Borek v Seidman

2023 NY Slip Op 30470(U)

February 14, 2023

Supreme Court, New York County

Docket Number: Index No. 805351/2021

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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NACHUM BOREK,

Plaintiff,

- v -

DR. STUART SEIDMAN, DR. ELIZABETH SUBLETTE, NEW YORK PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER, and PAYNE WHITNEY PSYCHIATRIC CLINIC,

Defendants.

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INDEX NO. 805351/2021

MOTION DATE 01/25/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 80, 81, 128, 129, 130, 131, 132, 133, 134 ,135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 179, 180, 227, 228, 229, 230, 231, 232, 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, 258, 259, 260, 261, 274, 275, 276, 277, 286, 287, 293, and the plaintiff's statement made on the record on January 25, 2023.

were read on this motion to/for RENEWAL/REARGUMENT.

In this action to recover damages for medical malpractice, the plaintiff moves:

(a) pursuant to CPLR 2221(d), in papers incorrectly denominated as a motion to vacate a prior order, but which, in actuality, is a motion for leave to reargue his prior motion to compel the defendant Dr. Elizabeth Sublette to provide him or his mother, as his attorney-in-fact, with all of his medical records, which had been denied by order dated July 14, 2022 (MOT SEQ 002), and

(b) pursuant to CPLR 2221(e) to renew his opposition to the motion of the defendants New York Presbyterian/Weill Cornell Medical Center and Payne Whitney Psychiatric Clinic (together the NYPH defendants) to dismiss the complaint against them as time-barred, which had been granted by order dated July 25, 2022 (MOT SEQ 001).

Sublette opposes that branch of the instant motion seeking leave to reargue the prior motion to compel her to provide all medical records in her possession referable to her treatment of the plaintiff. The NYPH defendants oppose that branch of the instant motion seeking renewal of the plaintiff's opposition to their motion to dismiss the complaint as against them. The plaintiff's motion is denied in its entirety.

The court notes that, by order dated January 5, 2023 (MOT SEQ 007), it granted the plaintiff's motion for leave to amend the notice of motion that had been addressed to his request for reconsideration of MOTION SEQUENCE 002, so as to reflect that he was seeking renewal, rather than mere vacatur of an order that was adverse to him. By order dated February 14, 2023 (MOT SEQ 009), the court denied the plaintiff's identical motion for leave to amend the notice of motion that had been addressed to his request for reconsideration of MOTION SEQUENCE 001, concluding that he was moving for leave to reargue, as he did not submit new facts, but only attempted to bring to the court's attention evidence and arguments that already were before it. In the January 5, 2023 order, the court also confirmed that it would consider both applications for reconsideration simultaneously under MOTION SEQUENCE 006, explaining that it had discretion to control its own calendar, that it could accelerate the return date of a motion when warranted (*see Harrington v Palmer Mobile Homes, Inc.,* 71 AD3d 1274, 1274 [3d Dept 2010]; *Visconti v Paino*, 137 Misc 2d 1, 6 [Sup Ct, Dutchess County 1987]), and that it had provided the parties with sufficient notice of the accelerated date (*see Freed v Best*, 175 AD3d 1494, 1495 [2d Dept 2019]).

As explained in this court's July 25, 2022 order, the plaintiff previously had requested Sublette to provide him with all of his medical and psychiatric treatment records in her possession. Rather than provide him with all of the records, she provided him with a summary of the psychiatric treatment that she rendered and the medications that she prescribed to him, relying on Public Health Law § 18(3)(d), which permits a physician to withhold records from a patient where it included sensitive information that might be harmful to the patient or family members. After the New York State Department of Health (NYS DOH) rejected his administrative appeal of Sublette's decision, the plaintiff commenced a CPLR article 78 proceeding seeking review of the NYS DOH determination. In a February 7, 2022 decision, order, and judgment, the Supreme Court, Albany County (Mott, J.), denied the petition and dismissed the proceeding, concluding that the NYS DOH determination was rational and not

arbitrary and capricious. By order dated May 24, 2022, Justice Mott denied the plaintiff's motion for leave to reargue the petition. This court denied the plaintiff's motion to compel production of his medical records, concluding that he was collaterally estopped by Justice Mott's determination from relitigating the issue of his entitlement to those records.

By order dated February 14, 2023, this court granted Sublette's motion for summary judgment dismissing the complaint against her as time-barred (MOT SEQ 010). Hence, that branch of the plaintiff's instant motion that is addressed to the issue of Sublette's medical records must, in the first instance, be denied as academic.

That branch of the motion seeking leave to reargue the motion to compel Sublette to provide all of the records must be denied on the merits as well. A party moving for leave to reargue must show that the court overlooked or misapprehended facts or relevant law that were presented to it in connection with a prior application (*see* CPLR 2221[d][2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]; *see also Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016]). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984], quoting *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). The court concludes that it did not overlook or misapprehend any facts or relevant law that were presented to it in connection with the plaintiff's prior application to compel production of Sublette's records.

In its July 25, 2022 order, this court granted the NYPH defendants' motion to dismiss the complaint insofar as asserted against them as time-barred. The court concluded that, inasmuch as the last relevant date that the NYPH defendants treated the plaintiff was January 16, 2016, that the plaintiff commenced the action on November 4, 2021, that the applicable limitations period was two years and six months, and that the plaintiff failed to establish that his claims against NYPH were tolled for all or a part of the time between those dates by virtue of his insanity, the action was time-barred insofar as against the NYPH defendants.

In connection with that branch of the instant motion referable to the timeliness of the action against the NYPH defendants, the plaintiff submitted several excerpts from his hospital records from December 10, 2015 through January 13, 2016, referable to his hospitalization at NYPH from December 10, 2015 through January 8, 2016, as well as additional hospital records from June 5, 2019 through June 6, 2019 from NYU Langone, records from June 16, 2019 from the NYPH defendants, and records from August 1, 2019 until August 8, 2019 from the NYPH defendants, referable to three additional hospitalizations, which he marked up in red pen with comments addressed to several of the entries therein. He also contended that the doctrine of "equitable tolling" rendered this action timely commenced against the NYPH defendants.

CPLR 2221(e) provides that

> "A motion for leave to renew:
>
> "1. shall be identified specifically as such;
>
> "2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> "3. shall contain reasonable justification for the failure to present such facts on the prior motion"

(*see Melcher v Apollo Med. Fund Mgt., LLC,* 105 AD3d 15, 23 [1st Dept 2013]; *American Audio Serv. Bur. Inc. v AT & T Corp*., 33 AD3d 473, 476 [1st Dept 2006]). "'Renewal is granted sparingly. . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'" (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], quoting *Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987]).

The new evidence shows that, during all periods of hospitalization, the plaintiff suffered from "[u]nspecified schizophrenia spectrum and other psychotic disorder" and "[u]nspecified psychosis not due to a substance or known physiological condition." Upon his discharge from each of his four hospitalizations, the plaintiff's manic and psychotic symptoms

abated, and he temporarily was stabilized by medication, as indicated in the hospital records, although his mother expressed concern that the medications were ineffective or deleterious.

Although the plaintiff provided the court with new evidence, that is, evidence that had not been provided to the court in connection with the NYPH defendants' motion, he failed to provide a reasonable justification for his failure to present those facts in connection with that prior motion and, thus, failed to exercise "due diligence in making [his] first factual presentation" (*Chelsea Piers Mgt. v Forest Elec. Corp*., 281 AD2d 252, 252 [1st Dept 2001], citing *Rubinstein v Goldman*, 225 AD2d 328, 328-329 [1st Dept 1996]). The plaintiff apparently had the subject hospital records in his possession at the time he was opposing the NYPH defendants' initial motion to dismiss. The plaintiff's claim of ignorance as to what facts or documents were necessary to establish, in opposition to the NYPH defendants' motion, that he was insane for a sufficient period of time so as to toll the limitations period, is insufficient to establish a reasonable justification for failure to have submitted those documents in connection with the prior motion (*see generally Arena v Shaw*, 179 AD3d 415, 415 [1st Dept 2020]).

"'[R]enewal motions generally should be based on newly discovered facts that could not be offered on the prior motion . . . courts have discretion to relax this requirement and to grant such a motion in the interest of justice'" (*Tuccillo v Bovis Lend Lease, Inc*., 101 AD3d 625, 628 [1st Dept 2012], quoting *Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept. 2003]), and courts also have discretion to grant renewal where the interest of justice requires it, despite the absence of any excuse (*Matter of Pasanella v Quinn*, 126 AD3d 504, 505 [1st Dept 2015]). Even if the court were to exercise its discretion in this regard, there is no basis for changing the court's initial determination (*see Jones v City of New York*, 146 AD3d 690, 691 [1st Dept 2017]). Here, the new facts established only that the plaintiff suffered from unspecified schizophrenic and psychotic symptoms that were temporary in nature and controlled with medication. He thus has failed, on renewal, to satisfy his burden (*see Scifo v Taibi*, 198 AD3d 704, 705 [2d Dept 2021]) of demonstrating that he was suffering from "insanity," as that term is employed in CPLR 208(a)

and narrowly interpreted by the courts (*see Matter of Goussetis v Young Adults with Special Abilities, Inc.,* 198 AD3d 761, 762 [2d Dept 2021]; *Kelly v Solvay Union Free School Dist*., 116 AD2d 1006, 1006 [4th Dept 1986]; *see also McCarthy v Volkswagen of Am*., 55 NY2d 543, 548 [1982]) for any period of time, let alone for a continuous period of time (*see Bethune v Mount Sinai Beth Isr. Med. Ctr.,* 173 F Supp 3d 10, 11 [SD NY 2016]) sufficient to toll the applicable limitations period. Hence, even were the court to add the 228-day toll of all limitations periods that was imposed during the 2020 COVID-19 pandemic pursuant to Executive Order (EO) 202.8, as extended (*see* Executive Law § 29-a, L 2020, ch 23, § 2 [eff Mar. 3, 2020]; *Brash v Richards,* 195 AD3d 582, 584 [2d Dept 2021]), the applicable limitations period already had lapsed in 2018, long before the COVID-19 toll went into effect on March 20, 2020.

A motion for renewal is an improper vehicle for advancing a new legal argument or theory (*see Atlas v Smily*, 156 AD3d 562, 562-563 [1st Dept 2017] [efforts to advance a new legal theory "were not within the scope of CPLR 2221"]). Hence, the court may not consider the plaintiff's contention that the doctrine of equitable tolling is applicable to this action. Were it to consider the merits of that contention, it would have to reject it in any event, as the plaintiff "has not shown that [he] was 'actively misled' by defendant, or that he 'in some extraordinary way had been prevented from complying with the limitations period'" (*Shared Communications Servs. of ESR, Inc. v Goldman, Sachs & Co.*, 38 AD3d 325, 325 [1st Dept 2007], quoting *O'Hara v Bayliner*, 89 NY2d 636, 646 [1997]).

The court also rejects the plaintiff's informal request to seal numerous docket entries in this action, including those designated as entries 99-102, 104-105, 110-112, 130-138, 230-237, 244, 246-251, and 285 in the New York State Court Electronic Filing System, of which many were considered on this motion. 22 NYCRR 216.1(a) provides, in relevant part, that

> "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records . . . except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties."

"[T]here is a broad presumption that the public is entitled to access to judicial proceedings and court records" (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010]). Although the public's right to access is not absolute (*see Danco Labs. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 [1st Dept. 2000]), "[t]he presumption of the benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public's right to access" (*Applehead Pictures, LLC v Perelman*, 80 AD3d 181, 191 [1st Dept 2010]; *see Matter of East 51st St. Crane Collapse Litig.,* 106 AD3d 473, 474 [1st Dept 2013]; *Danco Labs. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d at 6; *see also Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501-502 [1st Dept 2011]). As the Appellate Division, First Department, has explained, it has "been reluctant to allow the sealing of court records" (*Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.U.*, 28 AD3d 322, 324 [1st Dept 2006]; *see Matter of Holmes v Winter,* 110 AD3d 134, 138 [1st Dept 2013], *revd other grounds* 22 NY3d 300 [2013]; *Mosallem v Berenson*, 76 AD3d at 350; *see generally Davis v Nyack Hosp.,* 130 AD3d 455, 456 [1st Dept 2015]; *Matter of Brownstone*, 191 AD2d 167, 168 [1st Dept 1993]).

"Thus, the court is required to make its own inquiry to determine whether sealing is warranted, and the court will not approve wholesale sealing of [court] papers, *even when both sides to the litigation request sealing*" (*Applehead Pictures, LLC v Perelman*, 80 AD3d at 192 [citations omitted] [emphasis added]*; see Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.U.*, 28 AD3d at 324; *Liapakis v Sullivan*, 290 AD2d 393, 394 [1st Dept 2002]; *Matter of Hofmann*, 284 AD2d 92, 93 [1st Dept 2001] [denying request to seal court records despite the parties' confidentiality agreement]).

The party seeking to seal court records has the burden of establishing "good cause" for the sealing order (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 502 [2d Dept 2007]). "Since confidentiality is the exception," the movant must establish that "public access to

the documents at issue will likely result in harm to a compelling interest of the movant and that no alternative to sealing can adequately protect the threatened interest" (*id.* [citations omitted]). This court has discretion, on a case-by-case basis, to determine if good cause exists (*see id*.). Hence, where a party fails to show the existence of a compelling reason to seal a record, sealing should be denied (*see Davis v Nyack Hosp.,* 130 AD3d at 456).

Neither a party's embarrassment nor a general desire for privacy is sufficient, of itself, to establish good cause for sealing a court file (*see Matter of Holmes v Winter*, 110 AD3d at 138; *Mosallem v Berenson*, 76 AD3d at 351; *Liapakis v Sullivan*, 290 AD2d at 394; *Matter of Benkert*, 288 AD2d 247, 247 [1st Dept 2001]; *Matter of Hofmann*, 284 AD2d at 93; *State of New York ex rel. Aniruddha Banerjee v Moody's Corp*., 54 Misc 3d 705, 708 [Sup Ct, N.Y. County 2016]). Rather, the remedy for preventing the potential for significant embarrassment is to permit a party to proceed anonymously (*see Doe v Yeshiva Univ*., 195 AD3d 565, 566 [1st Dept 2021]). Conclusory claims of the need for confidentiality, and even the existence of a confidentiality agreement between the parties, are insufficient bases upon which to seal court records (*see Matter of Benkert*, 288 AD2d at 247; *Matter of Hofmann*, 284 AD2d at 93; *Matter of Tram Thuy Nguyen,* NYLJ, Feb. 23, 2016, at 22, col 6, 2016 NYLJ LEXIS 2391 [Sur Ct, N.Y. County, Feb. 18, 2016]; *Matter of Golden*, NYLJ, Jul. 16, 2015, at 24, col 1 [Sur Ct, N.Y. County]; *Matter of Brown*, NYLJ, Apr. 10, 2013, at 23, col 6 [Sur Ct, Kings County]; *Matter of Soltesz*, NYLJ, Jun. 29, 2015, at 25 [Sur Ct, Bronx County]).

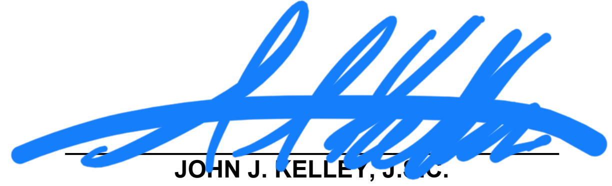
The plaintiff's remaining contentions are without merit.

In light of the foregoing, it is

ORDERED that the plaintiff's motion is denied in its entirety; and it is further,

ORDERED that the Clerk of the court shall unseal Docket Entry Nos. 99-102, 104-105, 110-112, 130-138, 230-237, 244, 246-251, and 285 that were uploaded in the New York State Court Electronic Filing System.

This constitutes the Decision and Order of the court.



2/14/2023	JOHN J. KELLEY, J.S.C.
DATE	

CHECK ONE:	☐	CASE DISPOSED			X	NON-FINAL DISPOSITION		
	☐	GRANTED	X	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE