

Frederick v Osman

2022 NY Slip Op 30379(U)

January 21, 2022

Supreme Court, New York County

Docket Number: Index No. 805151/2017

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 56M

Justice

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ELSA FREDERICK,

Plaintiff,

- v -

KHALED OSMAN, M.D., D.O., ABEER DABBAS, P.A., and
BRIGHT MEDICAL, P.C.,

Defendants.

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INDEX NO. 805151/2017

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) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101

were read on this motion to/for DISCOVERY.

In this action to recover damages for medical malpractice, the defendants move pursuant to CPLR 3124 to compel the plaintiff to comply with outstanding demands for authorizations. Although the pro se plaintiff does not oppose the motion, the motion nonetheless is denied.

The plaintiff commenced this action on April 21, 2017. Between December 21, 2017 and February 2, 2020, the court (Madden, J.) conducted eight discovery conferences and issued eight case management orders. On February 14, 2020, the defendants requested the plaintiff to sign and return HIPAA compliant authorizations permitting them to obtain the records of Rite Aid Pharmacy, CVS Albany, LLC, Health First PHSP, Inc., St. Luke’s Roosevelt Hospital, Katerina Dodelzon M.D., Kelly Brooke Tweed, P.A., Alfons Pomp, M.D., Robert Louis Savillo, M.D., Nicholas Bastidas M.D., Samuel Rhee, M.D., and John Chuback, M.D. By letter dated March 11, 2020, the defendants informed the plaintiff that, although they received those authorizations, “the authorizations are insufficient. The authorizations are restricted to only allow access to records from April of 2015 to present. The authorizations should be unrestricted as your

medical condition is at issue.” On October 12, 2020 the plaintiff provided the defendants with additional restricted authorizations, limited to treatment beginning in April 2015, and explicitly indicating that she was not permitting the release of any mental health records. By letter dated October 14, 2020, the defendants wrote to the plaintiff as follows:

“please note that per the authorizations provided via e-mail on October 12, 2020, you are only allowing access to medical records as far back as April 10, 2015. Additionally, you did not include initials next to ‘Alcohol/Drug Treatment,’ ‘Mental Health Information,’ and ‘HIV-related information.’ This is insufficient as your medical condition is in question in this matter. Our office demands unrestricted authorizations to be provided. Please forward the unrestricted authorizations to the office of the undersigned.”

After conducting a conference with the parties on October 15, 2020, the court (Madden, J.), by order dated October 22, 2020, essentially denied the defendants’ motion to compel the plaintiff to provide additional authorizations. The court ruled that,

“the defendant [sic] is entitled to authorizations for medical records pertaining only to the surgery/treatment at issue, that is liposuction of the stomach, and as to any treatment or surgery prior to the surgery/treatment at issue to the extent that it pertains to the same area of the stomach at issue, *and as it appears that plaintiff has provided such authorizations to defendant [sic] no further authorizations are required from plaintiff subject to further order of the court*”

(emphasis added). The court further held that, inasmuch as the plaintiff represented to the court that she was not seeking damages for psychological or mental suffering, while her bill of particulars did, in fact, make a claim for those damages, the plaintiff was required either to provide the relevant authorizations permitting the defendants to obtain her mental health records or notify the defendant and the court in writing by November 12, 2020 that she was withdrawing those claims. In addition, the court concluded that the defendants had not established a basis for obtaining any medical records referable to HIV, drug, or alcohol treatment.

Notwithstanding the clear import of the court’s order, by letter dated January 28, 2021, the defendants demanded that the plaintiff provide them with HIPAA-compliant authorizations permitting them to obtain the medical records of 30 different health-care and nonmedical

services providers, as well as *Arons* authorizations (see *Arons v Jutkowitz*, 9 NY2d 393 [2007]) permitting them to obtain records and speak with 8 additional providers, along with authorizations for 7 providers, with the box for releasing mental health records checked off.

The defendants complied with 22 NYCRR 202.20-f(b) by making unsuccessful attempts to telephone and confer with the pro se plaintiff. Hence, they have satisfied a condition precedent to making this motion.

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.”

Thus, under many circumstances, it is appropriate for the court to fix a firm deadline for the plaintiff to provide outstanding items of discovery (see CPLR 3124; *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]).

Here, however, the law of the case doctrine requires this court to deny the defendants' motion. “The law of the case doctrine is a rule of comity and convenience which states that ordinarily a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case” (*Abe v New York Univ.*, 139 AD3d 416, 416 [1st Dept 2016], quoting *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1st Dept 1987]). The doctrine “applies only to issues decided, directly or by implication, at an earlier stage of the action” (*Metropolitan Package Store Assn. v Koch*, 89 AD2d 317, 321-322 [3d Dept 1982]). Here, in disposing of MOTION SEQUENCE 002 subsequent to the defendants' February 12, 2020, March 11, 2020, and October 14, 2020 correspondence, the court (Madden, J.) ruled that the plaintiff, by providing the restricted authorizations complained of by the defendants, had already provided sufficient authorizations, that the defendants were not entitled to authorizations unrelated to the subject surgery or unrelated to prior treatment of the stomach

area, and that there was no basis for obtaining unrestricted authorizations that checked off the HIV and substance abuse categories (see *Del Terzo v Hospital for Special Surgery*, 95 AD3d 551 [1st Dept 2012]).

It is clear that the plaintiff, in expressly declining to release her mental health records by inscribing that restriction on the authorizations themselves, has withdrawn her claims to recover for psychological and mental health injuries. Hence, those portions of the bill of particulars asserting that such injuries are compensable are deemed to be withdrawn. Moreover, although the October 22, 2020 order left open the possibility that the defendants could obtain further authorizations pursuant to order of the court, the defendants have made no showing whatsoever that any of the additional authorizations that they seek are relevant to the subject liposuction surgery or involve the area of the stomach that was the subject of the surgery. Indeed, many of the entities for which authorizations were sought were transportation service providers. It appears that the defendants, notwithstanding the clear limitation placed upon their requests for authorizations by the October 22, 2020 order, simply compiled a list of every medical, nonmedical, and transportation services provider that could be identified in the plaintiff's records, and requested authorizations referable to everyone on that list.

Unless and until the defendants can specify which of the providers rendered treatment relevant to the surgery or relevant to the condition of the plaintiff's stomach area, there is no basis for this court to diverge from the directives set forth in the October 22, 2020 order.

Accordingly, it is

ORDERED that the motion is denied; and it is further,

ORDERED that the parties shall appear for a remote status conference on February 24, 2022 at 11:00 a.m. via the Microsoft Teams remote conference application, and the court shall provide the parties via email with the appropriate link to access the conference.

This constitutes the Decision and Order of the court.

1/21/2022

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