

**Doyle v Mount Sinai Hosp.**

2022 NY Slip Op 30052(U)

January 10, 2022

Supreme Court, New York County

Docket Number: 162438/2015

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: HON. JOHN J. KELLEY PART 56M**

*Justice*

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MARIE DOYLE, as Administrator of the Estate of ROBERT DOYLE, deceased, and MARIE DOYLE, individual,

Plaintiff,

- v -

THE MOUNT SINAI HOSPITAL and SETH BLACKSBURG, M.D.,

Defendants.

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INDEX NO. 162438/2015

MOTION DATE 11/15/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160

were read on this motion to/for DISCOVERY.

In this action to recover damages for medical malpractice, arising from allegedly negligent radiation treatment, the plaintiff moves pursuant to CPLR 3124 to compel the defendants to produce the relevant dose constraint sheet referred to in the deposition of the defendant Seth Blacksburg, M.D., any other portion of the decedent's medical and hospital chart that has yet to be produced, and a response to the plaintiff's February 19, 2021 notice for discovery and inspection that sought certain metadata. The defendants oppose the motion. The motion is granted to the extent that, on or before February 28, 2022, the defendants shall produce the relevant dose constraint sheet and any missing portion of the decedent's medical and hospital chart, while the action remains on the trial calendar, and the motion is otherwise denied.

The plaintiff's decedent commenced this action on December 4, 2015. The court (Shulman, J.) issued two discovery conference orders while the decedent remained alive. The decedent died on October 21, 2016. By order dated July 28, 2017, the court (Shulman, J.) granted the plaintiff's motion to substitute herself as the party plaintiff in place and stead of her

decident. Between December 5, 2017 and October 21, 2019, the same court issued seven additional discovery conference orders. On September 12, 2019, and thus during the interval between those discovery orders, the plaintiff conducted Blacksburg's deposition. In the course of that deposition, Blacksburg revealed the existence of a dose constraint sheet, in response to which the plaintiff requested that he produce it, along with any other missing portions of the decedent's medical and hospital charts. By order dated November 4, 2019, the court (Shulman, J.) granted the plaintiff's motion to consolidate, with the instant action, a related 2018 action that she had commenced against the same defendants. On January 7, 2020 and February 25, 2020, the same court issued two additional discovery conference orders, after which the action was reassigned to this court. On February 19, 2021, the plaintiff served a notice for discovery and inspection upon the defendants, seeking audit trails and metadata.

In a status conference order dated February 25, 2021, this court directed the defendants to serve a response to the plaintiff's February 19, 2021 notice of discovery and inspection within 45 days, or before April 12, 2021, the first business date after the lapse of the 45-day period. By specifying only that a response was required, and not directing the defendants to produce the metadata, the court left open the possibility that the defendants' response might consist of an objection. The court further directed the parties to submit a proposed follow-up status conference order on May 13, 2021, and fixed the note of issue filing deadline for May 28, 2021.

The defendants did not serve a response to the February 19, 2021 notice by April 12, 2021. There is no indication, however, that the plaintiff sought to consult with the defendants in good faith to resolve any dispute over the absence of such a response. In accordance with the February 25, 2021 status conference order, the plaintiff, on May 13, 2021, submitted a proposed status conference order that included both the defendants' proposed reservation of rights to depose Javaughan Alexander, and the plaintiff's proposed reservation of rights to move to compel the production of metadata. The plaintiff simultaneously requested that the court conduct a remote status conference to resolve any outstanding discovery disputes. Before the

court could review or sign the proposed conference order, and before it could schedule a remote status conference, at which it would have extended the note of issue filing deadline to accommodate the parties with respect to any disposition of the outstanding issues, the plaintiff filed the note of issue on May 28, 2021.

Two months after filing the note of issue, the plaintiff made the instant motion to compel the defendants to produce outstanding items of discovery, including the items requested during Blacksburg's deposition and the metadata she had sought.

Generally, "[d]isclosure proceedings may not be conducted after the note of issue is filed absent unusual or unanticipated circumstances" (*Bojkovic v JLT Assocs.*, 278 AD2d 46, 47 [1st Dept 2000], citing 22 NYCRR 202.21[d]). There has been no showing of unusual or unanticipated circumstances here. In fact, a court may vacate a note of issue where it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (see 22 NYCRR 202.21[e]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). Nonetheless, where, as here, discovery is nearly completed, "[a] court, in its discretion, may allow post-note of issue discovery without vacating the note of issue as long as prejudice to either party would not result" (*WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.*, 193 AD3d 523, 523 [1st Dept 2021]; see *Samuelson v Wollman Rink Operations, LLC*, 196 AD3d 408, 408-409 [1st Dept 2021] [permitting defendant to conduct IME while action remained on the trial calendar]). The court concludes that there would be no prejudice to any party in mandating the defendants to provide the relevant dose constraint sheet and any other missing portion of the decedent's medical and hospital chart while the action remains on the trial calendar.

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]). With respect to the branch of the motion seeking to compel production of metadata in response to the February 19, 2021 notice of discovery and inspection, the plaintiff’s counsel provided no proof that he engaged in an in-person or telephonic conference to resolve that discovery dispute, let alone the identities of the persons engaged in the consultation, whether it was an attorney from his office who engaged in such a consultation, or whether the person from his office was able to speak directly with any attorney at defense counsel’s office. Nor did the plaintiff’s attorney set forth the time or date on which any such consultation occurred or the length of the conference. The plaintiff’s attorney thus did not make the attestation of the facts required by the court rule. That branch of the motion referable to the metadata thus may be denied on that ground alone.

In any event, to the extent that the plaintiff seeks an “audit trail” or other metadata referable to her decedent’s medical and hospital charts and records, that information is not material, relevant, or necessary to the prosecution or defense of this action, unless the plaintiff shows, “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,” a showing that she has not made here (*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.], *affd* 191 AD3d 563 [1st Dept 2021]; 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*

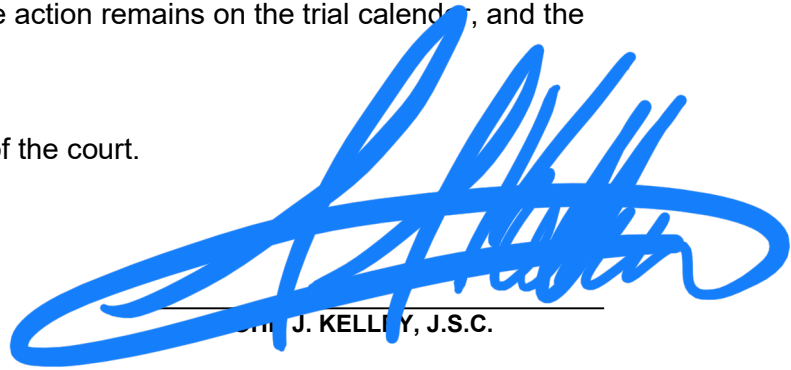
v Lee, 170 AD3d 1073 [2d Dept 2019] [on renewal, plaintiff sustained the threshold burden of demonstrating that the portion of the audit trail at issue was reasonably likely to yield relevant evidence]). As the Appellate Division, First Department, explained in *Punter*, “the reversal of a Kings County trial order [in *Vargas v Lee*] mentioned in the order on appeal did not effect a change in the law; the Second Department simply applied long settled principles of discovery” (*Punter v New York City Health and Hosps. Corp.*, 191 AD3d at 563). Consequently, in addition to the facts that the plaintiff is seeking this discovery two months after filing the note of issue, and her counsel did not engage in the necessary good-faith consultation with the defendants, there is no merit to the plaintiff’s contention that the defendants should be compelled to produce metadata in this case.

Accordingly, it is

ORDERED that the plaintiff’s motion is granted to the extent that, on or before February 28, 2022, the defendants shall produce the relevant dose constraint sheet described in the deposition of the defendant Seth Blacksborg, M.D., and any missing portion of the medical and hospital chart of the plaintiff’s decedent, while the action remains on the trial calendar, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/10/2022  
DATE



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J. KELLY, J.S.C.

CHECK ONE:	<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 type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER	<input type="checkbox"/> FIDUCIARY APPOINTMENT	