Caimares v Erickson
2020 NY Slip Op 34304(U)
November 9, 2020
Supreme Court, Bronx County
Docket Number: 20620/2017E
Judge: John R. Higgitt

Mtn. Seq. # 03
Mtn. Seq. # 04

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 34**

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CAIMARES, CINTHIA I.

- against -

ERICKSON, AIMEE, FNP, et al

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Index №. **20620/2017E**

Hon. **JOHN R. HIGGITT**, J.S.C.

The following papers in the NYSCEF System were read on this motion to **COMPEL (Motion Sequence #3)**, duly submitted as No. ___ on the Motion Calendar of **October 21, 2020**, and the following papers in the NYSCEF System were read on this motion to **COMPEL (Motion Sequence #4)**, duly submitted as No. ___ on the Motion Calendar of **October 21, 2020**

	NYSCEF Doc. Nos.
Notice of Motion –Exhibits and Affidavits Annexed (**Motion Sequence #3**)	77-98
Answering Affidavits and Exhibits	142
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Notice of Motion –Exhibits and Affidavits Annexed (**Motion Sequence #4**)	99-118
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Upon the August 21, 2020 notice of motion of defendants Montefiore Medical Center and Au ("the Montefiore defendants") and the affirmation and exhibits submitted in support thereof (Motion Sequence #3); the August 27, 2020 notice of motion of defendants Medalliance Medical Health Services, Inc. and Erickson ("the Medalliance defendants") and the affirmation and exhibits submitted in support thereof (Motion Sequence #4); plaintiff's October 5, 2020 affirmation in opposition to both motions and the exhibits submitted therewith; the Montefiore defendants' October 19, 2020 affirmation in reply; the Medalliance defendants' October 21, 2020 affirmation in reply; and due deliberation; the defendants' motions to compel plaintiff's production of discovery and appearance at a further deposition and for an order precluding plaintiff from offering evidence at trial are granted in part.

The complaint alleges that defendants failed to detect and monitor plaintiff's breast cancer. Plaintiff was deposed on March 28, 2019 and June 12, 2019. At her second deposition, after having denied same at the first deposition, plaintiff testified to keeping a diary of her treatment. A copy of the diary was thereafter provided to defendants.

The moving defendants assert that plaintiff has failed to comply with their demands for authorizations for phone records and Social Security Disability records, instead objecting to the demands as overbroad and seeking irrelevant material. Furthermore, given that plaintiff provided discovery after appearing for a deposition, the moving defendants seek a further deposition of plaintiff limited to her diary entries.

The moving defendants assert that phone records are relevant because plaintiff claims that they failed to monitor follow-up care by, among other things, phone contact. The Montefiore defendants, however, assert that their records indicate that they attempt to contact plaintiff by phone on multiple occasions. The moving defendants further assert that, because they have demanded phone records on several occasions since 2018, in the event that such records are no longer available from plaintiff and/or plaintiff's service providers, plaintiff should be precluded from offering and/or relying on such records at the time of trial.

Check one:
□ Case Disposed in Entirety
■ Case Still Active

Motion is:
■ GIP (Mtn Seq #3)
■ GIP (Mtn Seq #4)

Check if appropriate:
□ Schedule Appearance
□ Fiduciary Appointment
□ Settle Order
□ Submit Order

The moving defendants assert that disability records are relevant because plaintiff has been receiving disability benefits since 2013 or 2014 due to depression, plaintiff has alleged memory problems making it difficult for her to remember appointments and communications with medical providers, and plaintiff has alleged that she suffers from "pseudodementia attributed to underlying depression, cognitive impairment, difficulty with memory, learning and staying focused." As to the Medalliance defendants, plaintiff has alleged their failure to make follow-up appointments for plaintiff "in light of her debilitating cognitive issues."

In addition to phone and disability records and a further deposition of plaintiff, the Medalliance defendants seek an authorization for JEC Disability Management and a response to their April 14, 2020 demands seeking authorizations permitting them to obtain the records of the Greene Medical Arts Pavilion and Moses Campus of Montefiore Medical Center.

Plaintiff opposes the motions to the extent they seek preclusion and a further deposition. Plaintiff asserts that the diary entries "add absolutely nothing" to the discovery discussed at plaintiff's prior depositions (Shifren affirmation at para. 5).

Generally, "there shall be full disclosure [by a party] of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a][1]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). One method of obtaining disclosure is by discovery and inspection (*see* CPLR 3102[a]), on notice (*see* CPLR 3102[b]), by service by a party upon any other party of a notice seeking same (*see* CPLR 3120[1][i]), describing each item and category with reasonable particularity (*see* CPLR 3120[2]). The recipient must respond within 20 days (*see* CPLR 3120[2]). If the recipient of such a notice objects to any part of it, the recipient shall do so in a timely writing (*see* CPLR 3122[a][1]). Should the recipient object or not respond, the party seeking disclosure may move pursuant to CPLR 3124 (*see id.*). In addition, if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just" (CPLR 3126).

The party seeking discovery must show that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Abrams v Pecile*, 83 AD3d 527, 528 [1st Dept 2011] [citations omitted]). The test is one of usefulness and reason (*Allen*, 21 NY2d at 406). Furthermore,

> "Parties to an action are entitled to reasonable discovery of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. CPLR 3101(a), which permits discovery of all evidence material and necessary in the prosecution or defense of an action, has been most liberally construed, with the term 'evidence' held to include that which is required in preparation for trial. Pretrial disclosure extends not only to admissible proof but also to testimony or documents which *may* lead to the disclosure of admissible proof … [if] there is *any possibility* that the information is sought in good faith for *possible* use as evidence-in-chief or for cross-examination or in rebuttal, it should be considered evidence 'material' in the action" (*Fell v Presbyterian Hosp. in N.Y. at Columbia-Presbyterian Med. Ctr.*, 98 AD2d 624, 625 [1st Dept 1983] [citations and quotation marks omitted and emphasis added]).

It is thus apparent that a party's obligation with respect to discovery does not rest on the volume of discovery already produced but whether the discovery remaining outstanding is relevant to the issues. Given the interplay of plaintiff's psychological status, the specific claims of departure and negligence attributable to all defendants, plaintiff's claims of continuing damages and their sequelae, and the

particular insight afforded by and significance of a recorded personal narrative document, defendants should be permitted to inquire as to the diary entries, the relevance of which plaintiff does not dispute. Given the circumscribed nature of the deposition sought, it shall be limited in time, given that plaintiff has already appeared twice for deposition (*see* CLR 3103[a]), although allowances shall be made, given that plaintiff has testified through an interpreter.

As to preclusion of the phone records, plaintiff asserts that there are "clearly" no grounds calling for such a sanction because she stated her objections to the discovery sought in good faith.

The Montefiore defendants assert that they demanded telephone records on June 26, 2018 and June 14, 2019, and that plaintiff' response to the Montefiore defendants' demands was a subject of the February 13, 2019, October 30, 2019 and January 22, 2020 compliance conference orders.

The Montefiore defendants' June 26, 2018 demand sought "[a] copy of plaintiff's telephone records from October 2014 up to and through November 2015." The February 3, 2019 compliance conference order required plaintiff to respond to the demands.

The Montefiore defendants' June 14, 2019 post-deposition demands sought an authorization permitting them to obtain "full and complete copies of records referable to plaintiff(s)" for "Optimum (phone and internet)." By letter dated July 19, 2019, plaintiff objected to the post-deposition demand for Optimum records as overbroad and unduly burdensome. The October 30, 2019 compliance conference required plaintiff to respond to the demand. By letter dated December 10, 2019, plaintiff objected to the demand as overbroad and improper. The January 22, 2020 compliance conference order required plaintiff to provide a further response to the demand for home and cellular phone records.

The Medalliance defendants' February 18, 2020 demands sought authorizations permitting them to obtain the records of plaintiff's cellular and home telephone service providers from 2012 to 2015, based on plaintiff's deposition testimony that she received phone calls from medical providers to notify and/or remind her of appointments.

While the sanction of preclusion may be appropriately imposed where the non-disclosing party's behavior was neither willful nor contumacious (*see Vandashield Ltd v Isaacson*, 146 AD3d 552 [1st Dept 2017]), no response is warranted to demands which, as written, are impermissibly overbroad, vague and unduly burdensome (*see Clarendon Natl. Ins. Co. v Atlantic Risk Mgt., Inc.*, 59 AD3d 284 [1st Dept 2009]) even if not objected to on those grounds (*see Duhe v Midence*, 1 AD3d 279 [1st Dept 2003]). The Montefiore defendants' demands were not limited in time or to communications to or from a relevant medical provider, and sought disclosure of all of plaintiff's telephone records. While the Medalliance defendants' demands were limited in time, they were not limited to communications to or from a relevant medical provider, and sought disclosure of all of plaintiff's telephone records. However, the court may also, on its own or upon motion, issue a "protective order denying, limiting, conditioning or regulating the use of any disclosure device [which] shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]). The overbreadth of the demands should not foreclose the defendants' inquiry into arguably relevant discovery; the defendants will be given an opportunity to pursue such disclosure.

Accordingly, it is

ORDERED, that those aspects of the motions seeking an order compelling plaintiff to respond to the moving defendants' demands for discovery are granted to the extent that, within 30 days after service of a copy of this order with written notice of its entry, plaintiff shall provide authorizations permitting defendants to obtain Social Security Disability records and the records of JEC Disability Management and the Greene Medical Arts Pavilion and Moses Campus of Montefiore Medical Center; and it is further

ORDERED, that those aspects of the motions seeking an order compelling plaintiff's appearance at a further deposition are granted to the extent that, within 60 days after service of a copy of this order with written notice of its entry, plaintiff shall appear for deposition limited in time to four hours from the opening of the record and limited in scope to her diary entries and reasonable noncumulative inquiry arising therefrom; and it is further

ORDERED, that the aspects of the motions seeking an order compelling plaintiff's production of telephone authorizations and/or records, and conditionally precluding plaintiff's use of such records at trial in the event they are not so produced, are denied without prejudice to the moving defendants' service of appropriately-tailored demands, to which plaintiff shall respond within the time permitted by the CPLR; and it is further

ORDERED, that the motions are otherwise denied.

This constitutes the decision and order of the court.

Dated: November 9, 2020

Hon. John R. Higgitt, J.S.C.