

Moss v Mumford

2021 NY Slip Op 30427(U)

February 11, 2021

Supreme Court, New York County

Docket Number: 805392/2017

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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KATHY MOSS, as administrator of the estate of ESTHER MOSS,
deceased,

Plaintiff,

- v -

JAMES MCNEILL MUMFORD, M.D., MOUNT SINAI BETH
ISRAEL, BETH ISRAEL MEDICAL CENTER, and MOUNT SINAI
HEALTH SYSTEM, INC.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number 78, 79, 80, 81, 82, 83, 84, 85, 86,
87, 88, and 89 (Motion 002)

were read on this motion to/for COMPEL DISCOVERY.

In this action to recover damages for medical malpractice and wrongful death, the plaintiff moves pursuant to CPLR 3124 to compel the defendants Beth Israel Medical Center (BIMC) and Mount Sinai Health System, Inc. (MSHS), to proceed with depositions of all parties and produce other discovery items. BIMC/MSHS opposes the motion. The motion is granted to the extent that BIMC/MSHS is directed to respond to the plaintiff's March 27, 2018 notice for discovery and inspection with respect to certain items identified herein, and to the extent that the parties shall conduct depositions in accordance with the schedule set forth herein, and the motion is otherwise denied.

The plaintiff commenced this action on October 30, 2017. The several defendants joined issue between February 20, 2018 and April 10, 2018. The plaintiff served bills of particulars between March 27, 2018 and April 10, 2018. The parties exchanged additional discovery items between April and June 2018. As relevant here, in a notice for discovery and inspection dated March 29, 2018, the plaintiff requested that the defendants provide or produce the names and addresses of witnesses, opposing party statements, relevant insurance

DECISION AND ORDER

agreements, photographs, surveillance videos, incident reports, relevant agreements between BIMC/MSHS and the Institute for Family Health (IFH) that were in effect between October and November 2015, records of invoices, bills, and payment memoranda exchanged between BIMC/MSHS and IFH during the same time period in connection with the treatment of the plaintiff's decedent, documents reflecting the admitting privileges that the defendant James McNeill Mumford, M.D., had with BIMC/MSHS during that time, bills submitted by or on behalf of Mumford by BIMC/MSHS during that time in connection with the decedent's treatment, and documents reflecting the relationship between BIMC and MSHS during that period of time. The notice also sought the complete original hospital chart referable to the decedent and any medical reports generated in connection with the decedent's treatment at BIMC/MSHS, as well as records of any peer review of Mumford conducted by BIMC/MSHS in connection with his treatment of the decedent.

In a response dated August 13, 2018, BIMC/MSHS objected to each and every request as "vague, overly broad, palpably improper, and unduly burdensome" or at least "unduly burdensome." Nonetheless, BIMC/MSHS asserted that they were "unaware" of any witnesses other than those persons whose names appeared in the relevant medical records, and that they were "not aware" of any written statements by the plaintiff or her decedent. They further asserted that they were "unaware" of any photographs or surveillance videos.

In the same response, BIMC/MSHS provided information as to the identities of their insurance carriers, and the limits of coverage, but did not produce copies of the insurance agreements. In connection with the plaintiff's request for relevant agreements between BIMC/MSHS and IFH, records of invoices, bills, and payment memoranda exchanged between BIMC/MSHS and IFH, documents reflecting the admitting privileges granted by BIMC/MSHS to the defendant James McNeill Mumford, M.D., bills submitted by or on behalf of Mumford, and documents reflecting the relationship between BIMC and MSHS, BIMC/MSHS also objected to production on the ground that these documents were not likely to lead to admissible evidence

and, hence, were irrelevant to the dispute. They opposed the request for peer review documentation on the ground that it was privileged information, subject to withholding by virtue of Education Law § 6527(3) and Public Health Law §§ 2805-j, 2805-k, and 2805-m. They provided an invoice along with their response for the cost of producing the decedent's hospital chart, and agreed to produce it upon the plaintiff's payment thereof.

In a preliminary conference order dated May 29, 2018, the court (Shulman, J.) directed that the plaintiff's deposition be conducted on or before August 29, 2018, and the depositions of her siblings, Emily Moss and Michael Moss, proceed on or before September 5, 2018 and September 12, 2018, respectively. In addition, the court directed that BIMC/MSHS's deposition was to be conducted on or before September 26, 2018, and Mumford's deposition was to be conducted on or before October 17, 2018. The court further directed that the depositions of the other institutional defendants were to be conducted on or before November 1, 2018.

On October 16, 2018, the same court issued a status conference order that was silent as to whether the parties had complied with the deposition schedule set forth in the preliminary conference order. That status conference order did not reschedule the depositions, although it provided that "[t]his order does not waive any privileges of the defendants."

In a status conference order dated March 12, 2019, the same court directed BIMC/MSHS to "comply w/i [sic] PC order dated 5/29/18, to the extent not done so, w/i 30 days." The court further directed that the depositions of the plaintiff and her siblings were to be conducted on or before July 15, 2019, and that the plaintiff was to conduct "EBTs of BIMC on or before 9/30/19, w/TT to designate witnesses w/in 45 days." The order further provided that nonparty witness depositions were to be conducted on or before October 30, 2019.

On March 25, 2019, the plaintiff served a demand upon BIMC/MSHS to produce an audit trail, metadata, and/or electronically stored data concerning the decedent's hospital chart and records.

As of October 30, 2019, the parties had yet to conduct any party or nonparty depositions.

By order dated March 2, 2020, the court (Shulman, J.) granted the plaintiff's motion for leave voluntarily to discontinue the action against Mumford, and denied BIMC/MSHS's cross motion for leave to amend their answer to interpose cross claims against Mumford for apportionment, contribution, and indemnification or, in the alternative, to compel discontinuance of the entire action with prejudice. The order also scheduled a status conference for March 17, 2020.

On March 17, 2020, the court was closed down due to the COVID-19 pandemic. On March 22, 2020, the courts suspended filings in all actions. On May 2, 2020, the Chief Administrative Judge of the New York State Courts issued Administrative Order 88/20, providing that New York courts "shall not order or compel, for a deposition or other litigation discovery, the personal attendance of physicians or other medical personnel . . . who perform services at a hospital or other medical facility that is active in the treatment of COVID-19 patients." The Administrative Order also provided that "parties are encouraged to pursue discovery in cooperative fashion to the fullest extent possible." Electronic filings were resumed on May 5, 2020, and in-person filings in connection with non-electronically filed actions were resumed on June 10, 2020. On that same date, the Supreme Court, New York County, reopened for justices and judicial staff. On June 22, 2020, Administrative Order 88/20 was rescinded, although the Chief Administrative Judge continued to urge parties "to pursue discovery in a cooperative fashion and to employ remote technology in discovery wherever possible."

On August 26, 2020, the plaintiff made the instant motion to compel. On October 16, 2020, and thus during the pendency of the motion, BIMC/MSHS served another response to the plaintiff's demand for witness information, asserting the same boilerplate objection; it also asserted that "an investigation is underway to identify medical professional who entered the note on page 779 of Esther Moss' hospital chart," and that "[a] supplemental response will be

provided once the investigation is complete.” That same date, BIMC/MSHS finally responded to the plaintiff’s March 25, 2019 demand for an audit trail, metadata, and electronically stored information, objecting to the demand as overbroad and unwarranted, among other things. BIMC/MSHS opposed the motion in its entirety, claiming that they had fully responded to all of the plaintiff’s demands for discovery and inspection, and that “there is no standing discovery order that set forth the deposition schedule of the parties and nonparties to proceed at this time.”

The court agrees with BIMC/MSHS that the peer review documentation sought by the plaintiff is statutorily privileged, and that the plaintiff has not made a showing “beyond mere conjecture, that there is relevant information to be gleaned from metadata and audit trails which cannot be obtained from other sources, including the medical records and deposition testimony” (*Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], 2019 NY Misc LEXIS 1906, *16 [Sup Ct., N.Y County, Apr. 12, 2019] [Silver, J.]; see *Dennehy v Harlem Hosp. Cent.*, 2018 NY Slip Op 32496[U], 2018 NY Misc LEXIS 4370, *13 [Sup Ct, N.Y. County, Oct. 2, 2018]; *Czyz v Scherl*, 2017 NY Slip Op 31465[U], 2017 NY Misc LEXIS 2651, *8 [Sup Ct, N.Y. County, Jul. 10, 2017] [Shulman, J.]; see generally *Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 FRD 350, 354 [SD NY 2008]; cf. *Vargas v Lee*, 170 AD3d 1073, 1076-1055 [2d Dept 2019] [plaintiff demonstrated that there was relevant information to be gleaned from audit trail concerning post-operative care]).

The court rejects BIMC/MSHS’s contention that it can simply ignore the scheduling of depositions where the deposition deadline dates set forth in two prior court-ordered schedules have lapsed. The court also agrees with the plaintiff that BIMC/MSHS’s must fully respond to her request for relevant agreements between BIMC/MSHS and IFH, records of invoices, bills, and payment memoranda exchanged between BIMC/MSHS and IFH, bills submitted by or on behalf of Mumford, and documents reflecting the relationship between BIMC and MSHS.

CPLR 3101(a) provides that “there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” This language is “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” (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]; see *Anonymous v High School for Env'tl. Studies*, 32 AD3d 353, 358 [1st Dept 2006]). CPLR 3124 provides that

“If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.”

It is thus appropriate for the court to fix a firm deadline for the deposition of the parties and any nonparties with relevant information (see CPLR 3124). Hence, that branch of the plaintiff's motion seeking to compel that disclosure is granted (see *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 963-964 [2d Dept 2015]; *Rocco v Family Foot Ctr.*, 94 AD3d 1077, 1080 [2d Dept 2012]).

Moreover, the standard for determining whether information or documentation sought during discovery must be disclosed or produced is whether such information or documentation “is likely to lead to relevant information” (*Cioffi v S.M. Foods, Inc.*, 178 AD3d 1003, 1006 [2d Dept 2019]; see *Vargas v Lee*, 170 AD3d at 1077; *Milligan v Bifulco*, 153 AD3d 1624, 1625 [4th Dept 2017]; *Sexter v Kimmelman*, 277 AD2d 186, 187 [1st Dept 2000]). The court concludes that the disclosure of relevant agreements between BIMC/MSHS and IFH, records of invoices, bills, and payment memoranda exchanged between BIMC/MSHS and IFH, bills submitted by or on behalf of Mumford, and documents reflecting the relationship between BIMC and MSHS, as limited to the period from October 1, 2015 to November 30, 2015, is likely to lead to information relevant to the prosecution and defense of this action. The court, however, directs BIMC/MSHS to provide the court with all documents reflecting Mumford's admitting privileges to BIMC/MSHS,

from October 1, 2015 to November 30, 2015, for in camera inspection. To the extent that those documents reflect whether Mumford had admitting privileges during the time that he treated the decedent, they are relevant, and should be disclosed; to the extent they reflect that Mumford's admitting privileges had been revoked subsequent to his treatment of the decedent, they are privileged and irrelevant, and should be withheld from production.

Accordingly, it is

ORDERED that the plaintiff's motion to compel discovery is granted to the extent that

the plaintiff's deposition shall be conducted on or before March 25, 2021, the deposition of Emily Moss shall be conducted on or before April 8, 2021, the deposition of Michael Moss shall be conducted on or before April 15, 2021, the deposition of the defendants Beth Israel Medical Center/Mount Sinai Health System, Inc., shall be conducted on or before April 29, 2019, provided that the plaintiff shall designate a deposition witness for Beth Israel Medical Center/Mount Sinai Health System, Inc., on or before March 31, 2021, and any nonparty depositions shall be conducted on or before May 27, 2021; and

on or before April 15, 2021, the defendants Beth Israel Medical Center/Mount Sinai Health System, Inc., shall fully respond to so much of the plaintiff's March 29, 2018 notice for discovery and inspection as requested them to produce relevant agreements between Beth Israel Medical Center/Mount Sinai Health System, Inc., and the Institute for Family Health that were in effect between October 1, 2015 and November 30 2015; records of invoices, bills, and payment memoranda exchanged between Beth Israel Medical Center/Mount Sinai Health System, Inc., and the Institute for Family Health in connection with the plaintiff's decedent's treatment between October 1, 2015 and November 30, 2015; bills submitted by or on behalf of James McNeill Mumford by Beth Israel Medical Center/Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015 in connection with the plaintiff's decedent's treatment; and documents reflecting the relationship between Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015; and

on or before April 15, 2021, the defendants Beth Israel Medical Center/Mount Sinai Health System, Inc. shall submit to the court, for in camera inspection, documents reflecting the admitting privileges that James McNeill Mumford, M.D., had with Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015,

and the motion is otherwise denied; and is it further,

ORDERED that the note of issue filing deadline is extended until September 30, 2021.

This constitutes the Decision and Order of the court.

2/11/2021

DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE