

Greif v Mas
2019 NY Slip Op 31784(U)
June 13, 2019
Supreme Court, New York County
Docket Number: 805294/17
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN PART 11
Justice

LINDA GREIF,

Plaintiff,

INDEX NO. :805294/17
MOTION SEQ NO. 006

- v -

FRANCIS MAS,

Defendant.

The following papers, numbered 1 to _____ were read on this motion to seal/compel and cross motion to compel _

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

In this medical malpractice action arising out of defendant’s psychiatric treatment of plaintiff, plaintiff, appearing *pro se*, moves, by order to show cause, to file all court records under seal, or, at minimum, plaintiff’s medical records; to compel defendant to produce his original medical records for forensic testing/examination; to compel defendant to comply with plaintiff’s discovery demands regarding insurance and for sanctions. Defendants opposes the motion, and cross moves for discovery.

Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records. Mancheski v Gabelli Group Capital Partners, 39 AD3d 499 (2d Dept 2007) Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V., 28 AD3d 322 (1st Dept 2006), lv denied 10 NY3d 705 (2008). The public right to access, however, is not absolute

Danco Labs. v Chemical Works of Gedeon Richter, 274 AD2d 1 (1st Dept 2000). A court is empowered to seal court records pursuant to section 216.1 (a) of the Uniform Rules for Trial Courts (22 NYCRR 216.1 [a]). That rule states that:

Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public as well as of the parties (22 NYCRR 216.1 [a]).

Although the term “good cause” is not defined, “a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action.” Gryphon Domestic VI LLC v APP Intl. Fin. Co., B.V., 28 AD3d at 325. “A finding of ‘good cause’ presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant.” Mancheski v Gabelli Group Capital Partners, 39 AD3d at 502. “Confidentiality is clearly the exception, not the rule.” Matter of Hoffman, 284 AD2d 92, 93-94 (1st Dept 2001), and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access. Mancheski v Gabelli Group Capital Partners, 39 AD3d at 502.

Under this standard, plaintiff has not demonstrated a right to seal the all records, including medical records, in this action, in which plaintiff has commenced seeking damages for the alleged malpractice of the defendant psychiatrist. That said, however, during the discovery process, a confidentiality order shall be issued by the court, and will govern the treatment of medical/psychiatric records of the plaintiff during discovery. On the other hand, to the extent such records, including the medical records, are relevant to the issues raised in this action, such order shall be limited to the treatment of such records during discovery and shall not apply to summary judgment and trial of this action, subject to further order of the court.

As for plaintiff's motion seeking to compel defendants to permit her forensic expert to examine defendant's original medical records regarding plaintiff's treatment, this aspect of the motion is granted in view of the liberal rules of disclosure, conditioned on plaintiff providing an affidavit from the forensic expert that none of the tests will damage or destroy the records, and upon plaintiff bearing the cost of the inspection. See Schioppa v. Pallotta, 242 AD2d 698, 699 (2d Dept 1997).

As for the insurance information sought by plaintiff, based on defendant's opposition papers, it appears that defendant has largely complied the court's most recent order dated April 18, 2019, which required defendant to provide insurance information as directed in the 10th decretal paragraph of this court's March 6, 2019,¹ for the years 2003 through 2014, and any additional coverage information, including excess coverage for the years in issue. Defendants acknowledge, however, that they have not produced declaration pages (or dec sheets) for the entire period of the alleged malpractice (i.e. 2003 to 2014), asserting that they do not apply to the occurrences at issue. Accordingly, as directed below, defendant shall produce the dec sheets at issue for *in camera* inspection together with an affirmation explaining why such dec sheets do not apply to the malpractice at issue.

Next, the court notes that in a separate order dated May 10, 2019, that the court ordered that the records of plaintiff's former psychologists be produced for *in camera* inspection, based on plaintiff's assertion at a May 9, 2019 discovery conference that plaintiff did not provide

¹The 10th decretal paragraph states that "defendant shall provide plaintiff with further insurance information, including whether there are other applicable insurance policies in addition to the two listed in response to plaintiff's demand and, if so, defendant shall provide information about such policies, including policy number and policy coverage period and the declaration pages for all applicable insurance policies whether or not such declaration pages are presently in defense counsel's possession subject to any redaction of confidential information."

authorization for such records and that such records are not related to the claims asserted in this action. After *in camera* inspection, the court finds that the records of plaintiff's former treating psychologist, which were produced as the result of an authorization provided by plaintiff for her disability carrier, are relevant to the issues in the action. See Dillenbeck v. Hess, 73 NY2d 278 (1989)(noting that "[a] litigant will be deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue").

However, the disability insurer also produced records from plaintiff's rheumatologist. As underlying psychiatric malpractice action does not affirmatively place plaintiff's physical condition in issue, that plaintiff did not waive the physician-patient privilege with respect to these records. See Brito v. Gomez, 168 AD3d 1, 5 (1st Dept 2018); See also Felix v. Lawrence Hosp. Ctr., 100 A.D.3d 470, 471, 953 N.Y.S.2d 505 (1st Dept. 2012)(holding that plaintiff's subsequent obstetrical treatment was not placed in controversy as her claims relate only to subsequent emotional and psychological injuries).

In view of the above, it is

ORDERED that plaintiff's motion to seal the court records relating to this action, including her medical records, is denied; and it is further

ORDERED that pending the issuance of a confidentiality order regarding the handling of medical records during discovery, no medical records shall be filed in this action; and it is further

ORDERED that plaintiff's motion to compel defendants to permit her forensic expert to examine defendant's original medical records regarding plaintiff's treatment is granted conditioned on plaintiff providing an affidavit from the forensic expert that none of the tests will damage or destroy the records, and plaintiff agreeing to bear the costs of such inspection; and it is

further

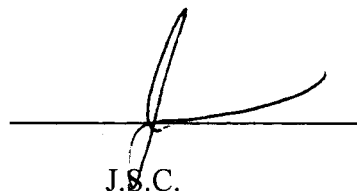
ORDERED that plaintiff's motion to compel defendant to produce certain insurance information is granted to the extent that within 20 days of e-filing this order defendants shall produce declaration pages (or dec sheets) for the entire period of the alleged malpractice (i.e. 2003 to 2014), for *in camera* inspection, together with an affirmation with an affirmation explaining why such declaration pages do not apply to the malpractice at issue such that they are not discoverable; and it is further

ORDERED that plaintiff's motion for sanctions is denied.

ORDERED that the discovery issues raised in defendant's cross motion will be addressed at the discovery conference scheduled below; and it is further

ORDERED that a status conference will be held on July 18, 2019 at 10 am in Part 11, room 351, 60 Centre Street, New York NY.

DATED: June 13 2019



J.S.C.

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