identify the handbook(s), manual(s), similar types of texts wherein [Memorial] sets forth rules, regulations, policies, procedures, guidelines, protocols of conduct, and standard operating procedures for plastic surgeons prior to, during and following the performance of plastic

¹The court extended defendant's time to move for summary judgment so that defendant could conduct a non-party deposition.

surgery procedures on a patient

Produce and identify with specificity all records kept by [Memorial] that set forth the complete daily and evening work schedule, including but not limited to surgery schedule of Dr. Evan Matos on Monday January 30, 2012, January 31, 2012, as well as Wednesday, February 1, 2012.

Produce the full and complete compiled by Patient Representative Sandra Sanchez and/or Patient Representative Department of [Memorial] for Patient Edmund D. Broadley including but not limited to:

Any and all handwritten typed, computer generated, electrically submitted or voice recorded records of any and all notes, memos, messages, texts, emails, correspondence and other written communications as well as telephone communications which in any way referenced Patient Edmund D. Broadley that have been received by Patient Representative Sandra Sanchez from any of the following persons:

- a) Patient Edmund D. Broadley
- b) Dr. Evan Matos;
- c) Dr. Samuel Singer
- d) Dr. Peter C. Cordeiro
- e) Other staff members of [Memorial]
- f) Any other individuals

Any and all handwritten typed, computer generated, electrically submitted or voice recorded records of any and all notes, memos, messages, texts, emails, correspondence and other written communications as well as telephone communications which in any way referenced Patient Edmund D. Broadley that have been forwarded by Patient Representative Sandra Sanchez to any of the following persons:

- a) Patient Edmund D. Broadley
- b) Dr. Evan Matos;
- c) Dr. Samuel Singer
- d) Dr. Peter C. Cordeiro
- e) Other staff members of [Memorial]
- f) Any other individuals

Memorial moved to quash the subpoenas served on it by plaintiff, and by decision and order dated June 27, 2018, the court denied the motion except to the extent of finding that Memorial was not required to produce Dr. Matos' schedule for the day before and the day after

plaintiff's surgery.

Plaintiff now moves for contempt and to compel Memorial's compliance with the subpoenas and for related relief. Plaintiff acknowledges that on or about August 19, 2018, he received a response to the subpoenas from Memorial. Specifically, the record shows that by letter dated August 10, 2018, Memorial wrote that its search for the operation manuals for surgery at issue revealed that no such manuals, policies or procedures relating to anterolateral thigh ("ALT") flap reconstruction surgery existed as of January 31, 2012 (i.e. the date of the surgery) or currently; that Dr. Matros' work schedule for the date of the surgery was enclosed; and that plaintiff's patient representative file was enclosed.

However, plaintiff argues that the response was insufficient for the reasons stated in his letter dated September 7, 2018, in which he wrote to Memorial that its response too narrowly interpreted the type of manual sought by the subpoena which would include general performance of surgeries and not only ALT flap reconstruction surgery. As for Matros' schedule, which contains two entries, one for 7:30 am, and another for 9:05 am, which indicates that plaintiff's surgery was performed at that time, plaintiff maintains that the schedule is insufficient as it does not indicate what Dr. Matros did at 7:30 am or the time that his surgery was completed. With respect to the patient representative file, plaintiff argues it is "too limited in scope and content" and that he "has reason to believe" that documents regarding patient representative Sandra Sanchez have not been produced. Plaintiff also argues that the response to the subpoena is insufficient as the records are not certified.

Lastly, plaintiff argues that he is entitled to the identity of the individuals who, on behalf of Memorial, authored the order to show cause to quash the subpoena and presented the order to show cause to the court, to demonstrate that the attorneys engaged in abusive litigation tactics.

Memorial opposes that motion, asserting that it properly responded to the subpoena and that court's June 27, 2018 order. In support of its opposition, Memorial submits affidavits, from Elizabeth M. D'Elia, Esq, Memorial's General Counsel and Chief Litigation Counsel, and from

Jorge Capote, Memorial's Senior Director of Patient Relations who certify Memorial's response to the three categories of documents required to be produced by the subpoena.

With regard to the first category of documents relating to Memorial's manuals, Ms. D'Elia certifies "to the best of my knowledge, after reasonable inquiry, Memorial does not have—as of January 31, 2012 or currently—any handbooks, manual, or similar types of texts setting forth rules, regulations, policies, procedures, guidelines, protocols of conduct or standard operating procedures for plastics surgeons regarding the performance of [ALT] flap reconstruction on a patient." As for Dr Matros' work schedule for January 31, 2012, Ms. D'Elia certifies that "to the best of my knowledge, after reasonable inquiry, the schedule provided in Mr. Broadley on August 10, 2018 is an accurate reproduction of Dr. Matros' schedule for January 31, 2012 and Dr. Matros had no clinic visits January 31, 2012. Accordingly, the schedule provided to Mr. Broadley on August 10, 2018 is the only schedule of Dr. Matros that is in the possession, custody and control of Memorial."

As for plaintiff's communications with Memorial's patient representative, Mr. Capote certifies that "to the best of my knowledge, after reasonable inquiry, the records provided ...is an accurate reproduction of Memorial's Patient Representative file concerning [plaintiff], which includes [plaintiff's] communications with Memorial's Patient Representative, that are in the possession, custody and control of Memorial." Attached to Mr. Capote's affidavit are the patient representative records provided to plaintiff.

