

Punter v New York City Health & Hosps. Corp.

2019 NY Slip Op 31065(U)

April 12, 2019

Supreme Court, New York County

Docket Number: 805071/2015

Judge: George J. Silver

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10**

IESHA PUNTER

Index No.:805071/2015

-against-

Hon. GEORGE J. SILVER

**NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, HARLEM HOSPITAL
CENTER, et al.**

Justice Supreme Court

The following papers numbered 45 to 106 were read on this motion and cross-motion (Seq. 002):

Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	45 - 54
Answering Affidavit and Exhibits	No(s).	57 - 67
Notice of Motion - Cross-Motion - Exhibits and Affidavits Annexed	No(s).	79-88
Affidavit or Affirmation in Reply	No(s).	89-94
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Replying Affidavit	No(s).	104
Affidavit or Affirmation in Opposition to Cross-Motion	No(s).	106

Defendants NEW YORK CITY HEALTH AND HOSPITALS CORPORATION s/h/a HARLEM HOSPITAL CENTER, ENYIOME EKELE NWANKPA, M.D. ("Dr. Nwankpa"), ARLENE IGNACCIO-BLATTMAN, M.D. ("Dr. Blattman"), MARGIE CAMPBELL, M.D. ("Dr. Campbell"), GENE PESOLA, M.D. ("Dr. Pesola"), and LEWIS SELLINGER, M.D. ("Dr. Sellinger")(collectively, "defendants") move for an order dismissing this action pursuant to CPLR 3103(c). In the alternative, defendants invoke the same statutory authority in pursuant of an order disqualifying plaintiff IESHA PUNTER's ("plaintiff") attorneys, Sonin & Genis, Esqs., and granting them a protective order suppressing the disclosure of privileged documents that defendants contend plaintiff's attorneys have in their possession. Plaintiff opposes the application.

Separately, plaintiff cross-moves for discovery that it believes defendants have unjustifiably withheld. Principal amongst that discovery is rules and regulations as well as billing records and all diagnostic codes. Plaintiff further contends that plaintiff is entitled to full, complete, and unobstructed depositions of defendants. Defendants oppose plaintiff's application, and cross-move for a protective order regarding the production of electronic medical records ("EMRs") or "audit trails." Notably, this court already found that EMRs were not discoverable in this case at a May 15, 2018 compliance conference, as a portion of an order entered into on that date crossed out a provision for EMRs at this court's direction. In reply, plaintiff highlights that defendants curiously do not oppose their request for the production of rules and regulations as well as billing records and diagnostic codes. With respect to the EMRs, defendants submit that discrepancies between plaintiff's testimony and the records concerning issues such as when plaintiff was administered antibiotics necessitate the production of audit trails. Indeed, defendants contend that the only way for them to objectively learn the truth is through the electronic audit trails that will show when various noted were actually made.

Motion is Respectfully Referred to Justice:

Dated:

the EMRs, defendants submit that discrepancies between plaintiff's testimony and the records concerning issues such as when plaintiff was administered antibiotics necessitate the production of audit trails. Indeed, defendants contend that the only way for them to objectively learn the truth is through the electronic audit trails that will show when various notes were actually made.

The court will address each one of the issues raised by the respective motions and cross-motions in turn.

BACKGROUND

This medical malpractice action involves the care and treatment rendered to plaintiff at Harlem Hospital from December 18, 2013 to December 24, 2013, following a cesarian section on December 18, 2013. Plaintiff alleges that she suffered from hospital-care acquired pneumonia, adult respiratory distress syndrome and sepsis following the delivery.

Plaintiff commenced this action by filing a summons and verified complaint on February 20, 2015. Issue was joined by defendants' service of verified answers on April 29, 2015. Plaintiff served a verified bill of particulars on or about September 30, 2016.

A court conference was held on May 15, 2018. That day, defendants' alleges that their counsel brought privileged and confidential work product to court. That work product allegedly included an 8-page document on Heidell, Pittoni, Murphy & Bach, LLP letterhead entitled CASE MANAGEMENT REPORT (in capital letters, underlined, and bolded font). According to defendants, the Case Management Report summarized defendants' counsel's investigation into the facts of the case, analysis of liability, and recommendations.

