

Abdullahi v Shenoy
2020 NY Slip Op 34578(U)
June 24, 2020
Supreme Court, Erie County
Docket Number: Index No. 809897/2015
Judge: Frederick J. Marshall
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At a Special Term of the Supreme Court, State of New York, held in and for the County of Erie at the Erie County Courthouse in the City of Buffalo, on this 3rd day of December, 2019.

PRESENT: HON. FREDERICK J. MARSHALL, J.S.C.
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

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ABDUKADIR ABDULLAHI, As Administrator
of the Estate of MARYAN M. ISSA,

Plaintiff,

ORDER

-vs-

Index No. 809897/2015

SADASHIV S. SHENOY, M.D.,
SADASHIV S. SHENOY, M.D., PLLC,
KALEIDA HEALTH,
HIROSHI TAKITA, M.D.,
GENERAL PHYSICIAN SUB II PLLC,
JOSEPH E. SERGHANY, M.D.,
WESTERN NEW YORK MRI LLP and
WESTERN NEW YORK PETCT LLC,

Defendants.

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Defendant, KALEIDA HEALTH, having moved this Court for an order: (1) quashing plaintiff's subpoenas duces tecum directed to non-parties Ralph Benedict, Ph.D., and Robert N. Sawyer, Jr., M.D.; (2) staying plaintiff's subpoena requests, if necessary, to permit the motion to be heard and the issues raised decided; and (3) granting a protective order pursuant to CPLR § 3103 regarding the "underlying raw data" sought by plaintiff; and said motion having duly come on to be heard,

Defendants, SADASHIV S. SHENOY, M.D., and SADASHIV S. SHENOY, M.D., PLLC, having moved this Court for an order: (1) quashing plaintiff's

subpoenas duces tecum served on nonparties Dr. Benedict and Dr. Sawyer, or (2) issuing a protective order precluding the “underlying raw data” sought by plaintiff’s counsel;

NOW, on reading the Notice of Motion, dated August 8, 2019, and Affidavit of Bryan P. Kroetsch, Esq. (sworn to on August 8, 2019), with exhibits, and the Affidavit of Patricia L. Vorpahl (sworn to on August 8, 2019), all in support of Kaleida Health’s motion;

NOW, on reading the Notice of Motion, dated November 11, 2019, and Affidavit of William Kalish, Esq. (sworn to on November 11, 2019), in support of the motion made by Dr. Shenoy and Sadashiv S. Shenoy, M.D., PLLC;

AND, upon reading the Affirmation of Joseph J. Manna, Esq. (dated November 12, 2019), with exhibits, in opposition to the defendants’ motions; and the Reply Affidavit of William Kalish, Esq. (sworn to on November 25, 2019), in further support of the motion made by Dr. Shenoy and Sadashiv S. Shenoy, M.D., PLLC; and the Reply Affidavit of Bryan P. Kroetsch, Esq. (sworn to on November 29, 2019), with exhibits, in further support of Kaleida Health’s motion; and

UPON hearing CONNORS LLP, John T. Loss, Esq., of counsel for Kaleida Health; BROWN GRUTTADARO & PRATO PLLC, David E. Brown, Esq., of counsel for Dr. Shenoy and Sadashiv S. Shenoy, M.D., PLLC; and LIPSITZ GREEN SCIME CAMBRIA LLP, Joseph J. Manna, Esq., of counsel for plaintiff; and due deliberation having been had, and consistent with this Court’s Memorandum Decision, dated June 1, 2020, attached hereto as *Exhibit A*, it is hereby

ORDERED, that the motions by Kaleida Health, Dr. Shenoy, and Sadashiv to quash the subpoena duces tecum served on Dr. Sawyer are moot and, to that extent, dismissed;

ORDERED, that the motions by Kaleida Health, Dr. Shenoy, and Sadashiv S. Shenoy, M.D., PLLC, to quash the subpoena duces tecum served on Dr. Benedict are moot and, to that extent, dismissed; and it is further

ORDERED, that the motions by Kaleida Health, Dr. Shenoy, and Sadashiv S. Shenoy, M.D., PLLC, pursuant to CPLR § 3103, for a protective order regarding the “underlying raw data” sought by plaintiff from Dr. Benedict are granted in all respects; and it is further

ORDERED, that plaintiff, plaintiff’s counsel and any other experts or other agents retained by plaintiff or plaintiff’s counsel are precluded, during the course of this litigation and after it concludes, from referring to or using, in any way, the raw data turned over to plaintiff’s counsel by Dr. Benedict, in accordance with this Court’s Memorandum Decision (*see Exhibit A*); and it is further

ORDERED, that plaintiff, plaintiff’s counsel, and any experts or other agents retained by plaintiff or plaintiff’s counsel are precluded from further disseminating the raw data to any other person or entity, in accordance with this Court’s Memorandum Decision (*see Exhibit A*); and it is further

ORDERED, that all copies of the raw data held by plaintiff, plaintiff’s counsel or plaintiff’s experts or other agents must be immediately returned to counsel for Kaleida Health and any electronically stored copies of the raw data shall be deleted, in accordance with this Court’s Memorandum Decision (*see Exhibit A*).

DATED: Buffalo, New York
June 24, 2020



Hon. Frederick J. Marshall, J.S.C.

ENTER.

EXHIBIT A

**STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE**

**ABDUKADIR ABDULLAH, as
Administrator of the Estate of
Maryan M. Issa, deceased,**

Plaintiff

**MEMORANDUM
DECISION**

vs.

**SADASHIV S. SHENOY, M.D.
SADASHIV S. SHENOY, M.D., PLLC,
KALEIDA HEALTH,
HIROSHI TAKITA, M.D.,
GENERAL PHYSICIAN SUB II PLLC,
JOSEPH E. SERGHANY, M.D.,
WESTERN NEW YORK MRI LLP and
WESTERN NEW YORK PETCT LLC**

Index no. 809897/2015

Defendants

APPEARANCES:

**Joseph J. Manna, Esq.
LIPSITZ GREEN SCIME CAMBRIA, LLP
Attorneys for Plaintiff**

Bryan P. Kroetsch, Esq.
CONNORS, LLP
Attorneys for Defendant Kaleida Health

Seth M. Weinberg, Esq.
MAURO LILLING NAPARTY, LLP
Of Counsel to Non-Party Coverys RRG

William Kalish, Esq.
BROWN, GRUTTADARO & PRATO, LLC
Attorneys for Defendant Sadishiv S.
Shenoy, M.D. and Sadishiv S. Shenoy,
M.D., PLLC

This trio of motions brought by two of the Defendants in this action and non-party Coverys RRG, deal with Subpoenas Duces Tecum issued by Plaintiff's counsel on or about July 17, 2019. Plaintiff has cross-moved to compel the non-party Coverys to answer his subpoena.

Plaintiff commenced this medical malpractice and wrongful death action against all Defendants in 2015. Prior to the commencement, Defendant Kaleida undertook a review of Defendant Shenoy's "credentials, physical and mental capacity and competence in delivering health care services." Public Health Law §2805-j(1)(c). That review resulted in two reports being issued by non-parties Ralph

Benedict, Ph.D. and Robert N. Sawyer, Jr. M.D. who both examined Dr. Shenoy at the request of Defendant Kaleida. The report of Dr. Sawyer was the subject of previous motion practice which resulted in the denial of a protective order sought by Kaleida. See Abdullah v. Shenoy, 174 A.D.3d 1334 (4th Dep't 2019). That Court held that although Dr. Sawyer's report was privileged under Public Health Law §2805-m(2) and Education Law §6527(3), the Defendant Kaleida had affirmatively waived its privilege by attaching the report to its answer in related litigation without taking any steps, such as a sealing request, to protect the confidentiality of the report. Dr. Benedict's report, while not the subject of the previous motion practice was also attached to the same Kaleida pleading. For the same reasons discussed in Abdullah, id., Dr. Benedict's report is no longer confidential and Defendant Kaleida has lost any privilege it previously had with respect thereto. No party or non-party argues otherwise. However, the Appellate Court declined to determine if Defendant Kaleida had "waived its right to assert the statutory privilege at the physician's deposition with respect to any information that may fall within the statutory privilege but was not previously disclosed in the written report." Abdullah, id. at 1335.

Subsequent to the Abdullah decision, Plaintiff's counsel issued two subpoenas that were served on non-parties Sawyer and Benedict directing them to produce the underlying data associated with their reports. Defendants Kaleida and Shenoy moved to quash these subpoenas and for protective orders. Dr. Sawyer reported that there were no underlying data generated prior to the issuance of his report and thus, the motions directed at that subpoena are moot. Dr. Benedict, on the advice of his personal counsel, complied with the subpoena and produced forty-three pages of his underlying data to Plaintiff's counsel. Pursuant to this Court's directive, Plaintiff's counsel produced a copy of the underlying data for *in camera* review. None of the data reviewed by the Court affects the outcome of these motions.

Counsel for Defendants Kaleida and Shenoy argue that Dr. Benedict's underlying data are protected by the privilege created by

Public Health Law §2805-m(2) and Education Law §6527(3), the same privilege that attached to the Sawyer and Benedict reports. Attached to Kaleida's motion is the affidavit of Patricia L. Vorpahl, Vice President, Physician Services and Medical Affairs for Kaleida. This affidavit satisfies Kaleida's burden of showing that Dr. Benedict's report and underlying data were generated in connection with its quality assurance review function and are therefore privileged. See Pazek v. Catholic Health System, Inc., 159 A.D.3d 1553 (4th Dep't 2018).