Memorial also argues that plaintiff's request for identifying information as to individuals drafting and submitting Memorial's prior motion to quash the subpoena is "a blatant abuse of the litigation process" and cross moves to preclude plaintiff from making any further motions in connection with this action in the absence of approval.

Defendant Dr. Matros cross moves to enjoin plaintiff from making further motions without court approval, arguing that repetitive motion practice has wasted judicial resources and

delayed the resolution of this action.²

Discussion

With respect to plaintiff's request to hold Memorial in contempt, the court notes that "[c]ontempt is a drastic remedy, which should not issue absent a clear right to such relief." Coronet Capital Co. v. Spodek, 202 AD2d 20, 29 (1st Dept 1994), citing, Usina Costa Pinto, S.A. v. Sanco Sav. Co. Ltd., 174 AD2d 487 (1st Dept 1991). To establish civil contempt based on an alleged violation of a court order, the movant must establish, by clear and convincing evidence, that a lawful order of the court expressing an unequivocal mandate was in effect, and that the order was disobeyed with reasonable certainty. See Department of Env'tl. Protection of City of New York v. Department of Env'tl. Conservation of State of N.Y., 70 NY2d 233, 240 (1987); McCormick v. Axelrod, 59 NY2d 574, amended 60 NY2d 652 (1983). In particular, it must be shown that the party to be held in contempt had knowledge of a clear and unequivocal order, failed to comply with its terms, and that the disobedience prejudiced the right of another party. See McCain v. Dinkins, 84 NY2d 216 (1994) McCormick v. Axelrod, supra; Garcia v. Great Atl. & Pac. Tea Co., 231 AD2d 401 (1st Dept 1996).

Under this standard, there is no basis for holding Memorial in contempt as the plaintiff has not established by clear and convincing evidence that Memorial violated the judicial subpoena or the court's June 27, 2018 order. In opposition, Memorial notes that it responded to the subpoena by stating that it did not possess any manuals or other similar types of texts regarding performance of [ALT] flap reconstruction on a patient, provided Dr. Matros' schedule for January 31, 2012, and documents as to communications between plaintiff and Memorial's patient representative.

²After the motion was marked fully submitted on November 23, 2018, plaintiff served, without court permission, an affirmation in reply and in opposition to the cross motion, which the court received via federal express on December 6, 2018. The court has therefore not considered these papers and, even if it did, the court's resolution of this motion and cross motions would be the same.

That said, however, the court finds that Memorial's response to the first category of documents sought by the subpoena is inadequate. While Memorial states that it is not in possession of any manuals or similar type of texts forth rules, regulations, policies, procedures, guidelines, protocols of conduct or standard operating procedures regarding the performance of [ALT] flap reconstruction on a patient, the subpoena is not limited to this category of surgery but seeks this information for plastic surgery procedures generally. The court does not condone Memorial's apparently evasive response to the subpoena. As directed below, Memorial shall produce and identify any handbooks, manuals, or similar types of texts setting forth rules, regulations, policies, procedures, guidelines, protocols of conduct or standard operating procedures for plastics surgeons generally, which were in effect on January 31, 2012 or, if Memorial cannot produce any handbook, manual or similar text in effect on January 31, 2012, then Memorial shall produce those in its possession that were in effect on the closest preceding and subsequent date to the January 31, 2012 surgery.

With regard to the two other categories of documents, while the court recognizes that Memorial's response with respect to Dr. Matros' schedule for the date of plaintiff's surgery is limited, Memorial has certified that its search resulted in the document it produced, and Memorial is not required to construct documents that do not exist. See Rosado v. Mercedes-Benz of North America, Inc., 103 AD2d 395 (2d Dept 1984) ("a party cannot be compelled to create new documents or other tangible items in order to comply with particular discovery applications"). As for the patient representative file, a review of the documents provided in response to the subpoena does not suggest that Memorial failed to produce any documents in the category which Mr. Capote has certified as the complete records. While plaintiff asserts that he believes that certain documents are missing, he fails to provide sufficient substantiation for this belief. Next, plaintiff is not entitled to information as to the identity of individuals responsible for Memorial's motion to quash, which information is not at issue in this action, and will not lead to discoverable information.

Finally, the cross motions are denied moot as in its order dated November 26, 2018, denying plaintiff's motion to reargue (motion sequence 007), the court directed that "all further requests for relief in this action shall be made by order to show cause and any motion submitted through the submissions part will be denied without prejudice to such relief being sought by order to show cause."

Conclusion

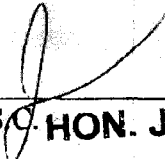
In view of the above, it is

ORDERED that the motion is granted only to the extent of directing that within 20 days of effing this order, Memorial shall provide to plaintiff any handbooks, manuals, or similar types of texts setting forth rules, regulations, policies, procedures, guidelines, protocols of conduct or standard operating procedures for plastics surgeons in effect on January 31, 2012 or, if Memorial cannot produce any handbook, manual or similar text in effect on January 31, 2012, then Memorial shall produce those in its possession that were in effect on the closest preceding and subsequent date to the January 31, 2012 surgery; and it is further

ORDERED that the cross motions are denied as moot; and it is further

ORDERED that the schedule provided for the summary judgment motion submissions in the court's November 26, 2018 order addressing motion sequence no. 7 shall remain in effect.

Dated: December 11/2018

J.S.C. 
HON. JOAN A. MADDEN
J.S.C.

Check One: ☐ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION