

Fiedler v Rodriguez

2022 NY Slip Op 34143(U)

December 5, 2022

Supreme Court, New York County

Docket Number: Index No. 805160/2017

Judge: Kathy J. King

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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. KATHY J. KING PART 06

Justice

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MARVIN FIEDLER, SYMMA FIEDLER,

Plaintiff,

- v -

JOSE A RODRIGUEZ, ELMELA ZLATANIC, BILGE D
KALYON, DAVID Y CHAN, TANSAR MIR, ARIEL TENNY
GOLDMAN, MATTHEW HEPINSTALL, NICHOLAS
LAGAMMA, SHIRLEY MATHEW, ALAN BULBIN, DAVA
KIRSFIELD, NORTH SHORE INFECTIOUS DISEASE
CONSULTANTS PC, LONG ISLAND JEWISH HOME CARE,
NORTH SHORE HOME CARE, NORTH SHORE LIJ HOME
CARE NETWORK, LENOX HILL HOSPITAL, NORTH
SHORE UNIVERSITY HOSPITAL

Defendant.

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INDEX NO. 805160/2017
MOTION DATE 11/24/2021,
04/06/2022
MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 202, 203, 204, 205, 206, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 262, 263, 264, 265, 266, 267, 268, 270, 272, 273, 274, 275, 276

were read on this motion to/for STRIKE PLEADINGS.

The within action sounds in medical malpractice for injuries allegedly sustained by plaintiff, Marvin Fiedler, and derivatively by his spouse, Symma Fiedler, for failure to timely diagnose and treat plaintiff Marvin Fiedler’s infection following hip replacement surgery, performed by Jose A. Rodriguez, M.D. (“Rodriguez”) at Lenox Hill Hospital on March 14, 2016.

Plaintiffs move for an order, inter alia, striking defendants’ answers, pursuant to CPLR §3126 or alternatively, compelling the defendants to provide discovery (Motion Seq. 03). A review of the moving papers indicates that plaintiffs served defendants with demands for discovery

and inspection dated September 12, 2021 and October 3, 2021, which included a demand for copies of office and cell phone records of defendant Tansar Mir, M.D. (“Mir”) over a five-month period. Defendants complied with the plaintiffs’ demands, however defendant Mir objected to plaintiffs’ demand for phone records, arguing it was improper as it would lead to the disclosure of privileged information concerning Mir’s other patients, and that plaintiffs had not provided a proper basis for the demand. Defendant Mir opposes the plaintiffs’ motion.

On December 2, 2021, plaintiffs served a subsequent notice for discovery and inspection on defendants Rodriguez and Tansar Mir, M.D. (“Mir”) seeking, among other things, copies of office and cell phone records, text messages and images relating to phone calls made to and from specific telephone numbers associated with the plaintiffs and plaintiff Marvin Fiedler’s home health aide. Defendants Rodriguez and Mir objected to plaintiffs’ demand, and plaintiffs moved to strike their answers, pursuant to CPLR §3126, or alternatively to compel production of the records, pursuant to CPLR §3124 (Motion Seq. 04).

Defendants Rodriguez and Mir cross-move seeking a protective order, pursuant to CPLR §3103, arguing that plaintiffs’ demand for the phone records will not yield any relevant discovery and is, among other things, overly broad, unduly burdensome, that has previously been produced, and seeks information that is already in the possession, custody and control of the plaintiffs (Motion Seq. 04). Plaintiffs oppose the cross-motion, arguing that the phone records are necessary to show a lack of communication between the plaintiffs and defendants Rodriguez and Mir, which allegedly lead to the worsening condition of plaintiff Marvin Fiedler.

CPLR §3103(a) permits a party to move for a protective order “denying, limiting, conditioning or regulating the use of any disclosure device.” The provision further dictates that “such order shall be designed to prevent unreasonable annoyance, expense, embarrassment,

disadvantage or other prejudice to any person or the courts.” Disclosure in civil actions is generally governed by CPLR 3101(a), which directs: “[t]here shall be full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Generally, the test of whether disclosure is “material and necessary” is “one of usefulness and reason” (*see Forman v Henkin*, 30 NY3d 656, 661 [2018]).

Plaintiffs’ demand for all office, cell phone and text message records of Rodriguez and Mir is overly broad and not reasonably tailored to obtain discovery relevant to the issues in this case (*see Doe v Bronx Preparatory Charter School*, 160 AD3d 591 [1st Dept 2018]). Contrary to plaintiffs’ contentions in opposition to the cross-motion, plaintiffs have failed to demonstrate that the phone records are material and necessary to the prosecution of this action (*see Gough v Panorama Windows, Ltd.*, 133 AD3d 526 [1st Dept 2015]), since the moving papers demonstrate there has been no showing through deposition testimony or otherwise, of an issue involving phone calls from or to the telephone numbers associated with the plaintiffs. Further, the Court notes that plaintiffs have not provided a basis for requiring the defendants to cull through their phone records when the records are readily obtainable by the plaintiffs.

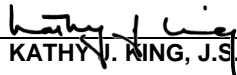
The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that plaintiffs’ motions (Motion Sequence 03 and 04) seeking to strike the answers of defendants Jose A. Rodriguez, M.D. and Tansar Mir, M.D., compel discovery or to preclude the defendants from offering evidence at trial is denied; and it is further

ORDERED, that the cross-motions (Motion Sequence 04) of defendants Jose A. Rodriguez, M.D. and Tansar Mir, M.D. are granted.

This constitutes the decision and order of the Court.

<u>12/5/2022</u> DATE		 KATHY J. NING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE