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STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHOHARIE

ROCK A. LOISELLE AND ELIZABETH M. LOISELLE,

Plaintiffs,

-against-

PROGRESSIVE CASUALTY INSURANCE COMPANY,

Defendant.

DECISION & ORDER
Index No.: 17-0004
RJI No.: 47-9078-17

(Supreme Court, Schoharie County, All Purpose Term)

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HON. JAMES H. FERREIRA, Acting Justice:

In this action, plaintiffs allege that plaintiff Rock A. Loiselle (hereinafter Mr. Loiselle) was injured in a car accident that occurred on January 12, 2015 and that defendant thereafter breached its contract of insurance with plaintiffs by denying their claim for supplementary uninsured motorist (hereinafter SUM) benefits with respect to the accident. Issue has been joined and discovery is ongoing. There are two motions presently pending before the Court. First, defendant moves for a protective order quashing a subpoena issued by plaintiffs to non-party Crossland Medical Review

Services and ExamWorks Company (hereinafter ExamWorks) seeking certain records. Plaintiffs oppose the motion and cross-move for an order compelling defendant to respond to their discovery demand. Defendant opposes the cross motion.

Defendant's Motion for a Protective Order

The Court turns first to defendant's motion. With respect to this motion, the record reflects that, in February 2018, defendant served plaintiffs with expert witness disclosure indicating that defendant may call Harvey L. Siegel, M.D., and Patrick J. Hughes, M.D., as expert witnesses at trial. The disclosure indicates that Dr. Siegel and Dr. Hughes each conducted an Independent Medical Examination (hereinafter IME) of Mr. Loiselle and issued an IME report. Thereafter, plaintiffs served a Notice to Produce on defendant, seeking: (1) copies of all 1099 Forms provided by defendant to Dr. Siegel and Dr. Hughes from January 1, 2015 to the present; (2) copies of all invoices, billing statements and payments made by defendant to Dr. Siegel and Dr. Hughes from January 1, 2015 to the present (see Affidavit in Support of Motion, Exhibit G). Defendant then moved for a protective order vacating the Notice to Produce, asserting, among other things, that the records sought are not under its control because it enlists a third-party vendor to retain medical examiners. By Decision and Order dated August 28, 2018, the Court granted defendant's motion on the ground that defendant does not possess the records sought and therefore cannot produce them.

Plaintiffs thereafter served a Subpoena to Produce Documents upon ExamWorks. The subpoena sought the production of:

(1) Copies of all Forms 1099 provided to Dr. Siegel and/or Post-Trauma Medical Services, P.C. and to Dr. Hughes for the calendar years 2015, 2016 and 2017; and

(2) "Copies of all records relating to the performance by [Dr. Siegel] of [IMEs] performed for and/or on behalf of [d]efendant . . . for calendar years 2015, 2016 and 2017" (Affidavit in Support of Motion, Exhibit M).

After plaintiffs did not withdraw the subpoena upon defendant's request, defendant filed this motion for a protective order quashing the subpoena.

CPLR 3101(a) provides that there "shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" include "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 [1968]; see Troy Sand & Gravel Co., Inc. v Town of Nassau, 80 AD3d 199, 200 [3d Dept 2010]). Disclosure by a non-party is permitted "upon notice stating the circumstances or reasons such disclosure is sought or required" (CPLR 3101 [a][4]).[1] "[A] trial court is vested with broad discretion in overseeing the discovery and disclosure process" (DG&A Mgt. Servs., LLC v Securities Indus. Assn. Compliance & Legal Div., 78 AD3d 1316, 1318 [3d Dept 2010]; Hameroff & Sons, LLC v Plank, LLC, 108 AD3d 908, 909 [3d Dept 2013]). Among other things, "[t]he court may . . . on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . . to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]).

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[1] "Because a nonparty is likely to be less cognizant of the issues in pending litigation than a party, section 3101(a)(4)'s notice provision mandates that the nonparty is apprised of the 'circumstances or reasons' as to why the party seeks or requires the disclosure" (Matter of Kapon v Koch, 23 NY3d 32, 36 [2014]). "The subpoenaing party must include that information in the notice in the first instance" (Matter of Kapon v Koch, 23 NY3d at 39). Here, the copy of the subpoena submitted by plaintiffs plainly fails to satisfy the notice requirement set forth in CPLR 3101(a)(4), as it contains no information as to "the circumstances or reasons such disclosure is sought or required" (see Affidavit in Support of Motion, Exhibit M). Nevertheless, defendant makes no argument that the subpoena is facially insufficient, and the Court cannot determine from this record whether there was material accompanying the subpoena which provided the notice required by CPLR 3101(a)(4). As such, the Court declines to quash the subpoena on that ground.

The purpose of a subpoena duces tecum is "to compel the production of specific documents that are relevant and material to facts at issue in a pending judicial proceeding" (Matter of Terry D., 81 NY2d 1042, 1044 [1993] [internal quotation marks and citation omitted]; see Matter of Niagara Mohawk Power Corp. v Town of Moreau Assessor, 8 AD3d 935, 937 [3d Dept 2004]). On a motion to quash a subpoena served on a non-party, the moving party bears the initial burden to "establish either that the discovery sought is 'utterly irrelevant' to the action or that the 'futility of the process to uncover anything legitimate is inevitable or obvious" (Matter of Kapon v Koch, 23 NY3d 32, 34 [2014]). If defendant meets its burden, the subpoenaing party "must then establish that the discovery sought is 'material and necessary' to the prosecution or defense of an action, i.e., that it is relevant" (Matter of Kapon v Koch, 23 NY3d at 34).

Here, defendant argues that the 1099 forms sought by plaintiff would not contain any information demonstrating how many times defendant has utilized ExamWorks to retain either doctor or Post-Trauma Medical Services, P.C., and therefore would not provide any information for plaintiff to use to impeach the doctors on cross-examination. Defendant argues that plaintiffs would not be able to show bias based solely upon a total dollar amount paid to the experts by a third-party vendor. Defendant points out that these records contain personal and private information such as social security numbers and information as to income. Defendant further argues that records as to unrelated IMEs that Dr. Siegel was retained to perform for defendant are privileged as materials prepared in anticipation of litigation; defendant also argues that the records have no direct tie to the instant litigation and are irrelevant to this action.

In opposition, plaintiffs argue that the evidence as to the experts' total earnings with respect to their IME practice is relevant so that the jury can determine "if they believe that the defense expert[s are], in fact, biased to the people who pay for their living" (Reply Affirmation in Support

of Cross Motion ¶ 8). Plaintiffs emphasize that the evidence is relevant to show bias; counsel avers: "These experts are in essence, employees of liability insurance companies and we should be allowed to present that evidence to a jury. . . . We are simply asking for what proof there is that can show how much they make from doing these reports on an annual basis for cross-examination purposes so we can lay out to the jury possible bias" (id. ¶¶ 10, 12).

Financial Information (1099s)

It does not appear that the Third Department has ruled on the specific issue before the Court, to wit, whether financial information of non-party examining physicians is discoverable where the party seeking discovery seeks to use the information solely for impeachment purposes. Moreover, as the Court pointed out in its prior Decision and Order in this action, there appears to be a split in authority among the other Appellate Divisions as to whether financial information of a physician who performs an IME is discoverable. The Appellate Divisions, First and Second Departments, have held it is improper for a party to serve a judicial subpoena upon an examining physician to obtain information about the physician's financial history for the sole purpose of impeachment (see Fazio v Federal Express Corp., 272 AD2d 259, 260 [1st Dept 2000]; Pernice v Devora, 238 AD2d 558, 559 [2d Dept 1997], see also Valdez v. Sharaby, 258 AD2d 458, 458 [2d Dept 1999]). In Fazio v Federal Express Corp., a judicial subpoena was issued seeking five years of financial records of a doctor who had conducted an IME in the case. The financial records pertained to "all money earned for testimony regarding exams, and consults" (Fazio v Federal Express Corp., 272 AD2d at 259 [internal quotation marks omitted]). The First Department held:

"The use of a judicial subpoena for the sole purpose of showing that an examining physician's history of financial compensation indicates a defense-oriented predisposition – in other words, for the purpose of impeaching the witness' general credibility – is improper. Such information is

irrelevant and immaterial to the underlying facts at issue in the case, and the subpoena should have been quashed" (id. at 260).

Likewise, in Pernice v Devora, the plaintiff had sought to obtain records from a doctor who had completed an IME of the plaintiff on behalf of the defendants. Specifically, the plaintiff sought "essentially all of [the doctor's] records, including records of the money [the doctor] received for medical examinations he performed on behalf of insurance companies" (Pernice v Devora, 238 AD2d at 559). The plaintiff sought these records solely for impeachment purposes. The Second Department held that the subpoena should have been quashed because "the plaintiff admittedly sought the requested records simply for the purpose of gaining information to impeach the general credibility of [the doctor]" (id.; see also Valdez v Sharaby, 258 AD2d at 458).

Conversely, the Appellate Division, Fourth Department, has held that a plaintiff is entitled to financial records of an examining physician for the purpose of cross-examining the physician as to bias or interest and has upheld a judicial subpoena served upon the physician and a third-party medical examination vendor (see Porcha v Binette, 155 AD3d 1676, 1677 [4th Dept 2017]) and a judicial subpoena served upon a nonparty insurance company which had retained the physician to conduct an IME (see Dominicci v Ford, 119 AD3d 1360, 1361 [4th Dept 2014]). In Porcha v Binette, the plaintiff served a judicial subpoena upon the physician who performed plaintiff's IME, the third-party medical examination vendor and the defendants' insurer. Among other things, the plaintiff sought "all billing and payment records related to examinations performed by [the doctor] on behalf of all insurance companies and attorneys for the prior five years" to ascertain possible bias of the doctor (Porcha v Binette, 155 AD3d at 1677). The Fourth Department held that "[p]laintiff was entitled to the information to assist her in preparing questions for cross-examination of [the doctor] concerning his bias or interest" (id.).

In Dominicci v Ford, the plaintiff served a subpoena on the defendant's insurance company seeking, among other things, "production of 1099 forms or other wage statements reflecting payments made by [the insurance company] to the examining physician for [a three year period], as well as bills and invoices related to the litigation received from the examining physician, his staff or business, or from the independent examination processing company" (Dominicci v Ford, 119 AD3d at 1360-1361). The Fourth Department held that Supreme Court did not abuse its discretion in denying a motion to quash the subpoena, reasoning that "[q]uestions concerning the bias, motive or interest of a witness are relevant and should be freely permitted and answered . . . and, thus, plaintiff is entitled to discovery materials that will assist her in preparing such questions" (id. at 1361 [internal citations and quotation marks omitted]). However, the Fourth Department, in an earlier case, has also held that it was not an abuse of discretion for Supreme Court to limit discovery "to information regarding the amount paid to defendants' experts in connection with services rendered in [that particular] case" and deny discovery with respect to "[r]ecords regarding previous unrelated payments to experts" (Baliva v State Farm Mut. Auto. Ins. Co., 286 AD2d 953, 953-954 [4th Dept 2001]).

Upon careful consideration, the Court grants defendants' motion to quash the subpoena inasmuch as it seeks the production of 1099 forms. The subpoena is improper under the precedent set by the Appellate Divisions, First and Second Departments. Inasmuch as the Appellate Division, Fourth Department, liberally permits discovery with respect to financial records of non-party examining physicians on the ground that a party is entitled to the records to ascertain possible bias, the Court declines to follow that precedent in this case. Based upon the facts and argument presented here, the Court finds that allowing disclosure of the non-parties' financial records based only upon plaintiffs' assertion that they may provide some evidence of bias – even though there is no actual link

between the 1099s and the case at bar – would unduly expand the scope of this litigation. Here, the documents sought are financial forms provided by Exam Works to the examining physicians and Post-Trauma Medical Services, P.C. These records would show, at most, how much money ExamWorks paid the doctors and Post-Trauma Medical Services, P.C. in each calendar year. As defendant points out, these records, on their face, do not have any link to this action or to this defendant and would not show how much money the non-parties were paid with respect to services provided to defendant. As such, the Court finds that defendant has established that the records sought are utterly irrelevant to this action.

In turn, plaintiff has not established that the records are material and necessary to the prosecution of this action. Plaintiff argues that the records are relevant to show possible bias. However, without more, the bare 1099 forms provided by ExamWorks to the non-parties would not tend to show bias in favor of this particular defendant or in favor of defendants in general. Plaintiff's assertion that the 1099 forms may show bias because they would show that the experts are essentially employees of liability insurance companies is conclusory and speculative. Importantly, "[d]iscovery requests that tend to broaden the scope of litigation and intrude upon rights to privacy should not be permitted unless there is a showing that the need for disclosure outweighs the importance of protecting non-parties' privacy" (Van Epps v County of Albany, 184 Misc 2d 159, 164 [Sup Ct, Albany County 2000]). Here, the Court does not find that plaintiffs' asserted need for the financial records to support their speculative assertion of bias is outweighed by the need to protect the privacy of the non-parties. As such, defendant's motion for a protective order quashing the subpoena as to the request for the 1099 forms is granted.

IME Records

In the subpoena, plaintiffs also seek the production of copies of all records relating to Dr.

Siegel's performance of IMEs for or on behalf of defendant for three calendar years. Neither party has cited any case law addressing the issue of whether records relating to prior IMEs performed by an examining physician are discoverable, and the Court could find none. In any event, the Court finds that defendant has met its burden of demonstrating that these records are utterly irrelevant to the prosecution of this action, as the records pertain to prior, unrelated cases that Dr. Siegel participated in and have nothing to do with the instant matter. In turn, the Court finds that plaintiffs have failed to meet their burden of demonstrating that the records are material and necessary. Plaintiffs make no specific argument in their opposition papers with respect to these records, and the Court finds plaintiffs' general arguments that the records that they seek are relevant to prove bias to be insufficient to meet plaintiffs' burden on this motion. Based upon the foregoing, defendant's motion is granted in its entirety and the subpoena served upon ExamWorks is quashed.

Plaintiffs' Cross Motion to Compel Discovery

The Court now turns to plaintiffs' cross motion. With respect to this motion, the record reflects that, in December 2018, plaintiffs served a Notice for Discovery and Inspection upon defendant. Plaintiffs sought the production of the following ten items:

(1) A complete copy of any and all settlements by defendant regarding any knee injuries with surgery on a SUM file;

(2) A complete copy of any and all settlements by defendant regarding a tear of the medial meniscus on a SUM file;

(3) A complete copy of any and all reserve guidelines for defendant for knee injuries requiring surgery;

(4) A complete copy of any and all reserve guidelines for defendant for tears of the medial meniscus;

(5) A complete copy of any and all settlements by defendant regarding any hand weakness and/or loss of sensation in the hand on a SUM file;

(6) A complete copy of any and all reserve guidelines for defendant for hand injuries;

(7) Complete copies of all correspondence between defendant and plaintiffs and/or plaintiffs' representatives regarding this claim;

(8) A complete copy of defendant's claim file for this matter;

(9) Copies of any and all denial letters for coverage pertaining to this loss; and

(10) The name of the company which arranged for the IMEs conducted in this case.

(See Reply Affirmation in Support of Cross Motion, Exhibit A). Defendant provided a response to the demand shortly thereafter objecting to all of plaintiffs' demands (see id., Exhibit B).

In their cross motion, plaintiffs argue that defendant's response to their demand "in essence fails to respond to any of the discovery demands" (id. ¶ 20). Plaintiffs assert that the documents sought are necessary for the prosecution of this action and that defendant has offered no reason why they cannot be produced. Specifically, they contend that they are entitled to production of the entire claim file under prevailing case law. Plaintiffs also summarily assert that they are entitled to documents pertaining to claim reserves and that they are entitled to depose defendant's representatives as to similar claims.

In opposition, defendant notes that it has already disclosed the name of the company that arranged for the IMEs. Defendant also states that it will submit the complete claim file to the Court within 30 days of the Court's Decision and Order, along with a privilege log, for the Court's in camera review. Defendant further asserts that plaintiff already has the information sought in Items 7 and 9. Finally, defendant asserts that it is not in possession of the information sought in Items 1 through 6. As to these items, defendant has submitted the affidavit of Brian Olewnick, a supervisory employee of defendant. Therein, Mr. Olewnick states that he is not aware of any means by which

the information sought in Items 1, 2 and 5 could be obtained. He further states that there are no reserve guidelines for the injuries identified by plaintiffs.

Pursuant to CPLR 3120, a party may serve on another party a notice "to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party . . . served" (CPLR 3120 [1] [i] [emphasis added]). Pursuant to CPLR 3124, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . , the party seeking disclosure may move to compel compliance or a response" (CPLR 3124).

Upon review, plaintiffs' motion is denied inasmuch as it seeks to compel defendant to provide the documents and records sought in Items 1 through 7 and Items 9 through 10 of their demand. As to Items 1 through 6, defendant has submitted evidence that the documents and/or information sought are not in the possession of defendant. As "a party cannot be 'compelled to produce records, documents, or information that [a]re not in [its] possession, or d[o] not exist' " (Deer Park Assoc. v Town of Babylon, 121 AD3d 738, 740 [2d Dept 2014], quoting Gottfried v Maizel, 68 AD3d 1060, 1061 [2d Dept 2009]; see Mary Imogene Bassett Hosp. v Cannon Design, Inc., 97 AD3d 1030, 1032 [3d Dept 2012]), the Court denies plaintiffs' motion to compel the production of the records identified in Items 1 through 6. The Court notes that plaintiffs have not submitted a reply to their cross motion and have not challenged defendant's evidence that it is not in possession of or cannot obtain the records or information. As to Items 7 and 9, defendant asserts – and plaintiffs do not dispute – that plaintiffs have been provided those records. Likewise, it is clear from the record that plaintiffs have been provided the name of defendant's IME vendor, as sought in Item 10. As such, plaintiffs' motion to compel the production of those records is denied as moot.

As to Item 8, defendant's claim file, the Court reserves decision as to plaintiffs' motion to compel the production of that evidence. The Court directs that defendant submit its entire claim file relating to plaintiffs' claim for SUM benefits, in unredacted form, to the Court for its in camera review within 30 days of the signature date of this Decision and Order. The Court also directs defendant to file and serve a supplemental affirmation or affidavit addressing the issue of whether the claim file is subject to disclosure within 30 days of the signature date of this Decision and Order. Any reply shall be filed and served within 10 days after receipt of the supplemental affirmation or affidavit. Upon review of these submissions, the Court will issue a Decision and Order addressing this aspect of plaintiffs' motion.

Accordingly, based upon the foregoing, it is hereby

ORDERED that defendant's motion is granted and the subpoena issued to ExamWorks is quashed; and it is further

ORDERED that plaintiffs' cross motion to compel discovery is denied only to the extent provided herein and the Court reserves decision with respect to that part of the cross motion which seeks to compel the production of defendant's complete claim file; and it is further

ORDERED that, within 30 days of the signature date of this Decision and Order, defendant submit its entire claim file relating to plaintiffs' claim for SUM benefits, in unredacted form, to the Court for its in camera review and file and serve a supplemental affirmation or affidavit addressing the issue of whether the claim file is subject to disclosure. Any reply shall be filed and served within 10 days after receipt of the supplemental affirmation or affidavit; and it is further

ORDERED that defendant serve a copy of this Decision and Order on ExamWorks within 10 days of entry of the Decision and Order.

The foregoing constitutes the Decision and Order of the Court. The original Decision and

Order is being returned to counsel for defendant. A copy of the Decision and Order has been delivered to the County Clerk for placement in the file. The signing of this Decision and Order, and delivery of a copy shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

SO ORDERED AND ADJUDGED
ENTER.

Dated: Albany, New York
June 27, 2019

Hon. James H. Ferreira
Acting Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause, dated January 2, 2019;
2. Affidavit in Support by Thomas A. Cullen, Esq., sworn to December 27, 2019, with attached exhibits;
3. Notice of Cross Motion, dated February 8, 2019;
4. Reply Affirmation in Support of Cross Motion by Paul H. Wein, Esq., dated February 8, 2019, with attached exhibits;
5. Affirmation in Opposition to Cross Motion by Thomas A. Cullen, Esq., dated March 4, 2019, with attached exhibit.