

<b>Raskin v New York Methodist Hosp.</b>
2018 NY Slip Op 34141(U)
January 27, 2018
Supreme Court, Kings County
Docket Number: Index No. 500831/16
Judge: Gloria M. Dabiri
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at the Civic Center, Brooklyn, New York, on the 27<sup>th</sup> day of January, 2018.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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BARRY RASKIN, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF LUIDA RASKIN,

Plaintiffs,

- against -

Index No. 500831/16

NEW YORK METHODIST HOSPITAL, MARGARITA KHOTSYNA, MUKUL ARYA, HIMANSHU VERMA, CAROLA FERNANDEZ, JOSEPH DURZIEH, AND VADIM NAKHAMIYAYEV,

Defendants.

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The following papers numbered 1-8 and read herein:

NYSCEF

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion

Affidavits (Affirmations) Annexed \_\_\_\_\_

1 - 4.

Opposing Affidavits (Affirmations) \_\_\_\_\_

5 - 6.

Reply Affidavits (Affirmations) \_\_\_\_\_

7 - 8.

Upon the foregoing papers defendants New York Methodist Hospital, Margarita Khotsyna, M.D., Mukul Arya, M.D., Vadim Nakhamiyayev (MS #2) and Joseph Durzieh (MS#3) seek an order compelling the plaintiff Barry Raskin to answer questions marked for a ruling at the time of Mr. Raskin's deposition pursuant to 22 NYCRR 222.1, CPLR 3101, 3113, 3115, 3124, and 3126.

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## BACKGROUND

Plaintiff Barry Raskin as administrator of the estate of Luida Raskin, deceased, and Barry Raskin individually, commenced this action on or about January 21, 2016 alleging causes of action in negligence, medical malpractice, wrongful death and lack of informed consent. Issue was joined by the defendants on March 23, 2016.

Plaintiffs allege that the defendants failed to diagnose and treat Mrs. Raskin's gallstones, inflammation of her gallbladder and infection of the common bile duct. Plaintiffs allege that as a result of the defendants' negligence, Mrs. Raskin experienced cardiac arrest, septic shock, hypotension, respiratory arrest, cholangitis<sup>1</sup>, acidosis<sup>2</sup>, pressure ulcers, lower back and heel pain, aggravation of kidney disease, acute cholecystitis<sup>3</sup> with obstruction, calculus of bile duct with acute cholecystitis, hypoosmolality<sup>4</sup>, hyponatremia<sup>5</sup>, diarrhea, nausea, vomiting, weakness, fear, anxiety and emotional distress. Mrs. Raskin died on September 4, 2014 from liver failure.

## THE PARTIES' CONTENTIONS

The plaintiff, Barry Raskin was deposed on June 9, 2017. The moving defendants contend that Mr. Raskin, at the direction of his attorney, Michael M. Bast, Esq., refused to answer several questions during his deposition which were material and relevant. Specifically, Mr. Raskin refused to answer questions regarding his health and overall

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<sup>1</sup> Cholangitis is an infection of the liver's bile duct.

<sup>2</sup> Acidosis is increased acidity in the blood and bodily tissue.

<sup>3</sup> Acute cholecystitis refers to gall bladder inflammation.

<sup>4</sup> Hypoosmolality is a medical condition where the levels of electrolytes, proteins, and nutrients in the blood are lower than normal.

<sup>5</sup> Hyponatremia is a condition that occurs when the level of sodium in the blood is too low.

wellness, regarding Mrs. Raskin's podiatric and ophthalmologic care and treatment, her litigation history and the substance of a September 2014 conversation between Mr. Raskin and Mr. Bast.

Defendants contend that during the deposition attorney Bast failed to provide an explanation for Mr. Raskin's refusal to answer questions, in violation of NYCRR 221.2. Defendants argue that such a refusal is not supported by the limited deposition objections set forth in CPLR 3115(b), (c) and (d). The defendants assert that questions concerning Mr. Raskin's health are material and relevant to the assessment of his damages. They contend that calculating damages in plaintiffs' wrongful death claim requires consideration of the health of the decedent's distributees. With respect to Mr. Raskin's loss of services claim, defendants argue that questions concerning Mr. Raskin's health at the time of his wife's death will shed light on the nature of the services Mrs. Raskin provided for him. The defendants therefore seek information concerning Mrs. Raskin's podiatric and ophthalmologic care and authorizations to obtain her ophthalmology and dermatological records. Defendants contend that by commencing this action to recover damages for medical malpractice, plaintiff has waived the physician-patient privilege with respect to her past medical history. Furthermore, defendants argue that plaintiffs' assertion of broad claims against them – such as their alleged failure to appreciate Mrs. Raskin's medical history – necessitates access to her ophthalmologic and dermatologic records. The defendants argue that not all questions pertaining to Mrs. Raskin's medical care are covered by the physician-patient privilege as Mr. Raskin is required to answer questions regarding matters of fact.