Prior to the conference, defendants allege that they were seated outside the courthouse with plaintiff's counsel and discussing the case. During that discussion, defendants' counsel states that she referred to the Case Management Report and other privileged documents that had been brought to the conference. Defendants' counsel affirms that she had the Case Management Report, and other documents, with her in a zippered bag. She further states that she took it out to refer to while writing the order, but did not allow plaintiff's counsel to view it, and did not exchange any information in the document with plaintiff's counsel. Defendants' counsel further submits that she believed the document was always in her hand or in her line of sight. Defendants' counsel states that after referring to the document, she believes that she placed it with her other papers pertaining to the case, which she then placed back into her bag. Defendants' counsel states that later, when she checked for the item in her bag, she realized she did not have it.

When she realized she no longer had the report in her possession, defendants' counsel states that she asked plaintiff's counsel to check to see whether the privileged document was inadvertently placed with her papers. Plaintiff's counsel agreed, checked her possessions, and informed defendants' counsel that she did not have the document.

On August 20, 2018, Dr. Nwankpa was produced for a third deposition session. During the course of his deposition, defendants submit that some of the questions asked of Dr. Nwankpa were based on information that could only have come from the Case Management Report. Indeed, defendants aver that those lines of questioning were not based on any information available in the medical records or discovery exchanged up to that point. As such, defendants argue that it is apparent from the questions asked of Dr. Nwankpa at her third deposition session that plaintiff's counsel has possession of defendants' confidential and privileged document and used the information obtained therefrom in the prosecution of this action.

By way of example, defendants highlight that Dr. Nwankpa was asked the following question during the deposition:

PC: Did you see the notation that Dr. Campbell was upset that Dr. Durgam did not respond to her requests to transfer Ms. Punter to the ICU?

DC: What time is that?

PC: I don't have the time noted.

DC: Did you see that in the chart?

W: No.

(see Deposition Tr., pg. 709, lines 18-25 and pg. 710, lines 1-3)

*PC=plaintiff's counsel; **DC=defense counsel ***W = Witness

Defendants submit that the medical record from Harlem Hospital is devoid of any notation that Dr. Campbell was "upset," yet this statement is contained in defendants' Case Management Report. As such, defendants' argue that plaintiff's counsel must have read the privileged document, mistakenly assumed this information was contained in the medical record, and asked Dr. Nwankpa this question at her deposition.

Further, defendants highlight that plaintiff's counsel asked the following question during the deposition:

PC: Do we agree Ms. Punter was so seriously harmed she was the first adult patient at Harlem Hospital Center ever to be given nitric oxide which helps oxygenation and a ventilator modified to accommodate it?

DC: Are you aware of that?

W: No.

(*see* Deposition Tr., pg. 717, lines 23-25 and pg. 718, lines 1-6)

Again, defendants submit that this information (about plaintiff being the first adult patient at Harlem Hospital to be given nitric oxide, through use of a specially modified ventilator) is not found anywhere in plaintiff's Harlem Hospital medical record. As such, defendants state that they are unable to come up with any other reasonable explanation as to why and how plaintiff could have asked this question apart from the improper possession of the Case Management Report. Indeed, defendants submit that even the form of the question clearly mirrors certain language found in defendants' privileged and confidential document.

Defendants state that plaintiff's alleged possession of the report has irrevocably compromised their ability to defend this case. In addition to the information unearthed through plaintiff's counsel's questions, defendants submit that the Case Management Report contains a thorough analysis of the case by defense counsel and the expert witnesses retained by the defense. As such, defendants state that plaintiff's purported use of a confidential document and defense counsel's attorney's work product warrants dismissal of the complaint under CPLR §3103(c). In the alternative, defendants submit that disqualifying plaintiff's attorneys, and granting them a protective order suppressing the disclosure of privileged documents, is appropriate.

In opposition, plaintiff contends that defendants' allegations are without merit, especially considering the fact that Dr. Nwankpa was deposed for three days and asked approximately two thousand four hundred thirty-four (2,434) questions. Of those questions, plaintiff highlights that defendants challenge only two as purportedly being formulated based on information contained within defendants' Case Management Report. As defendants' entire claim regarding plaintiff's possession of their Case Management Report is predicated on merely two questions asked during Dr. Nwankpa's deposition, plaintiff contends that the instant application is without merit. Accordingly, plaintiff's counsel asks this court to deny defendants application for dismissal as well as defendants' application to disqualify plaintiff's counsel from further representation of plaintiff.

Plaintiff further submits that the instant application is merely an attempt to delay discovery, and forestall disclosure of the items referenced above, including rules and regulations, billing records and all diagnostic codes, and audit trails. In response, defendants submit that some of the information requested, most notably the audit trail, is privileged and should be shielded from disclosure.

DISCUSSION

CPLR §3103(c) states as follows:

(c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the

court, on motion, may make an appropriate order, including an order that the information be suppressed.

Under this authority, the party seeking CPLR §3103(c) sanctions must show two things: first, that there has in fact been improper or irregularly obtained disclosure and, second, that a substantial right has been prejudiced (*see* CPLR §3103(c)). Assuming this has been established, the focus then shifts to fashioning an appropriate sanction. In this regard, the Court of Appeals has recently reaffirmed that courts have wide discretion in this area and can issue any sanction they believe will adequately redress the violation (*see Lipin v. Bender*, 84 NY2d 562 [1994]). In *Lipin*, dismissal of a plaintiff's complaint was deemed warranted where the plaintiff herself acknowledged that she took and read defense counsel's documents during a pre-trial hearing, made copies and forwarded a set to her counsel, who along with plaintiff read them based on the premise that defense counsel carelessly failed to secure the documents from view at the conference.

Here, unlike *Lipin*, there is a dispute as to whether defendants' alleged confidential communication actually came into plaintiff or plaintiff's counsel's possession. Rather than the documents retention being acknowledged, as it was in *Lipin*, here plaintiff and plaintiff's counsel wholly dispute ever coming into possession of the document. Indeed, affidavits have been submitted swearing to that point. Under such a circumstance, dismissal would be palpably improper. Indeed, the only evidence of plaintiff's counsel possessing the document is proffered in the form of the phrasing and content of two questions that plaintiff's counsel asked during Dr. Nwankpa's three-day deposition after the document was allegedly taken. While the phrasing of plaintiff's counsel's questions is curiously coincidental to information contained in defendants' Case Management Report, similar word choice and content by itself hardly constitutes unimpeachable proof that plaintiff possesses the Case Management Report. To hold otherwise would require this court to make a finding by way of inference that is unsupported by the record before it. The court refuses to do so, and finds that dismissal is inappropriate solution.

Based on the chance that plaintiff may have come into the possession of the Case Management Report, defendants propose another potential remedy: the disqualification of plaintiff's counsel, and issuance of a protective order suppressing future use of the document. Indeed defendants' submit that plaintiff's potential abuse of defendants' counsel's alleged confidential information has so compromised plaintiff's counsel that it warrants disqualification (*Matter of Beiny*, 129 AD2d 126 [1st Dept 1987] [disqualification warranted "to prevent the offending lawyer or firm from deriving any further benefit from information obtained and used in violation of basic ethical precepts and statutory obligations"]).

Here, defendants submit that the similarity between two questions asked at Dr. Nwankpa's three-day deposition and the content of the Case Management Report necessitates disqualification of plaintiff's counsel because the coincidence has no other reasonable explanation. That view, however, discounts the notion that at least one of the questions may have been formulated on account of information that the pertinent medical providers relayed to plaintiff's mother. If that is the case, disqualification is also too harsh a remedy for this court to condone. Indeed, while "[t]he disqualification of an attorney is a matter that rests within the sound discretion of the court," caution

should be taken in granting disqualification since it denies a party of its right to representation by the attorney of its choice (*Nationwide Assoc., Inc. v Targee St. Internal Medicine Group, P.C.*, 303 AD2d 728 [2d Dept 2003]). "[A] party is entitled to be represented by the attorney of his or her choice. This is a valued right which should not be abridged absent a clear showing that disqualification is warranted" (*Eisenstadt v. Eisenstadt*, 282 AD2d 570, 570 [2d Dept 2001]); *see also*, *S & S Hotel Ventures Limited Partnership v. 777 S. H. Corp.*, 69 NY2d 437, 443 [1987]). Here, the evidence proffered by defendants does not evince a clear showing that disqualification is appropriate. Accordingly, this court denies defendants' application for the same.

Finally, an order suppressing future use of the Case Management Report is similarly inappropriate where, as here, the record is devoid of unequivocal proof that plaintiff is in possession of the document in the first instance. As such, defendants' request pursuant to CPLR §3103(c) is necessarily denied in its entirety.

Plaintiff's Cross-Motion for Discovery

As previously highlighted, beyond defendants Order to Show Cause, plaintiff cross-moves for discovery not limited to rules and regulations, billing records and diagnostic codes, and audit trails. Plaintiff further contends that plaintiff is entitled to full, complete, and unobstructed depositions of defendants. Defendants cross-move for a protective order regarding plaintiff's request for audit trails.

The scope of discovery in New York is broad, and discovery from a non-party should be directed when the party seeking discovery demonstrates that the disclosure sought is "material and necessary." (CPLR §3101 [a][4]). The term "material and necessary" permits discovery of information that will "assist preparation for trial by sharpening the issues and reducing delay The test is one of usefulness and reason." (*Allen v Cromwell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also* *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 376 [1991]; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009]). Thus, a motion to quash should be granted only when the documents sought are "utterly irrelevant" to any proper inquiry (*see Ledonne v Orsid Realty Corp.*, 83 AD3d 598, 599 [1st Dept 2011]). A court has broad authority to limit disclosure and issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." (CPLR §3103 [a]; *see also* *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 1283 [2d Dept 2011]).

In sum, a court must consider "such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed" (*see Concord Boat Corp. v Brunswick Corp.*, 169 FRD 44, 49 [SD NY 1996]; *United States v Intl. Bus. Mach. Corp.*, 83 FRD 97, 104 [SD NY 1979]). Moreover, discovery may also be permitted when it is "reasonably calculated to lead to the discovery of information bearing on the claims (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 1140 [2d Dept 2010]; *Crazytown Furniture Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]).

The court will address each of plaintiff's requests in turn.

Rules and Regulations

In response to plaintiff's request for rules and regulations, defendants provided plaintiff with rules for cesarian sections, but neglected to provide full responses to the six (6) set of categories contained in plaintiff's demand. As defendants' have inadequately opposed that branch of plaintiff's motion, and have provided no reason why the records requested by plaintiff are not "material and necessary" to the prosecution of this case, defendants are directed to provide full and complete responses to plaintiff's request for rules and regulations, with objections to the extent applicable, within 30 days of this court's order. Indeed, the purpose of such rules and regulations is to ensure that proper hospital procedure is followed in a timely and uniform manner (*see* 10 NYCRR §405.2[e][f]; *see* NYS Public Health Law, Article 29-D, Title 1-A, §2997-g, j). As such, it is axiomatic that plaintiff be entitled to such information in the absence of a showing from defendants that such information is privileged or immaterial. Thus, in accordance with this court's directive, a full and complete response to plaintiff's request for the same is to be provided within 30 days of this court's order.

Billing Records and Diagnostic Codes

Defendants have not opposed plaintiff's request for billing records and diagnostic codes. Plaintiff submits, unopposed, that the records requested are "material and necessary" to her efforts to obtain information regarding the services she was charged for. 10 NYCRR §400.5(a) mandates hospitals to document such services, and to supplement their billing records with diagnostic codes. As plaintiff has similarly failed to oppose this request, or indicate, why it is irrelevant, defendants are directed to provide plaintiff with billing records and diagnostic codes within 30 days of this court's order.

