

Pessolano v Richmond Univ. Med. Ctr.
2018 NY Slip Op 33183(U)
December 11, 2018
Supreme Court, New York County
Docket Number: 805338/15
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 11

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JOANNA PESSOLANO, as Administrator of the Estate
of TERESA PESSOLANO, deceased,

Index No. 805338/15

Plaintiff,

-against-

RICHMOND UNIVERSITY MEDICAL CENTER,
MOUNT SINAI HEALTH SYSTEMS, INC.,
LUCIA PALLADINO, M.D., EDWARD ARSURA, M.D.,
KEITH DIAZ, M.D., FIEDENCIO DAVALOS, M.D.,
SAFET LEKPERIC, M.D., and ANATOLIY
VAYSBERG, M.D.,

Defendants.

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JOAN A. MADDEN, J.:

In this medical malpractice action, defendants move to compel plaintiffs to provide certain authorizations,¹ or to have the action dismissed. Plaintiff opposes the motion and cross move for a protective order with respect to the authorizations, and/or to require defendants to apply to court for further authorizations.²

At issue is defendants' entitlement to authorizations for the providers set forth in Exhibit A to their moving affirmation. On the return date of the motion, the parties agreed that the demands for authorizations for Amilia Schrier, M.D., Thomas Materna, M.D. and Vincent Giovinazzo, M.D. need not be provided because their treatment was irrelevant to the claims

¹At a court appearance on October 18, 2018, defendants agreed to withdraw that part of their motion seeking Arons authorizations, without prejudice to seeking such authorizations after the decedent's medical records are obtained and reviewed, or to plaintiff's right to object to the providing such authorizations.

²Plaintiff also cross moved to compel certain depositions. This request has been withdrawn as the parties agreed to a deposition schedule which is set forth in a conference order dated October 18, 2018.

asserted in this action. The parties also agreed that plaintiff's counsel need not provide any of the requested authorizations that have already been provided, subject to plaintiff's counsel advising defense counsel as to which authorizations fell into this category

The balance of the requested authorizations shall be provided to defendants as ordered below. Although the list of providers for which defendants are seeking authorizations is extensive, the decedent had a protracted and sequential course of treatment as an in-patient at a variety of facilities. Moreover, the records of the providers at issue are relevant to the claims at issue in this wrongful death action alleging improper treatment of the decedent's thyroid condition, and plaintiff's development of pulmonary edema, swelling of decedent's extremities with fluid, arrhythmia, and kidney failure.

While plaintiff claims that the treatment records of the providers for which defendants seek authorizations is likely set forth in the records of the various institutions where plaintiff was treated, defendants asserts that these providers were listed as collateral sources, separately billed decedent and may have their own medical records apart from those of the institutions. The court finds that, under these circumstances, defendants are entitled to ascertain whether the providers have additional records as to the treatment and care of the decedent.

As for plaintiff's request for copies of all records obtained by defendant from the authorizations, to the extent that defendants obtain copies of hospital records as a result of such authorizations, defendants are required to provide duplicate copies to plaintiff. See CPLR 3121(a)³(providing in relevant part that "where a party obtains a copy of a hospital record as a

³CPLR 3121(a), entitled physical or mental examination, provides that:

(a) Notice of examination. After commencement of an action in which the

result of the authorization of another party, he shall deliver a duplicate of the copy to such party”); see also, Tower v Chemical Bank, 140 AD2d 154 (2d Dept 1988)(the court erred in failing to direct defendants to deliver to the plaintiffs duplicate copies of any hospital records obtained as a result of the authorization).

In this regard, contrary to defendants’ position, CPLR 3121(a) cannot be read as restricting the right to obtain duplicate copies of hospital records to those circumstances in which the authorizations are sought in connection with a physical or mental examination of the plaintiff. In fact, as the court noted in Tower, “the clause [in 3121(a)] requiring a party who obtains a copy of a hospital record as a result of the authorization of another party to deliver a duplicate copy to the party who issued the authorization was designed to minimize repetitive demands upon hospitals.” 140 AD2d at 516. Such purpose would apply equally whether or not the hospital records are sought with in connection with a physical or mental examination, and hospital records may be sought under CPLR 3121(a) in the absence of a request for such an examination. See Connors, Commentaries McKinney’s Consol Laws of NY § 3121:7 (2018) (noting that

mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party, is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician, or to produce for such examination his agent, employee or the person in his custody or under his legal control. The notice may require duly executed and acknowledged written authorizations permitting all parties to obtain, and make copies of, the records of specified hospitals relating to such mental or physical condition or blood relationship; where a party obtains a copy of a hospital record as a result of the authorization of another party, he shall deliver a duplicate of the copy to such party. A copy of the notice shall be served on the person to be examined. It shall specify the time, which shall be not less than twenty days after service of the notice, and the conditions and scope of the examination.

“[a]lthough the language of CPLR 3121(a) can lead to the view that the hospital authorization can be secured only by demand in a notice setting up an examination, the examination is not necessary to the demand.”)

That said, defendants are not required to provide duplicate copies to plaintiff of those records resulting from authorizations to non-hospital providers. See Tower, 140 AD2d at 514 (holding that trial court properly denied plaintiffs’ cross motion for duplicate copies of records obtained through authorizations of plaintiffs’ physicians “[s]ince disclosure of [such]... records takes place pursuant to CPLR 3101(a) and CPLR 3120(b) and there is no statutory or court rule... requiring the defendants to supply the plaintiffs with duplicate copies of such medical records”); see also Hualde v. Otis Elevator Co., 235 AD2d 269 (1st Dept 1997)(holding that “defendant had no duty to turn over copy of [non-hospital] medical records obtained”).

Conclusion

In view of the above, it is

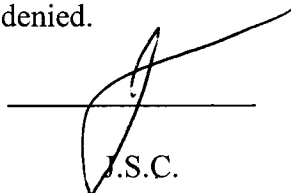
ORDERED that defendants’ motion to compel authorizations is granted to the extent that within 30 days of service of a copy of this order with notice of entry, plaintiff shall provide defendants with HIPAA compliant authorizations to obtain the records for all of the providers set forth on Exhibit A to the moving affirmation, and to the extent possible those providers’ addresses, except that plaintiff need not provide authorizations for Amilia Schrier, M.D., Thomas Materna, M.D. and Vincent Giovinazzo, M.D., and those providers which plaintiff advises defense counsel as having been previously provided; and it is further

ORDERED that defendants are to provide plaintiff with copies of any hospital records they obtain as a result of the authorizations for the providers set forth on Exhibit A to the moving

affirmation, within 30 days of obtaining such records; and it is further

ORDERED that plaintiff's cross motion for a protective order and related relief is granted only insofar as plaintiff shall not be required to provide defendants with authorizations as set forth in first decretal paragraph and is otherwise denied.

DATED: December 11, 2018


J.S.C.

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