At his deposition Mr. Raskin testified that his wife was involved in a personal injury action against their landlord, Kingsview Homes, Inc., for a 2007 slip and fall accident. Mr. Raskin refused to answer questions concerning the prior litigation. Defendants have served a demand for authorizations, dated January 31, 2017, pertaining to the non-privileged contents of plaintiff's legal file in the 2007 action (*Raskin v Kingsview Homes, Inc.* in Kings Court Supreme Court, Index #23915/09) as well as all records of medical treatment, employment and collateral sources associated with the previous action. Mr. Raskin testified that his wife had knee surgery as a result of the 2007 accident. The defendants contend that Mrs. Raskin's litigation history is material and relevant because it reveals the decedent's medical history and health at the time of her death.

Lastly, defendants seek details of a conversation between Mr. Raskin and attorney Bast in the public corridor of a synagogue approximately one week after Mrs. Raskin's death. Defendants contend that the attorney-client privilege does not apply to this communication, pursuant to CPLR 4503(c), because Mr. Raskin had no reasonable expectation of privacy in the synagogue hallway and there is no indication that an attorney-client relationship had existed at the time the conversation occurred.

Plaintiffs oppose defendants' motions on the ground that such questioning infringes upon physician-patient privilege and the attorney-client privilege. Plaintiffs argue that questions concerning Mrs. Raskin's ophthalmologic, podiatric and orthopedic care have no connection to this action as it concerns her gall bladder treatment. Plaintiffs contend that because a claim for loss of enjoyment of life is not being made the court should not allow discovery of medical care related to parts of the body other than Mrs. Raskin's gall bladder.

Plaintiffs argue that questions pertaining to Mr. Raskin's medical history are prohibited because, as administrator in this action, he has not waived the doctor-patient privilege. Plaintiffs contend that the attorney-client privilege precludes disclosure of the conversation between Mr. Raskin and his attorney at a synagogue.

#### DISCUSSION

CPLR 3101(a) provides that "there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action." The disclosure provisions of the CPLR are to be liberally construed (*see, Cynthia B. v. New Rochelle Hosp. Med. Center.*, 60 NY2d 452, 461 [1983]), with the test of what constitutes material and necessary evidence as being one of "usefulness and reason" (*see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 406 [1963]). This test is to be applied on a case by case basis. Disclosure will not be permitted where the demands are unduly burdensome, lack specificity, seek privileged matter, or are otherwise improper (*Buxbaum v Castro*, 82 AD3d 925 [2d Dept 2011]).

Fair and just compensation in a wrongful death case is determined by the pecuniary injuries resulting from the decedent's death and is awarded "to the persons for whose benefit the action is brought" (EPTL 5-4.3). To determine what is fair and just compensation, the finder of fact must weigh several factors including the number, age and health of the decedent's distributees (*Johnson Manhattan & Bronx Surface v Tr. Operating Auth.*, 71 NY2d 198, 203-204 [1987]; *Greenspan v East Nassau Medical Group*, 204 AD2d 273 [2d Dept 2004]; 1 NY PJI 2:320). Even though Mr. Raskin, as an administrator, has not waived his physician-patient privilege, the status of his health is relevant and thus a proper subject of questioning in his examination before trial (*see Greenspan*, 204 AD2d at

274). However, defendants' inquiries should only concern Mr. Raskin's overall health and wellness and not the substance of confidential communications between Mr. Raskin and his physicians (*Williams v Roosevelt Hosp.*, 66 NY2d 391, 396-397 [1985]; *Greenspan v East Nassau Medical Group*, 204 AD2d 273 [2d Dept 2004]). In addition, defendants are not entitled to disclosure of Mr. Raskin's medical records (*Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65 [2d Dept 1992]).

"In bringing an action for personal injury, a plaintiff waives the physician-patient privilege with respect to any physical or mental condition affirmatively placed in controversy" (*see*, CPLR 3121[a]; *Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 456-457 [1983]; *Hoening v Westphal*, 52 NY2d 605, 608-609 [1981]). However, "[t]he waiver of the physician-patient privilege made by a party who affirmatively asserts a physical condition in its pleading does not permit discovery of information involving unrelated illness and treatments" (*McLane v Damiano*, 307 AD2d 338 [2d Dept 2003]; *Barnes v Habuda*, 118 AD3d 1143, 1444 [4th Dept 2014]). Here, plaintiffs allege in their Bill of Particulars that as a result of the defendants' failure to diagnose her gall bladder disease Mrs. Raskin suffered, *inter alia*, heel pain. Thus, Mrs. Raskin placed this condition in controversy and has waived the physician-patient privilege with respect to her podiatric history (*see Koump v Smith*, 25 NY2d 287 [1969]; *Sadicario v Stylebuilt Accessories*, 250 AD2d 830 [1998]; *Josephs v Oliver*, 48 AD2d 688 [2d Dept 1975]), and thus the defendants are permitted to inquire as to matters concerning Mrs. Raskin's podiatric care.

However, the defendants do not meet their burden of establishing that ophthalmology, dermatology and litigation records concern matters that are "in

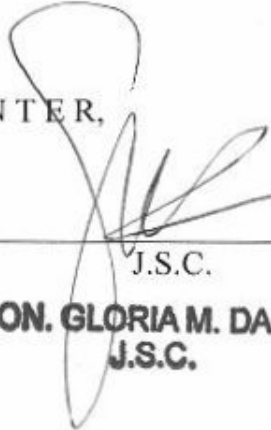
controversy” (see CPLR 3121[a]; *King v Salvation Army*, 240 AD2d 473 [2d Dept 1997; *McLane v Damiano*, 307 AD2d 338 [2d Dept 2003]). The defendants do not offer a reason for demanding such records and do not provide the affidavit of a medical expert explaining the alleged link between Mrs. Raskin’s gallbladder disease and her ophthalmologic, dermatologic and orthopedic condition resulting from a 2007 slip and fall (*Manley v New York City Hous. Auth.*, 190 AD2d 600 [1st Dept 1993]; *Gill v Mancino*, 8 AD3d 340 [2d Dept 2004]). However, the physician-patient privilege “seeks to protect... and thereby foster... confidential communications, not the mere facts and incidents of a person’s medical history... [A] witness may not refuse to answer questions regarding matters of fact” (*Williams ex rel. Williams v Roosevelt Hosp.*, 66 NY2d 391 [1985]; *Kivlehan v Waltner*, 36 AD3d 597 [2d Dept 2007]). As such the defendants are permitted to inquire as to the name(s) and address(es) of physicians and healthcare facility(ies) where, and when, Mrs. Raskin obtained ophthalmologic, dermatologic and orthopedic care (*Bongiorno v Livingston*, 20 AD3d 379 [2d Dept 2005]).

Under New York and federal law the protection of the attorney-client privilege extends only to confidential communications between the client and the attorney (CPLR 4503[a]). Confidential communications are “made between an attorney and client in the course of professional employment for the purpose of obtaining legal advice” (CPLR 4503(a); *Jakobleff v Cerrato, Sweeny & Cohn*, 97 AD2d 834 [2d Dept 1983]). Communications are not discoverable under CPLR 3101(b) unless the privilege is deemed to have been waived by the pursuant to CPLR 4503(a). The attorney who asserts the privilege has the burden of establishing it (*In re Kaplan*, 8 NY2d 214 [1960]). Contrary to

the defendants' contention, "an attorney-client relationship may exist in the absence of a formal retainer agreement" (*see Swalg Dev. Corp. v Gaines*, 274 AD2d 385 [2d Dept 2007]; *Haythe & Curley v Harkins*, 214 AD2d 361 [1st Dept 1995]; *Rann v Lerner*, 160 AD2d 922 [2d Dept. 1990]). During a November 3, 2017 conference with the court Attorney Bast advised the court that his September 2014 hallway conversation with Mr. Raskin related to his potential representation of Mr. Raskin in this matter. As such, the attorney-client privilege precludes inquiry by the defendants as to this communication. Accordingly, it is

**ORDERED**, that the defendants may inquire concerning Mr. Raskin's overall health and well-being, Mrs. Raskin's podiatric care, the dates, names and addresses of physicians and healthcare facilities providing Mrs. Raskin's ophthalmologic, dermatologic and orthopedic care; and it is further

**ORDERED**, that counsel for all parties are to appear in the Central Compliance Part on March 6, 2018 to schedule all outstanding or uncompleted depositions.

ENTER,  
  
 J.S.C.  
**HON. GLORIA M. DABIRI**  
 J.S.C.

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