

Hannan v Desir
2020 NY Slip Op 35791(U)
November 11, 2020
Supreme Court, Otsego County
Docket Number: Index No. EF2019-485
Judge: Brian D. Burns
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At a term of the Supreme Court of the State of New York, held in and for the County of Otsego, at Cooperstown, New York on October 30, 2020.

PRESENT: HON. BRIAN D. BURNS, Acting Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

LEO HANNAN,

Plaintiff,

-against-

DECISION AND ORDER

Index No. EF2019-485

WOODLEY DESIR, M.D., UNITED HEALTH
SERVICES HOSPITALS, INC. and UNITED
HEALTH SERVICES, INC.,

Defendants.

Plaintiff filed a motion seeking an order compelling defendants to provide a Records Audit Trail for plaintiff's medical records and a certified copy of billing records for plaintiff's treatment by defendant. Plaintiff also seeks an order directing that the depositions of the parties be conducted via remote video conferencing in view of the COVID-19 pandemic. The motion was made returnable for submission of papers. Defendants have been heard in opposition. Although defendant's opposition papers refer to a cross-motion for a protective order, the cross-motion was not properly noticed and is denied, without prejudice. Plaintiff's reply has also been considered. Plaintiff has demonstrated the requisite good faith efforts to resolve the discovery dispute prior to filing the motion (see, 22 NYCRR § 202.7).

This is a negligence and/or medical practice action. The Summons and Complaint were filed on June 12, 2019. Issue was joined with the filing of the Answer on July 3, 2019. A Notice

of Medical Malpractice was filed on August 1, 2019. Plaintiff served a Combined Discovery Demand and Demand for a Bill of Particulars on August 29, 2019. Plaintiff requested a copy of the plaintiff's billing statement on August 29, 2019. Plaintiff served a Discovery Demand for Hospital Record Audit Trail on May 20, 2020. The demand seeks a complete and accurate Audit Trail for the electronic medical record of the plaintiff while he was a patient of the defendants from January 2018 through May 30, 2018.

This court has broad discretion when deciding issues related to discovery (see, Perez v. Fleischer, 122 A.D.3d 1157, 997 N.Y.S.2d 773 [3rd Dept. 2014]). "Disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof...The words, 'material and necessary', are . . . 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" (Forman v Henkin, 30 N.Y.3d 656, 661, 70 N.Y.S.3d 157 [2018][internal citations omitted]).

Regarding the request for an audit trail, plaintiff contends that a comparison of the operative procedure report received by plaintiff reveals a difference between the report of the same operation contained in the certified records in the formatting of the report in the area of how the wound was closed. Defendant argues that there is no contextual or substantive difference between the copies. Defendant further argues that the motion to compel production of the audit trail, which spans nearly two years, is over broad, time consuming, expensive, unduly burdensome and wastes resources.

Plaintiff has demonstrated that the information sought is material and necessary.

Defendant's general averments that producing the audit trail would be over broad and time-consuming are not substantiated (see, Vargas v. Lee, 170 A.D.3d 1073, 1077, 96 N.Y.S.3d 587 [2nd Dept. 2019]). Plaintiff made clear that the request was limited to January 2018 through May 30, 2018. Further, hospitals are required to maintain audit trails under federal and state law (see, 45 CFR 164.312[b]; 10 NYCRR 405.10[c][4][v]); Vargas, at 1076). Therefore, the motion is granted. Defendant shall provide the requested audit trail within 45 days of receipt of this decision and order.

As to the billing statement, plaintiff disagrees with defendant's assertion that the issue is moot. Specifically, plaintiff states that the statement provided does not give plaintiff a complete itemized list of all supplies, instruments and medications that were used and billed for regarding plaintiff's surgery and post-surgical care. While the court notes that defendant has provided a billing statement, plaintiff has argued that more specificity is needed because there is a dispute as to whether certain adhesive was used. The court will grant to the motion to the extent that if more information is available to defendant than is contained in the billing statement, including whether an adhesive was used and what kind, or any other medications not specifically named, the same shall be provided to plaintiff within 45 days after receipt of this decision and order.

Turning to plaintiff's request that depositions be conducted remotely, defendant has offered safety measures in mitigation, but has also indicated being amenable to remote depositions provided an attorney is present with their clients or any witnesses on their behalf. In line with the developing case law on this issue, the court finds that remote depositions do not cause undue hardship in light of the technology available and the health risks posed by the

COVID-19 virus (see, Chase-Morris v. Tubby, 2020 N.Y.Misc. LEXIS 4015 [N.Y. Sup. Ct. 2020]; Rouviere v. Depuy Orthopaedics, Inc., 2020 U.S. Dist. LEXIS 122184 [S.D.N.Y. 2020]; Johnson v Time Warner Cable N.Y. City LLC, 2020 N.Y. Misc. LEXIS 2323, 2020 NY Slip Op 31592(U) [N.Y. Sup. Ct. 2020]).

Therefore, plaintiff's deposition and any other witnesses called by plaintiff shall be conducted remotely and participation by plaintiff's counsel in any deposition may be by remote means. Although defendant has not requested the same relief, defendants and defense counsel may avail themselves of the same options, but are not required to do so.

The court has considered all other arguments and requests for relief. To the extent they are not specifically mentioned, they are denied.

Based on the forgoing, it is hereby

ORDERED that the motion is granted, and the cross-motion is denied without prejudice, as set forth above.

Dated: November 11, 2020
Cooperstown, New York

E N T E R,



Hon. BRIAN D. BURNS
Acting Supreme Court Justice

To: Clerk of the Otsego County Supreme Court
James D. Linnan, Esq.
Carol C. Poles, Esq.