

**Cuenca-Perez v New York City Health & Hosps.  
Corp.**

2018 NY Slip Op 33560(U)

April 22, 2018

Supreme Court, New York County

Docket Number: 805087/2014

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK —NEW YORK COUNTY**

**PRESENT: GEORGE J. SILVER**

*Justice*

**GISEL CUENCA-PEREZ,**

**Plaintiff,**

INDEX NO. **805087/2014**

- v -

MOTION DATE  
MOTION SEQ. NO.

**NEW YORK CITY HEALTH AND HOSPITALS  
CORPORATION,**

**Defendant.**

**Cross-Motion:**  Yes  No

Defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (“defendant”) moves for an order, pursuant to CPLR § 3124, compelling non-party CARMEN GARCIA ALBARRAN, M.D. (“Dr. Albarran”) to comply with and respond to the judicial subpoena *duces tecum* dated October 9, 2018. Defendant also moves, pursuant to CPLR § 2308, for an order, holding Dr. Albarran in contempt of court for failing to comply with the judicial subpoena *duces tecum*. Plaintiff GISEL CUENCA-PEREZ (“plaintiff”) takes no position with respect to defendant’s application, except to request copies of Dr. Albarran’s records at her cost.

**BACKGROUND AND ARGUMENTS**

This medical malpractice action concerns defendant’s alleged negligence in its care and treatment of plaintiff at Metropolitan Hospital from December 15, 2010 to December 20, 2010, and March 20, 2013 to March 23, 2013. Specifically, plaintiff alleges that during her admission from March 20, 2013 to March 23, 2013, defendant failed to timely diagnose and treat her salmonella, E.coli, and staph infections, and was negligent in “ignoring and/or failing to diagnose and/or misdiagnosing signs and symptoms of occurring and/or impending multiple symptoms including abdominal pain, vomiting and/or dangerously high fever.” Plaintiff further alleges that

as a result of defendant's negligence, she suffered serious injuries, including an exacerbation of mitochondrial neurogastrointestinal encephalopathy syndrome.

Defendant asserts that it obtained an authorization for Dr. Albarran's records, however, Dr. Albarran did not provide any records despite defendant's multiple follow-up attempts to obtain a complete copy of plaintiff's medical chart. Defendant contends that Dr. Albarran was plaintiff's primary doctor from 2004-2013, before, during, and after the two alleged periods of negligence, and rendered treatment to plaintiff for the symptoms at issue in this action. Defendant also highlights that plaintiff's insurance claims records indicate that Dr. Albarran billed Medicaid for services rendered to plaintiff on approximately 24 occasions during the 9-year period.

On October 17, 2018, defendant served a judicial subpoena *duces tecum* directing Dr. Albarran to appear for a deposition on November 9, 2018 and to produce all of plaintiff's medical records by November 9, 2018. On or about November 14, 2018, Dr. Albarran's office responded to the subpoena. According to defendant, Dr. Albarran provided five pages of medical records, as well as a telephone message dated September 11, 2013, but these records were incomplete, and did not match the previously provided records on September 25, 2017.

On November 16, 2018, defendant informed Dr. Albarran's office that the records were incomplete and, based upon the Medicaid claims records, approximately 20 or more visits were not accounted for. Defendant also advised Dr. Albarran's office that, should it fail to provide a complete copy of plaintiff's medical chart, it would make a motion to hold Dr. Albarran in contempt, or direct her give testimony in this matter and appear in person with a copy of plaintiff's medical chart. However, Dr. Albarran did not comply. Per a conference before the court on December 18, 2018, defendant was instructed to make the instant application in order to obtain plaintiff's medical records.

Defendant argues that Dr. Albarran's records are material and necessary to the action, and without the records, defendant will be prejudiced. Defendant points out that because plaintiff stopped treating with Dr. Albarran in September of 2013, Dr. Albarran should still be in possession of plaintiff's medical chart since she is required to retain such records until September of 2019. Defendant also highlights that Dr. Albarran neither moved to quash the subpoena nor objected to it.

### DISCUSSION

CPLR § 3120 allows for the discovery and inspection of documents from a non-party. "A party seeking disclosure from a non-party . . . must state 'circumstances or reasons' warranting discovery from the non-party" (*Giacinto v. Shapiro*, No. 52228/12, 2013 WL 5974402, at 2 [Sup. Ct. Feb. 13, 2013] *citing Tenore v. Tenore*, 45 A.D.3d 571 [2d Dept. 2007] [additional citations omitted]). "The party must demonstrate the non-party discovery sought is material, necessary" (*id.*; *see also Kapon v. Koch*, 23 N.Y.3d 32, 37 [2014] [non-party disclosure must be "material and necessary" –*i.e.*, that the requested discovery is relevant to the prosecution or defense of an action]). "Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty" (*id.* at 38). Under CPLR § 2308(a), the failure to comply with a judicial subpoena "shall be punishable as a contempt of court."

Here, Dr. Albarran has failed to appear for a deposition and failed to provide a complete copy of plaintiff's medical chart in violation of the judicial subpoena *duces tecum*. As defendant highlights, because Dr. Albarran was plaintiff's primary doctor during and after the two alleged periods of negligence, and rendered treatment to plaintiff for the symptoms she alleges in this action, Dr. Albarran's medical records are material and necessary to the instant action. Indeed, without such records, defendant may be hindered in their defense of the action. Moreover, neither

Dr. Albarran nor plaintiff moved to quash the subpoena, nor objected to the production of plaintiff's medical records.

Consequently, it is hereby

ORDERED that Dr. Albarran is directed to comply with and respond to the judicial subpoena *duces tecum* dated October 9, 2018; and it is further

ORDERED that Dr. Albarran is directed to appear for a deposition within 30 days of this order; and it is further

ORDERED that Dr. Albarran is directed to produce a complete copy of plaintiff's medical chart within 30 days of this order; and it is further

ORDERED that defendant's application to hold Dr. Albarran in contempt of court for failing to comply with the judicial subpoena *duces tecum* is denied; and it is further

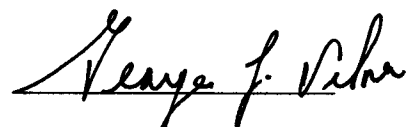
ORDERED that Dr. Albarran's failure to comply with the judicial subpoena *duces tecum* dated October 9, 2018 **may result in her being held in contempt of court**; and it is further

ORDERED that plaintiff's application that Dr. Albarran provide copies of plaintiff's medical records at plaintiff's cost is granted; and it is further

ORDERED that the parties shall appear for a compliance conference on JUNE 25, 2019 at 9:30 a.m. at 111 Centre Street (Part 10, Room 1227), New York, NY 10013 to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: April 22, 2018

  
**GEORGE J. SILVER**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION