

Matter of Cummings v Perkins
2022 NY Slip Op 31047(U)
March 30, 2022
Supreme Court, New York County
Docket Number: Index No. 805014/2022
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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In the Matter of	INDEX NO. <u>805014/2022</u>
CHRISTINA CUMMINGS,	MOTION DATE <u>01/31/2022</u>
Petitioner,	MOTION SEQ. NO. <u>001</u>

- v -

ANTHONY R. PERKINS, M.D., and NYC REBALANCE
CLINIC,

**DECISION, ORDER, AND
JUDGMENT**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11
were read on this motion to/for DISCOVERY - PRE-ACTION

In this proceeding pursuant to article 1, title II, of the Public Health Law and CPLR 3102(c), the petitioner seeks pre-action disclosure of certified copies of her complete medical chart referable to the plastic surgery procedure that the respondent Anthony R. Perkins, M.D., performed on her at the respondent NYC Rebalance Clinic (the Clinic). Perkins has not answered or opposed the petition. The Clinic submits responsive papers, asserting that Perkins was not employed by or affiliated with it, but merely used its facilities to perform various surgical procedures. The petition is granted, and the respondents are directed to provide the petitioner with certified copies of any records or charts referable to the petitioner's surgery.

CPLR 3102(c) authorizes a court to permit a party to conduct pre-action disclosure to aid in framing a complaint "and identifying prospective defendants" (*Matter of Sims v Metropolitan Transp. Auth.*, 123 AD3d 496, 496 [1st Dept 2014]; see *Matter of Walker v Sandberg & Sikorski Corp. Firestone, Inc.*, 102 AD3d 415, 415 [1st Dept 2013]; *Matter of Champion v Metropolitan Tr. Auth.*, 70 AD3d 587, 588 [1st Dept 2010]). A petitioner seeking leave to conduct pre-action

disclosure must demonstrate that he or she has a potentially viable cause of action against some person or entity, and that the disclosure sought is material and necessary to proof of an actionable wrong (see *Matter of Woodbridge Structured Funding, LLC v Pissed Consumer*, 125 AD3d 508, 508-509 [1st Dept 2015]; *Matter of Peters v Sotheby's, Inc.*, 34 AD3d 29, 34 [1st Dept 2006]; *Matter of Liberty Imports v Bourguet*, 146 AD2d 535, 536 [1st Dept 1989]). The resort to pre-action disclosure, however, "is not permissible as a fishing expedition to ascertain whether a cause of action exists" in the first instance (*Matter of Liberty Imports v Bourguet*, 146 AD2d at 536).

"Under New York law, patients and those similarly situated have generally been entitled to court orders granting them access to their medical records for purposes of litigation. This is obviously true in instances in which litigation has actually been commenced . . . and it is even true when litigation is merely contemplated" (*Wheeler v Commissioner of Soc. Servs.*, 233 AD2d 4, 9 [2d Dept 1997] [citations omitted]; see *Matter of Kaplan v North Shore Univ. Hosp.*, 117 Misc 2d 734, 736 [Sup Ct, Nassau County 1982]).

The petitioner has made the requisite showing that she has potentially viable causes of action against Perkins and the Clinic sounding in medical malpractice and negligence, premised upon an allegedly botched liposuction procedure, and that she may have a cause of action against the Clinic regardless of whether Perkins was employed by or affiliated with the Clinic. The Clinic, moreover, has not established that it does not maintain any relevant records concerning the subject surgical procedure, or that the petitioner would be unable to maintain an action against it in connection with the manner in which it managed its facilities. The court notes that, in the context of a proceeding pursuant to CPLR 3102(c), there is no requirement that a petitioner whose potential action sounds in medical malpractice must support the petition with an expert affirmation or affidavit to establish the merit of the claim (see *Matter of Toal v Staten Is. Univ. Hosp.*, 300 AD2d 592, 592 [2d Dept 2002] [granting CPLR 3102(c) petition of potential medical malpractice plaintiff over a dissent that argued that expert affirmation was required to

establish merit of claim]; *but see Matter of Accetta v Brookdale Univ. Med. Ctr.*, 2013 NY Slip Op 50657[U], 39 Misc 3d 1218[A] [Sup Ct, Kings County, Apr. 26, 2013] [holding that expert affirmation was required]).

The petitioner also relies upon Public Health Law § 17, which provides, in relevant part, that:

"Upon the written request of any competent patient, . . . an examining, consulting or treating physician or hospital must release and deliver, exclusive of personal notes of the said physician or hospital, copies of all x-rays, medical records and test records including all laboratory tests regarding that patient to any other designated physician or hospital . . . Either the physician or hospital incurring the expense of providing copies of x-rays, medical records and test records including all laboratory tests pursuant to the provisions of this section may impose a reasonable charge to be paid by the person requesting the release and deliverance of such records as reimbursement for such expenses . . . However, the reasonable charge for paper copies shall not exceed seventy-five cents per page."

Although the petitioner established that she provided a proper authorization to the respondents requesting that they provide her with her medical records and chart, she did not establish that Public Health Law § 17 was applicable to her request, as she did not seek to have the respondents deliver those records to "any other designated physician or hospital" (*cf. Casillo v. St. John's Episcopal Hosp.*, 151 Misc 2d 420, 423 [Sup Ct, Suffolk County 1992] [concluding that, despite the facially limiting language of Public Health Law § 17, the statute also compels health care providers to release records directly to requesting patient]).

In any event, where records are sought for sole purpose of determining, with the assistance of counsel, if the petitioner had a cause of action and could commence a lawsuit against a medical provider, Public Health Law § 17 is inapplicable. That statute was enacted solely for the purpose of promoting public health and healthcare, and is not an alternative to CPLR 3102(c), which relates to discovery and production of records to aid in the commencement of an action (*see Boltja v Southside Hosp.*, 153 Misc 2d 568, 572 [Sup Ct, Nassau County 1992], *affd* 186 AD2d 774 [2d Dept 1992]; *cf.* Public Health Law § 18[1][g], as

amended L 1992, ch 277 [adding plaintiff's attorneys as persons "qualified" to request the delivery of medical records at the statutory rate of \$.75 per page]).

Nonetheless, Public Health Law § 18(2)(d) provides that "upon the written request of any qualified person, a health care provider shall furnish to such person, within a reasonable time, a copy of any patient information requested . . . which the person is authorized to inspect pursuant to this subdivision." That statutory provision, rather than Public Health Law § 17, is the one applicable here, and entitles either the petitioner or her attorney to obtain her medical chart and records from the respondents.

In light of the foregoing, it is

ADJUDGED that the petition is granted; and it is,

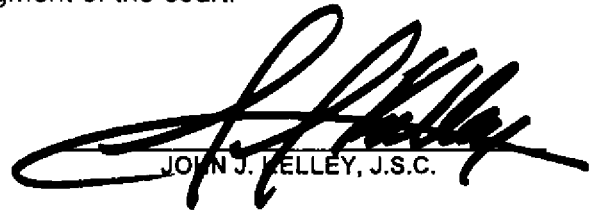
ORDERED that, within 15 days of the entry of this Decision, Order, and Judgment, the petitioner shall serve a copy of this Decision, Order, and Judgment, with notice of entry, upon the respondent Anthony R. Perkins, M.D., by regular mail, and upon the respondent NYC Rebalance Clinic by uploading it to the New York State Court Electronic Filing System; and it is further,

ORDERED that, within 30 days of service upon each of them of a copy of this Decision, Order, and Judgment, with notice of entry, as described above, the respondents Anthony R. Perkins, M.D., and NYC Rebalance Clinic shall provide the petitioner's attorney with a certified copy of the entirety of the petitioner's medical records and chart referable to the September 4, 2020 liposuction and plastic surgery performed by Anthony R. Perkins, M.D., at NYC Rebalance Clinic, including, but not limited to, patient registration, operative notes, operative procedure report, anesthesia administration record, medication administration record, pre- and post-operative notes, history and physical examination notes, nursing notes, diagnostic testing results, discharge notes, medication prescriptions, and any photographs of the petitioner made a part of the medical chart or records, or, if applicable, an affidavit from a person with

knowledge that such records do not exist, or could not be located after a diligent search,
provided that any search methods must be described in detail.

This constitutes the Decision, Order, and Judgment of the court.

3/30/2022
DATE


JOHN J. VELLEY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
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"/>	REFERENCE