

Rosenberg v Glickman

2023 NY Slip Op 32462(U)

July 17, 2023

Supreme Court, New York County

Docket Number: Index No. 800036/2011

Judge: John J. Kelley

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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**

<p>PRESENT: <u>HON. JOHN J. KELLEY</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>JENNIFER ROSENBERG,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>ROBERT S GLICKMAN, D.M.D.,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART 56M</p> <p>INDEX NO. <u>800036/2011</u></p> <p>MOTION DATE <u>05/05/2023</u></p> <p>MOTION SEQ. NO. <u>006</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 006) 21, 22, 23, 24, 25, 32, 33, 34, 42, 51, 52, 53
 were read on this motion to/for SEAL.

In this action to recover damages for dental malpractice, the plaintiff moves pursuant to 22 NYCRR 216.1(a) to seal all of her dental records in this action. The defendant opposes the motion. The motion is denied.

By placing her dental 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, in the first instance, all issues relevant to the plaintiff's dental treatment and ongoing dental condition became discoverable (*see Winslow v New York-Presbyterian/Weill-Cornell Med. Ctr.*, 203 AD3d 533, 533 [1st Dept 2022]; *Jones v FECS-WeCARE/Human Resources, NYC*, 139 AD3d 627, 628 [1st Dept 2016]; *Giustiniani v Giustiniani*, 278 AD2d 609, 611 [3d Dept 2000]; *Monica W. v Milevoj*, 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]).

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 rule disfavoring the sealing of records in a civil action 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]; *Borek v Seidman*, 2023 NY Slip Op 30617[U], *3-4, 2023 NY Misc LEXIS 854, *5 [Sup Ct, N.Y. County, Mar. 3, 2023] [Kelley, J.]; *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]). There is no basis for the plaintiff's contention that, if the information underlying this dental malpractice action were permitted to remain completely open to the public, her ability to obtain employment in the future would be placed in jeopardy. This court has presided over hundreds of medical and dental malpractice actions, and no party has ever claimed that his or her prosecution of a medical or dental malpractice action had adversely affected a job opportunity, either in the private sector or in government. The New York State court system processes thousands of medical and dental malpractice actions every year, and the court is aware of no study or proof that the commencement and prosecution of a medical or dental malpractice action causes or contributes to adverse employment outcomes, or that prospective employers actually learned of the existence of those actions in any event.

Accordingly, it is

ORDERED that the plaintiff's motion is denied.

This constitutes the Decision and Order of the court.

7/17/2023

DATE



JOHN U. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: