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 02/28/2023

MOTION SEQ. NO. 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 300, 301, 302, 303, and 311

were read on this motion to/for SEAL.

In this action to recover damages for medical malpractice, the defendant Dr. Elizabeth Sublette moves pursuant to 22 NYCRR 216.1 to seal a written summary of the treatment that she had provided and medications that she had prescribed to the plaintiff. No party opposes the motion. The motion nonetheless is denied.

By order dated July 14, 2022 (MOT SEQ 002), this court denied the plaintiff's motion to compel Sublette to provide him or his mother, as his attorney-in-fact, with all of his medical records that were in Sublette's possession. This court concluded that the plaintiff was collaterally estopped from raising that issue before this court by virtue of a February 7, 2022 judgment in a CPLR article 78 proceeding that had been litigated in the Supreme Court, Albany County, and had determined that issue adversely to him. By order dated February 14, 2023, as amended February 16, 2023 (MOT SEQ 006), this court denied the plaintiff's motion for leave to reargue that motion. In both of those orders, the court noted that Sublette, in lieu of releasing all of the plaintiff's medical records to him, provided him with a written, two-page summary of the treatment that she had rendered and medication that she had prescribed to him.

By placing his mental health condition in controversy, the plaintiff has waived both the common-law physician-patient privilege and the physician-patient privilege recognized by the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d, *et seq.*). Thus, issues relevant to the plaintiff's mental health, and treatment thereof, became discoverable, including some of the relevant medical and psychiatric records that would likely have been admitted into evidence in open court had there been a trial of this action (*see Winslow v New York-Presbyterian/Weill-Cornell Med. Ctr.,* 203 AD3d 533, 533 [1st Dept 2022]; *Jones v FEGS-WeCARE/Human Resources, NYC*, 139 AD3d 627, 628 [1st Dept 2016]; *Giustiniani v Giustiniani*, 278 AD2d 609, 611 [3d Dept 2000]; *Monica W. v Milevoi*, 252 AD2d 260, 262 [1st Dept 1999] [medical records]; *Kaplowitz v Borden, Inc.*, 189 AD2d 90, 92-93 [1st Dept 1993] [medical records]; *Napoleoni v Union Hosp.*, 207 AD2d 660, 662 [1st Dept 1994]).

Nonetheless, as the Court of Appeals explained in the context of a medical malpractice action,

> "[w]hen a party moves to compel discovery of medical records, in this case psychiatric records, a treating hospital, physician or other institution who is custodian of the records may request a protective order on the ground that disclosure of all or part of the record may be seriously detrimental to the interests of the patient, to uninvolved third parties, or to an important program of the custodian of the records, notwithstanding a valid waiver of the physician-patient privilege"

(*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 454-455 [1983]). The Court elaborated on this standard, explaining that

> "[i]t is obvious that the psychological response of a patient to reading his or her medical record is generally more critical in the context of mental illness than in treatments for physical ailments (*see* Note, 57 Wash L Rev, *op. cit.*, at p 700). For example, misconceptions about the information in the record could lead a patient to treat the diagnosis as a 'label' that might serve to reinforce the patient's negative behavior or lead to feelings of hopelessness, which would impair treatment (*id.*, citing 15 J Psychiatric Nursing and Mental Health Services 25). The danger of 'self-fulfilling diagnoses' may be particularly evident in cases where homicidal or suicidal tendencies have been diagnosed (*id.*, at pp 700-701). In addition, the unfettered disclosure of sensitive and confidential information relating to third parties, such as the patient's family and friends, that the patient has revealed during therapy, may irreparably harm the patient's relationship with these persons (*Gotkin v Miller*, 379 F Supp 859, 866 [EDNY], *affd* 514 F2d 125

> [2d Cir], *supra*; Weiner, Discovering Mental Health Records in Divorce or Personal Injury Proceedings, 64 Chi Bar Rec 244, 246, citing Ill Rev Stat, ch 91 1/2, par 810[a][1]).
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> "Because of this potential of harm to a patient, medical records, particularly those of psychiatric treatment, should not be automatically and necessarily disclosed upon a patient's waiver of the privilege of confidentiality under CPLR 4504. The treating doctor or hospital possessing such records should have the right to assert, by means of a motion for a protective order, reasons for preserving the confidentiality of all or portions of such records, notwithstanding a patient's waiver, in order to protect a patient, third party, or the doctor, or hospital, from potential injury"

(*id.* at 459-460). In declining to release all of the plaintiff's medical records to him, Sublette relied upon the factors articulated in Public Health Law § 18(3)(d), as analyzed by the Court of Appeals in *Cynthia B.* In denying the plaintiff's CPLR article 78 petition, the Supreme Court, Albany County, concluded, after considering that same statute and those same factors, that it was not irrational for the New York State Department of Health to confirm Sublette's determination to withhold the plaintiff's records from him and his mother.

In its February 14, 2023 order deciding MOTION SEQUENCE 006, as amended February 16, 2023, the court denied the plaintiff's request to seal hospital records that he had submitted in connection with his application for reconsideration of prior orders. In that order, the court explained that neither a party's embarrassment nor a general desire for privacy is sufficient, of itself, to establish good cause for sealing court records (*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 345, 348 [1st Dept 2010]; *Liapakis v Sullivan*, 290 AD2d 393, 394 [1st Dept 2002]; *Matter of Hofmann*, 284 AD2d 92, 93 [1st Dept 2001]; *State of New York ex rel. Aniruddha Banerjee v Moody's Corp.*, 54 Misc 3d 705, 708 [Sup Ct, N.Y. County 2016]). This rule frequently has been applied to deny requests for the sealing of medical records despite a party's contention that the records contained sensitive or embarrassing medical information (*see Kelly D. v Niagara Frontier Tr. Auth.*, 177 AD3d 1261, 1264 [4th Dept 2019]; *Ava v NYP*

Holdings, Inc., 64 AD3d 407, 416-417 [1st Dept 2009]; *Guberman v West*, 2019 NY Slip Op 33508[U], *4-5, 2019 NY Misc LEXIS 6352, *5-6 [Sup Ct, N.Y. County, Nov. 21, 2019]).

The document under consideration here was the one document that Sublette did, in fact, provide to the plaintiff, presumably because she concluded that production of a treatment summary would not have the same adverse effects upon him or his family as the release of the entirety of his medical records. For the same reasons as this court previously denied the plaintiff's request to seal his hospital records and other motion papers, it denies Sublette's request to seal the written summary of her treatment of the plaintiff. Specifically, she failed to show good cause to seal the document. By commencing this action and placing his mental health in issue, the plaintiff has opened the door to scrutiny of those medical records that have in fact been exchanged, and the mere fact that the subject document may contain sensitive or embarrassing information does not rise to the level of good cause for sealing the document.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the Decision and Order of the court.

3/1/2023
DATE

JOHN J. KELLEY, J.S.C.

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

805351/2021 BOREK, NACHUM vs. SEIDMAN, DR. STUART ET AL
Motion No. 012