Audit Trails

Plaintiffs seek information pertaining to changes made to plaintiff's EMRs, including the dates and times thereof. While plaintiff has been provided with responsive medical records in this case, plaintiff argues that the EMR audit trail is necessary as the metadata it contains will allow plaintiff to see when entries were made, and who made them, thus allowing her to determine whether the orders regarding diagnoses and treatments were made in a timely and appropriate manner. 10 NYCRR §405.10 requires that hospitals maintain audit trails for their EMRs. Here, defendants submit that the audit trails requested are irrelevant, as they merely demonstrate when and by whom the medical records were accessed, not when the patient was seen by a provider. In order to show relevance, defendants submit that plaintiff is required to show, beyond mere conjecture, that there is relevant information to be gleaned from metadata and audit trails which cannot be obtained from other sources, including the medical records and deposition testimony. Similar to the movant in *Vargas v. Lee*, 2015 NY Slip Op 31048 U (Sup. Ct. Kings Co. 2015), here plaintiff has yet to demonstrate that the information gleaned from an audit trail would be material and necessary and cannot be deduced from plaintiff's EMRs, which have already been produced. Indeed, to date plaintiff has made no allegation that the EMRs are inauthentic or improperly altered. Plaintiff may establish such a foundation following further discovery and depositions, but has yet to make such a showing, rendering the instant request premature. As such,

the court plaintiff's request for audit trails is denied without prejudice to plaintiff remaking the application, with a proper foundation, following the completion of defendants' depositions. If such an application is made, defendants may renew their cross-motion for a protective order, which is denied as moot.

Deposition

Plaintiff's final application for an additional deposition of Dr. Nwanpka is denied. Based on the record before the court, the court does not find defendants' conduct during Dr. Nwankpa's deposition to be so inappropriate that a further deposition is warranted. Given plaintiff's concerns, however, the parties are free to raise a request future supervision of depositions if objectionable conduct occurs. Indeed, there is no question that this court has discretion to oversee the discovery of cases brought to its attention (*Estate of Ungar ex rel. Strachman v Palestinian*, 44 AD3d 176 [1st Dept 2007]; *In re Steven B.*, 24 AD3d 384, 385 [2005] ["given the crushing caseloads ... judges face ... they are vested with broad discretion to advance cases fairly and cautiously, but also expeditiously"], *affd.* 6 NY3d 888 [2006]). This discretion includes the power, pursuant to CPLR §3104, to oversee the discovery process and direct that discovery, such as a deposition, be held in the courthouse (*Kogan v Royal Indem. Co.*, 179 AD2d 399, [1st Dept 1992] [stating that the decision to appoint a referee pursuant to CPLR §3104 "is a matter within the discretion of the trial court and is especially appropriate where, as here, a party appearing *pro se* is hostile or otherwise frustrates discovery"]).

The uniform rules for the conduct of depositions became effective on October 1, 2006. Section 221.1(a) ("uniform rules"), "Objections at depositions," provides in pertinent part:

"(a) . . . All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR."

Section 221.1(b), "Speaking objections restricted," provides in pertinent part:

"Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning."

Section 221.2 requires a deponent to answer all questions except to preserve a privilege or right of confidentiality or when the question is plainly improper and would, if answered, cause significant prejudice

to any person. That section specifically states:

"An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor."

Here, many of the issues plaintiff raises concerning conduct during Dr. Nwanpka's deposition were as to form. As many of those objections speak to form rather than to substance, the deposition appears to have been able to proceed with plaintiff making objections where necessary. Nothing in the record before the court points to specifically delineated and unmistakable improper conduct that would warrant this court to order an additional deposition, or the supervision of subsequent depositions. However, if future violations of the of the uniform rules occur, either party is within its right to renew this application.

Based on the foregoing, it is hereby

ORDERED that defendants' motion for an order dismissing this case pursuant to CPLR §3103(c), or in the alternative, disqualifying Sonin & Genis, Esqs., and granting a protective order, is denied in its entirety; and it is further

ORDERED that plaintiff's cross-motion for discovery is granted in part and denied in part, as set forth herein; and it is further

ORDERED that defendants' cross-motion for a protective order with respect to audit trails is denied as moot in light of the court's denial of disclosure of said audit trails, as set forth herein; and it is further

ORDERED that the parties are directed to appear for a conference before the court in Part 10, 111 Centre Street, New York, New York, Room 1227, on June 4, 2019, at 9:30 a.m. for a compliance conference, and to facilitate further discovery.

This constitutes the decision and order of the court.

Dated: April 12, 2019

Hon. George J. Silver
GEORGE J. SILVER, J.S.C.
GEORGE J. SILVER

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER