

Pannullo v Evans
2021 NY Slip Op 34319(U)
August 24, 2021
Supreme Court, Erie County
Docket Number: Index No. 804073/2018
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

BARBARA L. PANNULLO,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 804073/2018

RAYMOND COREY EVANS, D.C.,
DANIEL C. COX, D.C.,
DR. DANIEL COX, D.C., P.C., and
JOANNE LIBERTI

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **THE CAREY FIRM, LLC**
Shawn W. Carey, Esq., Of Counsel
Attorneys for Plaintiff

TREVETT CRISTO, P.C.
Melanie S. Wolk, Esq., Of Counsel
Attorneys for Defendant, Raymond Corey Evans, D.C.

SMITH SOVIK KENDRICK & SUGNET, P.C.
Jaclyn S. Wanemaker, Esq., Of Counsel
Attorneys for Defendants, Daniel C. Cox, D.C.
and Dr. Daniel C. Cox, D.C., P.C.

BARTH CONDREN, LLP
Douglas P. Hamberger, Esq., Of Counsel
Attorneys for Defendant, Joanne Lberti

WALKER, J.

Defendant, Raymond Corey Evans, D.C. ("Evans"), has applied for an order (Motion 1;
Doc. 20): (i) compelling Plaintiff, Barbara Pannullo, to provide all information relating to

causation of the claimed medical condition (“Causation”) contained in the her legal files maintained by attorneys Christopher O'Brien and Shawn Carey (respectively, “O'Brien File” and “Carey File”), because counsel allegedly waived the attorney-client privilege; (ii) granting an *in camera* review of the O'Brien File and Carey File relating to Causation; (iii) declaring that the attorney-client privilege has been waived as to any information shared with Mr. O'Brien and concerning Causation, and (iv) allowing for Mr. O'Brien to testify as to Plaintiff's medical conditions while he handled her claims in this matter and compelling him to produce any records in his file relating to same.

Defendants, Daniel C. Cox, D.C., and Dr. Daniel C. Cox, D.C., P.C. (collectively, “Cox”), have cross-applied (Motion 2; Doc. 36) for an order precluding the deposition testimony of Christopher O'Brien, Esq., and alternatively, compelling Mr. O'Brien to produce the O'Brien File.

BACKGROUND

Plaintiff contends that she suffered personal injuries as a result of her involvement in a motor vehicle accident with Defendant, Joanne Liberti, on August 18, 2015 (“MVA”). On March 14, 2016, Plaintiff commenced an action for personal injuries against Liberti (“MVA Action”).

On March 15, 2018, Plaintiff commenced the instant medical malpractice action against Evans and Cox, in which Plaintiff alleges that they negligently performed chiropractic care to her following the MVA, in violation of accepted medical standards. On May 28, 2020, the MVA Action was consolidated into the within action for discovery and trial.

Mr. O'Brien initially represented Plaintiff in the MVA Action.

On February 13, 2020, Plaintiff was deposed regarding her medical malpractice claims. As of the date of her deposition, Mr. O'Brien had been discharged as Plaintiff's attorney, and Mr. Carey had been substituted in as Plaintiff's counsel. On the day of the deposition, Plaintiff provided the parties with a memorandum, which Mr. O'Brien created after a conversation with Plaintiff regarding her medical condition and Causation ("Memorandum"). The Memorandum was marked as a deposition exhibit, and Mr. Carey elicited testimony regarding it.

Specifically, Mr. Carey asked Plaintiff "do you want to waive the attorney/client privilege just with regards to the [M]emorandum documenting this conversation that you had with attorney Christopher O'Brien," and Plaintiff responded, "[y]es" (Doc. 28, p. 8).

The Memorandum references a compression test conducted by Defendants during Plaintiff's chiropractic treatment and conversations Plaintiff had with her treating physicians ("Compression Test").

Over the course of the deposition, Plaintiff testified that the Compression Test caused separate and distinct injuries beyond those suffered as a result of the MVA, including, *inter alia*, that she has been prevented from performing household chores in the kitchen and that she has experienced headaches since the Compression Test (*Id.*, at 30-31). Plaintiff also testified that she was "numb from head to toe . . . at the time of the compression test" (*Id.*, at p. 171) and she felt like she was going into "shock . . . after the first time he pressed down" (*Id.*, at p. 172).

On February 14, 2020 (the day after the completion of Plaintiff's deposition), Evans' counsel contacted Mr. Carey (via electronic mail; Doc. 31) to demand additional paper discovery arising out of the deposition ("Document Demand"), including, *inter alia*:

(1) [a]11 photographs on her [Plaintiff's] phone; (2) Chris

O'Brien's entire file, including but not limited to attorney notes, in-take forms, emails, tests, and other communications with [Plaintiff]; (3) [a]ll notes that were taken by [Plaintiff] on her work computer, which were partially produced at the deposition; and (4) [t]he correct name of [Plaintiff's] Instagram account.

In responding to the Document Demand, Mr. Carey asserted the attorney-client privilege in refusing to disclose any additional documents from Mr. O'Brien's file (*Id.*).

On January 15, 2021, Evans served Mr. O'Brien with a subpoena directing him to appear for a deposition on February 3, 2021 (Doc. 32). By letter, dated January 19, 2021, Mr. O'Brien responded to the subpoena by indicating that he believes any testimony related to the MVA Action is protected by the attorney-client privilege and he would be unable to provide testimony regarding the MVA Action or Memorandum (Doc. 34).

DISCUSSION

It is well settled that an attorney's "work product" includes such items as "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs conducted, prepared or held by the attorney" (*Kenford Co., Inc. v. Erie County*, 55 AD2d 466, 470 [4th Dept 1977], quoting *Hickman v. Taylor*, 329 US 495, 511 [1947]). Generally, when an item that would otherwise constitute "work product" is disclosed to a third party, that item would not retain its confidential status (*Garner v. New York State Attorney General's Office*, 160 AD 1087, 1092 [3d Dept 2018]). The "work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality" (*Bluebird Partners, LP. v. First Fidelity Bank, N.A., New Jersey*, 248 AD2d 219, 225 [1st Dept 1998]).

As applied to disclosures in the context of depositions, the standard has typically been applied to scenarios involving a client who is provided a document to review prior to conducting the deposition, which had not been provided to opposing counsel. “While an unqualified privilege . . . can be waived by a party, it is not waived merely through the client's review of an attorney’s memorandum in preparation for a deposition” (*Fernekes v. Catskill Regional Medical Center*, 75 AD3d 959, 961 [3d Dept 2010]). Thus, “a social worker’s review of a confidential case file prior to testifying does not constitute a wholesale waiver of the privileges attached to that file” (*Id.*, citing *Geffers v. Canisteo Cent. School Dist. No. 463201*, 105 AD2d 1062 [4th Dept 1984]).

However, in the instant matter, the purpose of disclosing the Memorandum was not limited to preparing Plaintiff for her deposition. Rather, Mr. Carey asked Plaintiff questions about the contents of the Memorandum and marked the Memorandum as an exhibit to Plaintiff’s deposition. Counsel used the Memorandum at Plaintiff’s deposition in an attempt to prove Causation, a factual element of the case. Thus, the Memorandum’s disclosure was voluntary and intentional, as opposed to inadvertent. Plaintiff failed to take “reasonable steps to prevent its disclosure,” thus voluntarily waiving the privilege (*Baliva v. State Farm Mutual Automobile Insurance Co.*, 275AD2d 1030, 1031 [4th Dept 2000] [“Disclosure of a privileged document generally waives that privilege unless the client intended to retain the confidentiality of the printed document and took reasonable steps to prevent its disclosure”]).

Evans contends that Plaintiff’s waiver of the attorney-client privilege in connection with the Memorandum entitles Evans to all material in the case files maintained by Plaintiff’s former attorney, Mr. O’Brien, and her current attorney, Mr. Carey, regarding Causation. Evans relies on

a decision from the District of Columbia Circuit and several decisions from the New York Supreme Court (*see e.g., Permian Corp.*, 665 F2d 1214 [DC Cir 1981]; and *Charter One Bank, F.S.B. v. Midtown Rochester, LLC*, 191 Misc2d 154 [Sup Ct, Monroe Cty 2002]). *Permian* does not apply New York law, nor is this court bound by the District of Columbia Circuit. In addition, the court disagrees with the proposition advanced by Evans, and notes that the court in *Charter One Bank, F.S.B.* denied movant's request to compel disclosure. Nor has Plaintiff evinced any intent to waive the attorney-client privilege with respect to documents other than the Memorandum.

Turning to the cross-motion, Cox seeks to preclude Mr. O'Brien from testifying at a deposition. Cox contends that the deposition should be precluded because, *inter alia*, the Memorandum is allegedly replete with hearsay (which would lead to Mr. O'Brien providing largely hearsay testimony) and there is better evidence in the record relating to Plaintiff's account of the Compression Test.

These are insufficient bases upon which to preclude a deposition. It is well settled that discovery is broad and liberal (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]), and such issues as whether evidence is the cumulative or inadmissible due to hearsay are best left for determination at trial.

Liberti takes no position relative to either motion.

With respect to both motions, Plaintiff does not oppose an order compelling Mr. O'Brien (i) to testify and (ii) disclose his case file, but opposes an order compelling the production of Mr. Carey's case file. These issues are fully addressed above.

In light of the foregoing, it is hereby

ORDERED, that Evans' application for an order compelling Plaintiff to provide all information relating to Causation contained in the O'Brien File and the Carey File is denied; and it is further

ORDERED, that Evans' application for an order granting an *in camera* review of the O'Brien File and Carey File is denied; and it is further

ORDERED that Evan's application for an order declaring that the attorney-client privilege has been waived as to any information shared with Mr. O'Brien by Plaintiff concerning Causation is granted, and the court hereby declares that the attorney-client privilege has been waived (relative to Mr. O'Brien, but not Mr. Carey) relative to the Memorandum, and it is further

ORDERED, that Evans' application for an order compelling Mr. O'Brien to testify as to Plaintiff's medical conditions while he handled her claims in this matter is granted; and it is further

ORDERED, that Evans' application for an order compelling Mr. O'Brien to produce any records in the O'Brien File relating to Plaintiff's medical conditions while he handled her claims in this matter is denied; and it is further

ORDERED, that Cox's cross-motion seeking an order precluding the deposition of Mr. O'Brien is denied; and it is further

ORDERED, that Cox's cross-motion seeking an order compelling Mr. O'Brien to produce the O'Brien File is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not

constitute notice of entry.

Dated: August 24, 2021
Buffalo, New York

A handwritten signature in blue ink, appearing to read 'T. Walker', is positioned above the printed name of the signatory.

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice