

**Arena v Shaw**

2019 NY Slip Op 33528(U)

November 26, 2019

Supreme Court, New York County

Docket Number: 850095/2017

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

-----X  
GIANFRANCO ARENA, Administrator of the Estate of  
CHRISTINE L. ARENA, and GIANGRANCO ARENA,  
Individually,

Plaintiff,

Index No.  
850095/2017

- against -

**Decision and  
Order**

LESTER NOAH SHAW, M.D.,

Mot. Seq. 5

Defendant.  
-----X

HON. EILEEN A. RAKOWER, J.S.C.

Gianfranco Arena (“Plaintiff”) commenced this medical malpractice action by Summons and Complaint on April 24, 2017 on behalf of himself and the estate of his late wife Christine L. Arena (“Decedent”). Plaintiff alleges that defendant Lester Noah Shaw, M.D. (“Shaw”) departed from accepted standards of medical practice in his psychiatric care of Decedent who subsequently committed suicide. Decedent sought treatment with Shaw on April 2, 2015 and committed suicide on April 30, 2015. Specifically, in the Bill of Particulars, Plaintiff claims *inter alia* that Shaw failed to obtain a “complete evaluation of decedent’s relevant history,” prescribed medications before attempting psychotherapy, increased the dosages of the medications inappropriately, failed to recognize Decedent’s adverse reactions to the medications, failed to appreciate “the toxic interaction” of the medications, misdiagnosed “the true mental health condition from which [Decedent] was suffering,” and failed to advise Decedent of the risks and alternatives of the medications.

Plaintiff moves by Order to Show Cause for an Order pursuant to CPLR §2304 quashing seven subpoena duces tecum/subpoena ad testificandum issued by Shaw to nonparties Mindful Wealth Management (“Mindful Wealth”); St. Cassian’s School Foundation; PNC Bank (“PNC”); Louise Feiler; Lisa Schmey; St. Cassian’s School; and Ashenfelter, Slous, Trembulak, McDonough, Golia & Trevenen LLP

("Ashenfelter LLP"). Plaintiff also seeks a protective order preventing disclosure of the discovery sought in the subpoenas. Shaw opposes the motion.

### Relevant Chronology

Shaw sought documents that Plaintiff produced in the federal action entitled *Gianfranco Arena v. Riversource Life Insurance* ("Riversource") ("Federal Action") previously pending in the District Court of New Jersey. In the Federal Action, Plaintiff alleged that Riversource improperly refused to pay the death benefit of \$3.5 million upon Decedent's death on the grounds that her suicide within two years of issuance of the policy is a disqualifying event. Plaintiff produced over 17,000 documents in the discovery of that action including private emails, text messages, social media posts and accounts, and mortgage records that cover a period of 8 years.

On October 3, 2017, Shaw sought to compel the documents that had been produced in the Federal Action. Shaw asserted that the documents bear on "Ms. Arena's mental state at the time of her death and the comparison of this mental state before she began taking medication" prescribed by him. On January 31, 2018, the Court held that "where Mr. Arena has already willingly produced documents related to Ms. Arena's mental state in one action and has placed them in the public arena without requesting any limitations or protections in the Federal Court, there is no reason these documents should not be turned over to Dr. Shaw."

Plaintiff moved for leave to reargue/renew Shaw's motion dated October 3, 2017. Plaintiff advised the Court that "the documents produced in the Federal Action were in fact subject to a Discovery Confidentiality Order and not placed in the public arena." On June 5, 2018, the Court granted the motion for renewal, and held that "Shaw's request for *all* of the potentially sensitive and personal documents produced in the Federal Action is overly broad." The Court stated that Shaw could proceed to more narrowly tailor his discovery requests to obtain documents that may be necessary for his defense.

On June 5, 2018, the parties entered into a stipulation regarding discovery. In that stipulation, Plaintiff agreed to provide the following categories of discovery: authorizations for all hospital visits (including births) and all doctors who treated her for 10 years prior to the incident; all correspondence relating to her well-being which reflect any emotional/psychological difficulties generated with reference to her employment/psychological difficulties; all emails/texts/or correspondence relating to emotional/psychological difficulties; internet searches regarding anxiety and

pulling funds from 401(k); texts from friends offering support or inquiring as to how Decedent was feeling; and transcripts and depositions of Decedent's mother and physicians and all exhibits that are referenced at those depositions.

### Parties' Contentions

Plaintiff contends that the subpoenas seek "irrelevant and overbroad documents from nonparties including irrelevant documents; all documents and communications concerning personal finances and purchase/sale of real estate; and irrelevant private communications between decedent and her children's school." Plaintiff argues that the subpoenas go beyond the discovery outlined in the June 5, 2018 stipulation. Plaintiff further argues that the subpoenas were served in violation of CPLR 3120(3) which requires notice of the subpoena be served on parties "at the same time."

Shaw opposes the motion. Shaw argues that he is permitted to serve subpoenas on non-parties who have information concerning Decedent's state of mind, and potential contributing factors to her suicide. Shaw argues that the information sought is not "utterly relevant" and the subpoenas should be enforced.

### Legal Standard

CPLR § 3101(a) generally provides that, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has held that the term "material and necessary" is to be given a liberal interpretation in favor of the disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," and that "[t]he test is one of usefulness and reason." *Allen v Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 (1968).

CPLR § 3103(a) provides that a protective order may be warranted in order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome. *See Sage Realty Corp. v Proskauer Rose, LLP.*, 251 A.D.2d 35, 40 (1st Dep't 1998).

“It is frequently opined that a motion to quash on relevancy grounds will be denied as long as the party issuing the subpoena duces tecum can show that the materials sought are not ‘utterly irrelevant’ to the matter at hand.” *Reuters Ltd. v Dow Jones Telerate, Inc.*, 231 AD2d 337, 341-42 (1st Dept 1997). “However, this broadly stated standard, while consistent with a policy favoring the production of information, should not serve as an excuse for a court to abdicate its responsibility to determine whether the materials sought are in fact relevant to a legitimate subject of inquiry or to permit the subpoena power to be used as a tool of harassment or for the proverbial ‘fishing expedition’ to ascertain the existence.” *Reuters*, 231 AD2d at 342.

### Pending Subpoenas

#### A. Subpoenas Served on Mindful Wealth, PNC, and Ashenfelter LLP

The subpoenas served on Mindful Wealth, PNC, and Ashenfelter LLP seek information relating to Decedent’s finances, loans, and purchase of real estate. Shaw argues that he “is entitled to discovery that establishes alternative proximate causes of decedent’s death by statute,” such as Decedent’s financial concerns. Shaw further argues that based on the Bill of Particulars and the Federal Action, Plaintiff is claiming that he “failed to adequately treat plaintiff’s psychological delusions over her family’s finances.” Shaw argues that he “is entitled to information to defend himself in this action, even if that information was not available to him at the time of treatment, in order to prove that decedent’s financial concerns were grounded in reality, and not the result of any psychological delusion undiagnosed by [him] or caused by the medication he prescribed.” Shaw argues that “[t]o the extent that decedent’s suicide was prompted by well-founded financial concerns and life stressors, [he] is rightfully entitled to that evidence that will disprove plaintiff’s theory of liability and defend [his] diagnosis and prescription management of decedent’s mental condition.” Shaw submits an affidavit from his “causation experts” that “this information is [needed] in order to reconstruct decedent’s state of mind leading up to her suicide and to perform a ‘psychological autopsy.’” Shaw further argues that the information is necessary to defend against Plaintiff’s claim for damages including Decedent’s loss of earnings.

Plaintiff, in turn, argues that at issue is whether Shaw’s treatment of Decedent deviated from accepted medical malpractice and specifically whether Decedent’s complaints to Shaw and her history as contained in Defendant’s medical records

warranted the medications that were prescribed to her. Plaintiff argues that “Decedent’s prior conversations and financial history, concededly not known to defendant and not relied on when making his diagnosis and treatment plan, is not relevant to whether the doctor prescribed the appropriate drug cocktail knowing what he did then.”

Documents concerning Decedent’s finances, loans, and purchase of real estate are not related to issues concerning liability. “In the context of mental health providers, [the Court has] held that ‘[w]hen a psychiatrist chooses a course of treatment, within a range of medically accepted choices for a patient after a proper examination and evaluation, the doctrine of professional medical judgment will insulate such psychiatrist from liability.’” *Park v Kovachevich*, 116 AD3d 182, 190 (1st Dept 2014). “A decision will not be insulated by the medical judgment rule if it is not based upon a careful examination.” *Park*, 116 AD3d at 191.

The information sought does not bear on whether Shaw deviated from accepted medical standards in his treatment of Decedent based on Decedent’s complaints and history as she provided. The information sought does not bear on the issue of damages either. Plaintiff has produced five years of W2’s to show Decedent’s wages, which bears directly on Plaintiff’s claim of loss earnings. The additional information sought from Mindful Wealth, PNC, and Ashenfelter LLP amounts to a fishing expedition.

Shaw further argues that information sought has been determined to be relevant and discoverable in suicide actions. The cases that Shaw relies upon in his motion are distinguishable to the facts of this case.

Specifically, Shaw cites to *Maglaras v Mt. Sinai Hospital*, 107 AD2d 605 (1st Dept 1985) and *Janecka v Casey*, 121 AD2d 28 (1st Dept 1986). In *Maglaras*, 107 AD2d at 606, the Court ordered the Decedent’s wife and administratrix to produce certain bank records, income tax returns, and employment records “in order to shed light on decedent’s financial status” and “the loss of financial contributions from him.” Here, Plaintiff has produced proof of Decedent’s wages and financial contributions to the family. Shaw, however, is seeking additional information that does not bear on Decedent’s financial contributions. In *Janecka*, 121 AD2d at 32, the Court held that “given the relevancy of the relationship between the deceased and the spouse who claims pecuniary loss due to her death, and the obvious significance of the court file in the spouse’s matrimonial action on that issue, sufficient has been shown to warrant the disclosure of information otherwise privileged by virtue of the marital relationship.” The Court held that “[i]n such circumstances, the shield afforded by Domestic Relations Law § 235 must give way

to the need for disclosure of relevant evidence.” *Id.* There is no alleged marital privilege here.

The portion of Plaintiff’s motion which seeks to quash the subpoenas served on Mindful Wealth, PNC, and Ashenfelter LLP is granted.

#### A. Subpoena Served on Louise Feiler

The subpoena served on Decedent’s mother Louise Feiler (“Feiler”) seeks all documents related to Decedent’s death and medical treatment for the period of January 1, 2015 to April 30, 2015. Shaw contends that Feiler testified to having gotten into an argument with Decedent minutes before Decedent committed suicide. Shaw further contends that Feiler kept notes on Decedent’s mental health and medications and was in frequent communication with Decedent in the months leading up to her death.

Plaintiff states, “As it relates to decedent’s mother, plaintiff already provided the notes taken by Mrs. Feiler with reference to her daughter’s treatment. If defendant believes that Mrs. Feiler’s deposition is relevant and necessary, then defendant should pursue her deposition after depositions of the parties have been completed.”

The information sought concerning Feiler’s communications with Decedent and her notes relating to Decedent’s mental health, medications, treatment, and death are relevant to this case. Shaw would also be entitled to take a deposition of her. The portion of Plaintiff’s motion which seeks to quash the subpoena served upon Feiler is therefore denied.

#### B. Subpoenas Served on St. Cassian School Foundation, St. Cassian School, and Lisa Schmey

The subpoenas served on St. Cassian School Foundation, St. Cassian School, and Lisa Schmey (“Schmey”) relate to Decedent’s work and communications regarding her work. Shaw states that Schmey had served on the St. Cassian School’s board alongside Decedent since 2012 and leading up to Decedent’s death. Shaw claims that Decedent was in frequent communication with Schmey and other members of St. Cassian School and Foundation in the months and days leading up to her suicide.

Plaintiff states, "As it relates to conversations decedent had with her children's school ... pursuant to the Court-Ordered Stipulation, plaintiff already provided each and every conversation referencing to decedent's emotional well-being and emotional/psychological difficulties including conversations with friends offering support and inquiring into how decedent was feeling."

The documents relating to Decedent's work at St. Cassian School Foundation and St. Cassian School are not relevant to whether Shaw was negligent in his medical care of Decedent. However, to the extent that Decedent communicated with Lisa Schmey or any other member of the school or foundation as to her emotional well-being and difficulties, those communications would be relevant.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion is granted only to the extent that the subpoenas served on Mindful Wealth, PNC, and Ashenfelter LLP are quashed and the subpoenas served on St. Cassian School Foundation, St. Cassian School, and Lisa Schmey are limited to Decedent's communications as to her emotional well-being and difficulties.

This constitutes the Decision and Order of the Court. All other requested relief is denied.

DATED: NOVEMBER 26, 2019

  
EILEEN A. RAKOWER, J.S.C.