Contrary to the contention of Plaintiff's counsel, Kaleida argues that it has not affirmatively waived its privilege with respect to that data. He correctly points out that Kaleida is the privilege holder rather than any individual such as Dr. Benedict. While Kaleida may have waived its privilege as to Dr. Benedict's report by attaching the report to its answer in the unrelated litigation and failing to request that the attachment be sealed, it has done nothing to affirmatively waive the privilege as to the underlying data. See Abdullah, *supra*. The underlying data have not been disseminated in any way by Defendants Kaleida or Shenoy. Nor does Kaleida's waiver of the confidentiality of the report constitute a waiver of the confidentiality of the underlying data.

Plaintiff argues that since the subpoena has already been complied with, Kaleida has lost its option of moving to challenge its validity. See Brunswick Hospital Center, Inc. v. Hynes, 52 NY2d 333 (1981). But in Brunswick, *supra*, it was the subpoenaed party who complied with the subpoena and then, later, sought to challenge it. Here, Dr. Benedict, an independent non-party, answered the subpoena and sent the raw data to Plaintiff's counsel. There has been no showing by Plaintiff that he did so with the permission or consent of Kaleida. Thus, Kaleida has not lost its right to challenge the subpoena.

Plaintiff also argues that Defendant Kaleida never objected to the subpoena as required by CPLR § 2304, citing Rubino v. 330 Madison Co., LLC, 39 Misc.3d 450 (N.Y. Sup. Ct. 2013). But, again,

Kaleida was not the party served with the subpoena – Dr. Benedict was. The Court in Rubino held that “a *recipient* of a subpoena is first required to provide his or her objections to the discovery sought in a response to the party seeking such discovery, rather than to the court in a motion for a protective order.” Rubino, *id.* (emphasis supplied). Here, Kaleida was not the recipient of the subpoena and Plaintiff has supplied no authority to the effect that a non-recipient is held to the same standard.

Plaintiff’s remaining arguments are without merit. Even so, since Dr. Benedict has already answered the subpoena, Defendants’ motions to quash are now moot and their motions are, to that extent, dismissed.

However, the relief of a protective order can adequately protect the rights of both Defendants and is granted. Plaintiff, Plaintiff’s counsel and any experts or other agents retained by Plaintiff or Plaintiff’s counsel are precluded, during the course of this litigation and after it concludes, from referring to or using, in any way, the raw data turned over to Plaintiff’s counsel by Dr. Benedict. Plaintiff, Plaintiff’s counsel and any experts or other agents retained by Plaintiff or Plaintiff’s counsel are precluded from further disseminating the raw data to any other person or entity. Furthermore, all copies of the raw data held by Plaintiff, Plaintiff’s counsel or Plaintiff’s experts or other agents must be immediately returned to counsel for Kaleida and any electronically stored copies of the raw data shall be deleted.

The third motion to quash is directed at a subpoena *duces tecum* issued to non-party, Coverys RRG. That subpoena directed Coverys to produce documents related to insurance coverage provided by Coverys to Dr. Shenoy and Sadashiv S. Shenoy, M.D., PLLC.

Counsel for Coverys raised several grounds upon which the motion should be granted. However, the Court need only address one.

CPLR §2303 provides that “a subpoena duces tecum shall be served in the same manner as a summons ...” CPLR §2303 (a). CPLR §311 provides that personal service of a summons on a domestic or foreign corporation shall be made by delivering the summons to an “officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service”. A business corporation may also be served pursuant to BCL §306 or §307. CPLR §311.

Here, the subpoena was served on the attorney for Dr. Shenoy who then forwarded it to Coverys. The attorney for Dr. Shenoy is not employed by Coverys in any capacity and is not an agent authorized to receive service for Coverys. Such attempted service does not comply with the requirements of CPLR §2303(a) or CPLR §311 and is defective. See Donley v. Gateway 2000, Inc., 266 A.D.2d 184 (2nd Dep’t 1999). And even though the subpoena was eventually delivered to Coverys, the receipt by Coverys does not cure the defective service. Fashion Page, LTD. v. Zurich Ins. Co., 50 N.Y.2d 265 (1980). Moreover, in a letter to Plaintiff’s counsel, Coverys’ counsel objected to the method of service. (See Exhibit C to the Affirmation of Seth M. Weinberg, Esq. dated Aug. 16, 2019).

Because the subpoena was improperly served the motion of Coverys to quash is granted. The motion for a protective order is dismissed as unnecessary. Plaintiff’s cross-motion to compel is denied.

Submit order.

June 1, 2020



Frederick J. Marshall, JSC