

Mazarakis v Caremount Med. P.C.
2020 NY Slip Op 34934(U)
March 16, 2020
Supreme Court, Westchester County
Docket Number: Index No. 68955/2018
Judge: Joan B. Lefkowitz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
YERASIMOS MAZARAKIS and KELLY
MAZARAKIS,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 68955/2018
Motion Date: Mar. 2, 2020
Seq. No. 1

CAREMOUNT MEDICAL P.C., DANA L. MURPHY,
M.D., JEFFREY S. POWELL, M.D. AND
BENJAMIN A. SPENCER, M.D.,

Defendants.
-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs pursuant to CPLR 3101, CPLR 3124 and CPLR 3126 seeking to compel defendants to respond to plaintiffs' notices for discovery and inspection dated December 2, 2019, December 9, 2019, and January 12, 2020 (collectively referred to as the "discovery demands") and compelling defendant Caremount Medical P.C. ("Caremount") to appear for a deposition pursuant to plaintiffs' notice for deposition dated December 9, 2019 (the "deposition notice") and granting such other and further relief as the Court deems just and proper:

Order to Show Cause - Affirmation in Support - Exhibits 1-10
Good Faith Affirmation
Affirmation in Opposition - Exhibits A-D
NYSCEF File

Upon the foregoing papers and the proceedings held on March 2, 2020, this motion is determined as follows:

Facts and Procedural History

Plaintiff Yerasimos Mazarakis ("Mr. Mazarakis") commenced this medical malpractice action by filing a summons and verified complaint on November 13, 2018 (NYSCEF Doc. #1). Among plaintiffs' allegations is that defendants were negligent in their failure to order PSA testing, to assure that the PSA testing was performed, and to diagnose Mr. Mazarakis's prostate

cancer. Kelly Mazarakis asserts a derivative claim as Mr. Mazarakis's wife. Defendants served their verified answer on or about December 10, 2018 (NYSCEF Doc. 6).

Plaintiffs' December 2, 2019 discovery demand sought: the "[a]udit trail and metadata for all laboratory orders and testing ordered or performed re Yerasimos Mazarakis between July 19, 2010 and the date of defendants' response to this demand" (Ex. 2).

Plaintiffs' second discovery demand dated December 9, 2019 sought:

"1. Defendants' rules, regulations, guidelines or protocols (of whatever nature and no matter how denominated or named) in effect during the period June 30, 2010 through October 8, 2018 concerning creating, recording, indexing, storing and otherwise dealing with orders for laboratory testing (including patient encounter documents) and reporting test results to physicians and patients.

2. The names and titles of the individuals responsible for creating, indexing, recording, storing and otherwise dealing with laboratory testing (including patient encounter documents) and reporting of laboratory results to physicians and patients during the period June 30, 2010 through October 8, 2018" (Ex. 3).

On December 9, 2019 plaintiffs served a deposition notice to depose Caremount "by an individual familiar with creating, recording, indexing, storing and otherwise dealing with orders for laboratory testing (including patient encounter documents) and reporting of test results to physicians and patients" (Ex. 5).

By letter dated December 23, 2019, plaintiffs' counsel stated that he would be willing to limit plaintiffs' request for the audit trail and metadata to the "orders and testing ordered or performed re Yerasimos Mazarakis by or at the request of Dr. Murphy" (Ex. 6). Defendants responded to the December 9, 2019 discovery demands on or about January 9, 2020 (Ex. D). In their responses defendants stated that there are no rules, regulations, guidelines or protocols responsive to demand number 1. In response to demand number 2 defendants stated that they "agree to produce a witness familiar with the PSA orders of 10-16-14 and 2.20-17 issued by Dr. Murphy" (*id.*) Plaintiffs' discovery demand dated January 12, 2020 sought "[a]udit trail and metadata for all notes of office visits with Dr. Murphy on 10/16/14 and 2/20/17" (Ex. 4).

Contentions by the Parties

Plaintiffs contend that the essential questions in this case are whether PSA testing was ordered on October 16, 2014 and February 20, 2017 by Dr. Murphy, whether Mr. Mazarakis knew that these tests were ordered, whether he appeared to have the tests performed, and whether Dr. Murphy or anyone else at Caremount followed up to ensure that the ordered tests were performed. Plaintiffs contend that although defendants claim the PSA testing was ordered by Dr. Murphy on October 16, 2014 and February 20, 2017, Mr. Mazarakis did not appear for

the tests. Plaintiffs state that although defendants produced two pages of lab records (Ex.10), which show an alleged order on October 16, 2014 for a PSA test, they have not provided anything which shows an order for a February 20, 2017 PSA test. Plaintiffs contend that Mr. Mazarakis had every test performed that was ordered that he knew about. Plaintiffs argue that the audit trail and metadata for the orders that defendants claim were ordered but which were not performed is clearly relevant to plaintiffs' claim that the defendants did not order and follow-up regarding PSA testing.

Plaintiffs also argue that the information sought by the December 9, 2019 and January 12, 2020 demands is also relevant to whether PSA testing was ordered, whether Mr. Mazarakis appeared for same, and whether there was follow-up for such testing. Plaintiffs contend that the audit trail and metadata for Dr. Murphy's visit notes of October 16, 2014 and February 20, 2017 are relevant because it will show when these notes were created, whether any changes were made in the notes and when and who made those changes.

Defendants argue that plaintiffs are seeking discovery of audit trails and metadata which far exceed discovery concerning the PSA testing. Defendants contend that the present discovery issue stems from a note made by defendant Jeffrey Powell, M.D. ("Dr. Powell") in Mr. Mazarakis's Caremount medical chart which summarized a telephone conversation between them on October 8, 2018 (Ex. A). The note reflects that Dr. Powell indicated to Mr. Mazarakis that Dr. Murphy had ordered a PSA lab test during Mr. Mazarakis's office visit on February 20, 2017, and that although Mr. Mazarakis mentioned that he thought there was an order for a PSA test in 2014, Dr. Powell advised him he "did not see this."

During his deposition on December 11, 2019 Dr. Powell explained the reason why he could not locate the October 16, 2014 PSA order during his telephone conversation with Mr. Mazarakis. He testified that during the conversation he was looking at the order summary screen for Mr. Mazarakis's computer chart which Dr Powell believed would show all orders placed for Mr. Mazarakis (Dr. Powell deposition Transcript, Ex. B, p. 15). Dr. Powell stated that after the conversation occurred, he learned that the order summary screen did not include all past orders and that these were located at "order management tab" in the computer chart (Ex. B, p. 15). Dr. Powell further testified that he first viewed Mr. Mazarakis's order management tab on Friday December 6, 2019 but had previously not been aware of that tab's existence (Ex. B, pp. 15-16). Dr. Powell explained that after the telephone conversation he learned that there had been a "change in the way orders were listed in the electronic medical record and that after July 2016 any orders that had been unprocessed for fifteen months were dropped from the order summary screen. However, they still got listed on the order management tab. I was not aware of that at the time of my telephone conversation of October 2018" (Ex. B, p. 16).

Defendants contend that they provided proof that Dr. Murphy ordered a PSA test in 2014 and refer to plaintiff's Ex. 10. Defendants state that they also explained the issue concerning the 2014 PSA test order in their discovery response dated January 20, 2020 (Ex. 9). Defendants further state that they additionally agreed to present an IT witness to testify regarding both PSA orders and to produce an audit trail for both orders. Defendants assert that what plaintiffs are

seeking (e.g.: “when these notes were created, whether any changes were made in the notes and when and who made any changes”) constitutes an audit trail which defendants agree to produce for both PSA orders only. Defendants state that Dr. Murphy treated Mr. Mazarakis from March 3, 2011 to February 21, 2018 and during that time Dr. Murphy issued many orders, but only two of those orders have anything to do with PSA testing. Defendants’ argue that plaintiffs’ request for audit trails/metadata for all of Dr. Murphy’s orders for which Mr. Mazarakis did not appear is irrelevant. Defendants state that they have properly responded to the December 9, 2019 discovery demand and refer the Court to Ex. D.

Analysis:

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of 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 Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate 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” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). The considerations about whether metadata should be produced are the same standards that apply to the production of all discovery in a case (*Hinshaw v Culbertson, LLP v E-Smart Technologies, Inc.*, 2012 NY Slip Op. 307151 [U] [Sup Ct, NY County 2012]). “Disclosure of meta-data is required if it bears on the controversy and will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*id.*) (additional citations omitted).

Metadata, frequently referred to as ‘data about data’ is electronically stored information (“ESI”) that describes the “history, tracking, or management of an electronic document” and includes the “hidden text, formatting, codes, formulae, and other information associated” with an electronic document including “all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records” (*Aguilar v Immigration and Customs Enforcement Div. Of U.S. Dept. Of Homeland Sec.*, 255 FRD 350,354 [SDNY 2008]) (internal citations omitted). “[A]n audit trail is a form of metadata created as a function of the medical provider’s computerization of medical records” (*Gilbert v. Highland Hosp.*, 52 Misc.3d 555, 557, [Sup. Ct., Monroe County 2016]). An audit trail generally shows the sequence of events related to the use of a patient’s electronic

medical records; i.e., who accessed the records, when and where the records were accessed, and changes made to the records (*id.*).

Presently, plaintiffs have established that the audit trail of the metadata is relevant to plaintiffs' allegations concerning the PSA test orders as such information will show the sequence of events related to changes made to Mr. Mazarakis's electronic medical records (*see Vargas v Lee*, 170 AD3d 1073, 1076 [2d Dept 2019]). However, plaintiffs have failed to demonstrate the relevancy of ESI for tests other than the PSA tests. Accordingly, any discovery of the metadata for Mr. Mazarakis's electronically stored medical records will be limited to the notes for the office visits that occurred on October 16, 2014 and February 20, 2017 and the PSA tests ordered on those dates. Additionally, the Court finds unavailing defendants' assertion that they have adequately responded to plaintiffs' December 9, 2019 discovery demand. Specifically, demand number 2 sought the names of individuals responsible for creating, indexing, recording, storing and otherwise dealing with laboratory testing (including patient encounter documents) and reporting of laboratory results to physicians and patients during the period June 30, 2010 through October 8, 2018. Defendants' offer to produce someone familiar with the October 16, 2014 and February 20, 2014 PSA orders is insufficient. Certainly, plaintiffs' demand is overly broad in that it seeks documents beyond the Dr. Murphy's dates of treatment of Mr. Mazarakis. Accordingly, defendants shall provide a supplemental response to demand number 2 as limited herein.

All other arguments raised, and evidence submitted by the parties have been considered by this court notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that plaintiffs' motion is granted to the limited extent that on or before April 10, 2020 defendants counsel shall provide to plaintiffs' counsel;

1. The audit trail metadata for Dr. Murphy's notes concerning Mr. Mazarakis's office visits on October 16, 2014 and February 20, 2018 and for the PSA tests ordered on those dates; and
2. The name/s of the person/s responsible for creating, indexing, recording, storing and otherwise dealing with laboratory testing (including patient encounter documents) and reporting of laboratory results to physicians and patients during the period of March 3, 2011 through February 21, 2018; and it is further

ORDERED that defendants shall produce for deposition a person with first-hand knowledge of how laboratory tests were created, indexed, recorded, stored and how laboratory results are reported to physicians and patients during the period of March 3, 2011 through February 21, 2018; and it is further

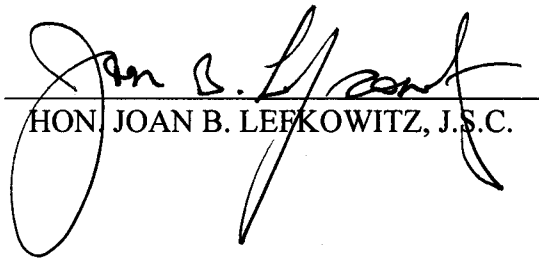
ORDERED that all other relief requested is herewith denied; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order with notice of entry upon defendants' counsel within ten days of entry and shall file proof of service to the NYSCEF website within three days thereof.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York

March 16 2020



HON. JOAN B. LEFKOWITZ, J.S.C.

To: Service upon all counsel via NYSCEF

CC: Compliance Part Clerk