

Dondero v Sylvester

2021 NY Slip Op 32952(U)

December 6, 2021

Supreme Court, New York County

Docket Number: Index No. 805349/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT:	<u>HON. JOHN J. KELLEY</u>	PART	IAS MOTION 56EFM
	<i>Justice</i>		
-----X		INDEX NO.	<u>805349/2018</u>
DONNA DONDERO, as Guardian of the Property of PETER DONDERO, and DONNA DONDERO, individually,		MOTION DATE	<u>08/16/2021</u>
Plaintiff,		MOTION SEQ. NO.	<u>003</u>

- v -

ANDREW SYLVESTER, M.D., INTERNATIONAL MULTI SCLEROSIS, and JOHN DOES 1-10,
Defendants.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, and 65 (Motion 00)

were read on this motion to/for COMPEL DISCLOSURE/X-MOTION FOR A PROTECTIVE ORDER

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3124 to compel the defendant International Multi Sclerosis (IMS) to produce the entire personnel file of a physician affiliated with it, identified in the plaintiff's notice of motion as a "Dr. Sadiq," but apparently meant to refer to the defendant Andrew Sylvester, M.D. Sylvester and IMS both oppose the motion, and each separately cross-moves pursuant CPLR 3103 for a protective order preventing the disclosure of Sylvester's personnel file at IMS and for the imposition of sanctions. The plaintiff's motion is denied. Both cross motions are granted to the extent that the defendants are granted a protective order permitting them to withhold Sylvester's personnel records from production, and the cross motions are otherwise denied.

The plaintiff asserts that, on April 21, 2021, in preparation for the deposition of one of IMS's corporate representatives, she requested IMS to produce Sylvester's personnel file. IMS objected to the request on the ground that such documentation is not subject to disclosure.

On June 11, 2021, the plaintiff made the instant motion to compel IMS to produce Sylvester's personnel file. In the affirmation of good faith submitted in support of the plaintiff's motion, her attorney asserted that

"The movants by and through their counsel, have made several good faith attempts to work out the issues raised herein, in an effort to resolve these matters without the need for motion practice."

In another affirmation, the plaintiff's counsel simply annexed a series of email messages dated March and April 2021, in which the issue of Sylvester's personnel file was mentioned, along with the issue of whether the plaintiff would conduct a deposition of Dr. Sadiq.

Initially, pursuant to the court rules adopted on February 10, 2021,

"[a]bsent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. Such consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each such discovery motion shall be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of such conference, persons participating, and the length of time of the conference"

(22 NYCRR 202.20-f[b] [emphasis added]). The affirmations of the plaintiff's attorney contain only vague assertions that he made good faith attempts to resolve the discovery dispute, but did not describe those attempts, omitting any proof that the consultations were in-person or by telephone, and failing to specify the date and time of the conference, the identities of the persons engaged in the consultation, and the length of time of the conference. The plaintiff's attorney thus did not attest that he complied with the condition required by the court rule. The motion must, therefore, be denied on that ground alone.

In any event, the plaintiff's contentions are without merit. The plaintiff seeks disclosure of Sylvester's personnel file for the purpose of assessing and impeaching his credibility. She seeks that documentation particularly to corroborate whether he left employment with IMS because he "got a promotion to become director of the MS center where [he] work[s] now," as he testified at his deposition, or whether he left for some other reason. Although Sylvester

correctly argues that “extrinsic evidence introduced solely to impeach credibility on a collateral issue is, with special exceptions, inadmissible” (*Halloran v Virginia Chemicals, Inc.*, 41 NY2d 386, 390 [1977]), that rule does not establish that the evidence sought by the plaintiff here is not discoverable, as 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 1073, 1077 [2d Dept 2019]; *Milligan v Bifulco*, 153 AD3d 1624, 1625 [4th Dept 2017]; *Sexter v Kimmelman*, 277 AD2d 186, 187 [1st Dept 2000]). Even applying that broad standard, however, the production of Sylvester’s personnel file will not likely lead to relevant information concerning the treatment and care of the plaintiff’s ward, nor to any issue relevant to the litigation of this action.

Although the plaintiff cites to numerous decisions in which a party’s personnel file was deemed to be both discoverable and relevant, only one of the cited decisions pertains to the personnel file of a health-care provider. In that case, however, the employee worked for a nursing home, and the Appellate Division, First Department, relied upon a regulation unique to nursing homes, requiring such facilities “to maintain and continuously collect ‘information concerning the facility’s experience with negative health care outcomes and incidents injurious to residents’ (10 NYCRR 415.15[a][3][i]), and does not deny maintenance of personnel files” (*Simmons v Northern Manhattan Nursing Home, Inc.*, 52 AD3d 351, 352 [1st Dept 2008]). Consequently, the plaintiff in that action was entitled to obtain personnel files of a nurse who may have been demoted in light of the fact that the plaintiff’s decedent fell and was injured in the nursing home while that nurse was on duty. This case does not present an equivalent situation.

The court nonetheless concludes that the defendants have not established that Sylvester’s personnel files are exempt from disclosure by virtue of Education Law §6527(3) and Public Health Law §2805(m). With certain exceptions not relevant here, those statutes

specifically prohibit the disclosure of personnel and quality management review files relating to a physician employed by a “hospital,” as that term is defined by the Public Health Law (see *Logue v Velez*, 92 NY2d 13, 18 [1998]; *Megrelishvili v Our Lady of Mercy Med. Ctr.*, 291 AD2d 18, 25 [1st Dept 2002]). The term “hospital” is defined by Public Health Law § 2801(1) as a

“facility or institution engaged principally in providing services by or under the supervision of a physician or, in the case of a dental clinic or dental dispensary, of a dentist, or, in the case of a midwifery birth center, of a midwife, for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition, including, but not limited to, a general hospital, public health center, diagnostic center, treatment center, dental clinic, dental dispensary, rehabilitation center other than a facility used solely for vocational rehabilitation, nursing home, tuberculosis hospital, chronic disease hospital, maternity hospital, midwifery birth center, lying-in-asylum, out-patient department, out-patient lodge, dispensary and a laboratory or central service facility serving one or more such institutions.”

The actual name IMS is International Multiple Sclerosis Management Practice. Neither IMS nor Sylvester has provided the court with a detailed description of IMS’s operations sufficient to permit it to ascertain whether IMS is simply a private medical practice, or a facility enumerated in Public Health Law § 2801(1), such as a “treatment center” or “diagnostic center.” Moreover, the defendants have not cited, and research has not revealed, any precedent for their contention that Education Law §6527(3) and Public Health Law §2805(m) are applicable to private medical practices in any event. Instead, they simply assert that public policy considerations require the court to apply the confidentiality provisions of those statutes to private medical practices. The court declines to do so here.

The court further concludes that there is no basis for the imposition of a monetary or other sanction upon the plaintiff.

Accordingly, it is

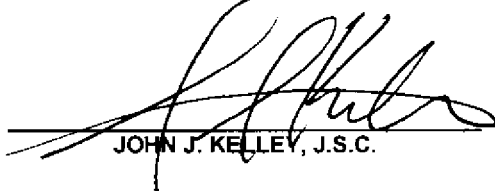
ORDERED that the plaintiff’s motion is denied; and it is further,

ORDERED that the defendants’ cross motions are granted to the extent that they are granted protective orders permitting them to withhold, from production, the personnel files of the

defendant Andrew Sylvester, M.D., referable to his employment by the defendant International Multi Sclerosis, and the cross motions are otherwise denied.

This constitutes the Decision and Order of the court.

12/6/2021
DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CROSS MOTION 1:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
CROSS MOTION 2:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	