

Neurological Surgery, P.C. v Group Health Inc.
2023 NY Slip Op 35194(U)
June 15, 2023
Supreme Court, Nassau County
Docket Number: Index No. 612078/2017
Judge: Eileen C. Daly-Sapraicone
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**SUPREME COURT – STATE OF NEW YORK
COUNTY OF NASSAU**

**PRESENT: HON. EILEEN C. DALY-SAPRAICONE,
JUSTICE OF THE SUPREME COURT**

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**NEUROLOGICAL SURGERY, P.C.,
Plaintiff,**

**TRIAL/IAS, PART 22
Index No.: 612078/2017**

-against-

**Motion Seq. No.: 006
Motion Submitted: 2/24/2023**

DECISION AND ORDER

**GROUP HEALTH INCORPORATED,
Defendant.**

-----X
**GROUP HEALTH INCORPORATED,
Counterclaim Plaintiff,**

-against-

**NEUROLOGICAL SURGERY, P.C.,
Counterclaim Defendant,**

-and-

**ROBERT HOLTZMAN, JAI GREWAL,
ALAN MECHANIC, ARTEM VAYNMAN,
Additional Counterclaim Defendants.**

-----X
The following papers were read on this motion

NYSCEF
DOCUMENT NUMBERS

Notice of Motion, Affirmation, Exhibits, Memorandum of Law in Support 133 – 145
Memorandum of Law in Opposition, Affidavit, Affirmation, Exhibits 155 – 162
Memorandum of Law in Reply, Reply Affirmation, Exhibits 163 – 166

Upon the foregoing papers, Defendant-Counterclaim Plaintiff GROUP HEALTH INCORPORATED’S (“GHI”), motion seeking an order pursuant to Civil Practice Law and Rules (“CPLR”) §§ 3124 and 3126: (1) compelling the production by Plaintiff of all information necessary to cure its inadequate responses to GHI’s outstanding interrogatories 2, 4, 5, and 6, and GHI’s corresponding document requests 11-12, 14-15 related to same, within seven (7) days of

this Court's order; (2) in the event of Plaintiff's noncompliance with this Court's order, dismissing Plaintiff's Complaint, filed February 14, 2018, with prejudice; and, (3) in light of the willful and frivolous nature of Plaintiff's conduct, ordering that Plaintiff pay GHI's costs and attorneys' fees in connecting with making this motion is determined as set forth hereinafter.

Factual and Procedural Background

The parties to this action are Plaintiff-Counterclaim Defendant NEUROLOGICAL SURGERY, P.C. ("NSPC"), a private neurosurgery practice; Defendant-Counterclaim Plaintiff, GHI, a health insurance company; and, Additional Counterclaim Defendants ROBERT HOLTZMAN, JAI GREWAL, ALAN MECHANIC, and ARTEM VAYNMAN, members of NSPC's medical staff.

Essentially, this action involves NSPC¹ and GHI's dispute regarding payment for services rendered by NSPC to over 280 GHI Member patients. In pertinent part, NSPC's Complaint, filed on February 14, 2018, asserts that "NSPC is not a participating provider in GHI's networks, although a small number of its physicians have independent contractual arrangements with GHI to accept in-network rates" and alleges that "[t]his litigation arises primarily out of GHI's wrongful failure and refusal to reimburse NSPC – in many cases, at all, and in other cases, at anything more than a dramatically reduced rate – for medically necessary services that its surgeons provided to GHI Members." Contrastingly, GHI's Answer with Counterclaims, filed on June 15, 2020, asserts, in pertinent part, that those members of NSPC's medical staff who are parties to Participating Practitioner Agreements with GHI "agreed that if a nonparticipating provider in NSPC who shared a TIN, NPI or specialty/taxonomy code with them provided services to GHI members, the claim would be billed to GHI and reimbursed at the contracted fee schedule rates applicable under the Agreements."

Notwithstanding the parties' respective claims, relevant to this Court's determination of GHI's motion to compel discovery, is NSPC's allegation that as an out-of-network provider, "GHI was obligated to reimburse NSPC in full – or at the very least at a usual, customary, or reasonable amount – for the medically necessary services provided" to its GHI Member patients. Regarding this allegation requested disclosure of information and documentation. Specifically, GHI's First Set of Interrogatories, dated June 1, 2020, requests:

INTERROGATORY NO. 2: For each service, procedure or CPT code that is part of a Disputed Claim, explain in detail: (a) how You calculated or determined the amounts billed for that service, procedure or CPT code; (b) whether or not the billed amount is the UCR rate; and (c) whether You billed the same amount for every patient to whom You provided the same service or procedure.

¹ For ease of review, any subsequent reference to NSPC is intended to include the members of its medical staff named as counterclaim-defendants.

INTERROGATORY NO. 4: For each service, procedure or CPT code for which You billed GHI and seek payment in the Complaint, set forth the amount You billed to every other patient, insurer, health maintenance organization, independent practice association or other payor in 2014, 2015 and 2016. This Interrogatory seeks the amounts, and not the identities of patients.

INTERROGATORY NO. 5: For each service, procedure or CPT code for which You billed GHI and seek payment in the Complaint, set forth the amount You received in payment from every other patient, insurer, health maintenance organization, independent practice association or other payors for the same service, procedure and/or CPT code in 2014, 2015 and 2016. This Interrogatory seeks the amounts, and not the identities of other patients.

INTERROGATORY NO. 6: To the extent that You have or had contracts with any health insurers, health maintenance organizations, independent practice associations or other payors, set forth the amount which You agreed to accept in 2014, 2015 and 2016 for the same services or procedures (or CPT codes) that You provided to GHI Members as alleged in the Complaint.

Moreover, GHI's Demand for Production, June 1, 2020, requests:

DOCUMENT REQUEST NO. 11: All Documents concerning your calculation of the UCR Rate for each of the Disputed Claims.

DOCUMENT REQUEST NO. 12: Documents showing the calculation of Your alleged damages, including the UCR Rate(s) for the services, procedures and/or CPT Codes.

DOCUMENT REQUEST NO. 14: For each service, procedure or CPT Code that is part of a Disputed Claim, Documents sufficient to show the amount You received in payment for the same service, procedure or CPT Code from (a) every non-GHI insured patient, and (b) every insurer, health maintenance organization, independent practice association or payor other than GHI in 2014, 2015 and 2016.

DOCUMENT REQUEST NO. 15: To the extent You have or had contracts with any insurer, payor, health maintenance organization or independent practice association, Documents showing the amounts You agreed to accept for services or procedures (including CPT Codes) of the same type that You rendered to GHI Members in the Disputed Claims at issue in the Complaint.

On June 22, 2020, NSPC filed its responses. Regarding Interrogatory No. 2, NSPC asserted that:

In determining its rates, Plaintiff routinely considers data that is collected and published by FAIR Health, Inc., a national nonprofit corporation that has maintained a database of billions of billed medical services since its inception in 2009, with adjustments made based upon market forces; Plaintiff's understanding of managed care companies' level of reimbursement; Medicare reimbursement rates and rules; the complexity of the procedures involved; the direct, indirect, and overhead expenses associated with a procedure or service; the presence of competitors in the marketplace; and other relevant factors. The charges are reviewed periodically and adjusted as appropriate. Plaintiff does not specifically calculate or bill its charges at the UCR Rate, but it believes its charges to be reasonable and reflective of the UCR Rate in light of its consideration of the foregoing factors. Furthermore, the rates that NSPC billed to GHI and/or its members for the health care services at issue in this lawsuit are consistent with the rates it charged for the same services provided to other patients at or around the time those services were rendered, unless a different rate was specified by applicable law.

NSPC made similar representations in response to Interrogatory No. 4 and objected to Interrogatory Nos. 5-6. Regarding document production, Plaintiff objected to Document Request Nos. 11, 14, and 15, but stated that, subject to its objections, documents responsive to Document Request No. 12 would be provided at a later date.²

On January 25, 2021, the parties, by and through counsel, entered into a Stipulated Confidentiality and HIPAA Qualified Protective Order, which was "so ordered" on April 27, 2021. Thereafter, between March-December 2021, GHI sent at least two (2) detailed letters demanding supplemental responses to its requested disclosure. During this time period, the parties also engaged in several compliance conferences with this Court, as well as several "meet and confers," regarding GHI's requested disclosure. As addressed in greater detail hereinafter, by Notice of Motion filed on February 10, 2022, GHI moved for an order, *inter alia*, compelling disclosure. Thereafter, the parties continued to engage in negotiations and, agreed in principle, but without formal stipulation, on an initial set of CPT codes and insurers for production. However, as of August 18, 2022, the date of GHI's reply papers, substantive responses to its requested disclosure had not been produced.

GHI's Notice of Motion to Compel

By Notice of Motion filed on February 10, 2022, GHI moves for an order, *inter alia*, compelling the production of information necessary to cure NSPC's responses to Interrogatory

² The parties fail to provide this Court with NSPC's First Supplemental Response to GHI's First Notice for Discovery and Inspection. The Court notes that on February 24, 2022, Plaintiff filed a Second Supplemental Response to GHI's First Notice for Discovery and Inspection; however, because this response did not contain documents responsive to requests 11-12, 14-15 it is not addressed herein.

Nos. 2, 4-6, and Document Request Nos. 11-12, 14-15 (collectively referred to as “the requested disclosure”).

GHI’s requested disclosure corresponds to NSPC’s allegation that “GHI was obligated to reimburse NSPC in full – or at the very least at a usual, customary, or reasonable amount – for the medically necessary services provided” to its GHI Member patients. Summarily, the requested disclosure seeks information and documentation pertaining to NSPC’s methodology for billing and the amounts NSPC billed and accepted/received from other patients and insurers for the same services referenced in the Complaint.

GHI contends that its requested disclosure is intended to seek relevant information as courts have recognized that it is the amount accepted/received, not the amount billed, that is indicative of the UCR Rate for services (*see, e.g., Nassau Anesthesia Associates PC v Chin*, 32 Misc.3d 282 [Sup. Ct., Nassau Cnty., 2011], citing *Temple University Hospital, Inc. v Healthcare Management Alternatives, Inc.*, 832 A2d 501 [Pa.Super.Ct. 2003]). GHI further relies upon the decision in *Neurological Surgery P.C. v The Travelers Companies, Inc.* (Sup. Ct., Nassau Cnty., Nov. 8, 2019, Gianelli, J., Index No.: 609740/2017), wherein this Court compelled NSPC to disclose information responsive to discovery requests nearly identical to those requests made herein.

NSPC simultaneously asserts its willingness to provide disclosure in accordance with the parameters discussed by counsel while also opposing disclosure for myriad reasons. First, NSPC acknowledges that “the information sought by GHI is generally relevant,” but claims that the requested disclosure is overbroad. NSPC argues that the information sought is “more appropriately found elsewhere,” citing the database maintained by FAIR Health, Inc. – a non-profit organization that, by its own website’s description, maintains “an independent database of claims information.” NSPC further argues that GHI’s requests impose an undue burden upon it as it must manually search its records. Next, NSPC argues that the release of information regarding its network contracts and in-network rates “could harm NSPC financially . . . and could jeopardize NSPC’s ability to negotiate contract rates with payors in the future.” Finally, Plaintiff argues that because there is no “technical formula” to determine the amount billed for each service, the information and documents sought do not exist.

Analysis

Compelling Disclosure

In pertinent part, CPLR § 3101 provides for “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The Court of Appeals has consistently acknowledged the principle that the phrase “material and necessary” is subject to liberal interpretation intended to facilitate disclosure (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]). “A party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is ‘material and necessary’ – i.e., relevant (*Forman v Henkin*, 30 NY3d 656 [2018]). Contrastingly, “[d]isclosure demands may be palpably improper where they seek irrelevant information, are overbroad and burdensome, or fail to specify with reasonable particularity many of the documents demanded” (*Asprou v Hellenic Orthodox Cmty. of Astoria*, 185 AD3d 638 [2d Dep’t 2020]). Considering a motion to compel, this Court must balance

the parties' competing interests on a case-by-case basis (*Id.* at 662, citing *Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952 [1998]; *Andon v 302-304 Mott Street Associates*, 94 NY2d 740 [2000]).

At the outset, it is axiomatic that in seeking damages based upon the amount billed or at the UCR Rate, NSPC has placed into issue an evaluation of its billing and whether it comports with the UCR Rate for the services rendered. The requested disclosure is useful to this evaluation as it seeks information regarding NSPC's billing methodology, as well as the amounts "actually received" by NSPC, which is indicative of the UCR Rate (*Nassau Anesthesia Associates PC*, 32 Misc.3d at 286, citing *Temple University Hospital, Inc.*, 832 A2d 501. Thus, GHI has satisfied its threshold requirement of demonstrating relevance.

Moreover, contrary to NSPC's claims that the requested disclosure is overbroad, GHI's requests state with sufficient particularity the information and documentation sought, which requests are limited in scope and duration to the services and dates referenced in the Complaint (i.e., 2014, 2015, 2016).

Insofar as NSPC may refer to FAIR Health, Inc.'s database, that database is not, in and of itself, dispositive of the UCR Rate. By NSPC's own response to Interrogatory Nos. 2 and 4, the information it procures from FAIR Health, Inc.'s database is subject to a series of other factors. Thus, the existence of the FAIR Health, Inc. database alone does not obviate the requested disclosure herein.

Similarly, neither the absence of a "technical formula," nor the conclusory claim that GHI Members were billed in a consistent manner as other patients for the same services is sufficient to circumvent the requested disclosure herein.

Further, notwithstanding NSPC's repeated assurances that disclosure was forthcoming, GHI's requests have been outstanding for three (3) years. NSPC has been afforded ample opportunity to compile its disclosure, rendering any claim of undue burden unavailing.

Finally, aside from its vague, speculative assertions of harm, NSPC fails to identify any confidentiality or anti-trust concerns that have not been resolved by the Protective Order that has been in place since April 2021. To the extent that NSPC's disclosure stands to compromise its compliance with any confidentiality agreements between its in-network providers or its compliance with anti-trust policies, NSPC is granted leave to file an application with this Court to further expand the Protective Order to address any specific concerns that arise.

Therefore, balancing the parties' competing interests, GHI is entitled to an order compelling the production of information necessary to cure NSPC's responses to Interrogatory Nos. 2, 4-6, and Document Request Nos. 11-12, 14-15, to the extent such disclosure complies with the So Ordered Stipulated Confidentiality and HIPAA Qualified Protective Order of this Court (Mahon, J.) entered on April 27, 2021.

Penalties for Non-Compliance

In pertinent part, CPLR § 3126 authorizes this Court to impose sanctions for failure to comply with its order to compel disclosure. NSPC's dilatory approach to discovery, which spans three (3) years, is evident. Consequently, in the event NSPC does not comply with this Order within sixty (60) days of its notice of entry, its Complaint will be dismissed, with prejudice.

Attorney's Fees

Insofar as GHI seeks an award for attorney's fees in connection with filing this motion, it fails to include any substantive argument in support thereof; accordingly, its request is denied, without prejudice for leave to renew.

Accordingly, it is

ORDERED, that GHI's motion to compel the production by Plaintiff of all information necessary to cure its inadequate responses to GHI's outstanding Interrogatory Nos. 2, 4-6, and Document Request Nos. 11-12, 14-15 is **GRANTED** to the extent such disclosure complies with the So Ordered Stipulated Confidentiality and HIPAA Qualified Protective Order of this Court (Mahon, J.) entered on April 27, 2021; and, it is

ORDERED, that NSPC must produce its responses within sixty (60) days of notice of entry of this Order; and, it is

ORDERED, that in the event that NSPC does not comply with this Order within sixty (60) days of its notice of entry, its Complaint, filed on February 14, 2018, will be dismissed, with prejudice; and, it is

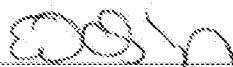
ORDERED, that GHI's request for an award of counsel fees is **DENIED** without prejudice; and, it is

ORDERED, that all requests for relief not addressed herein are **DENIED**.

This shall constitute the Decision and Order of the Court.

Dated: June 15, 2023
Mineola, New York

ENTER:



HON. EILEEN C. DALY-SAPRAICONE, J. S. C.

ENTERED

Jun 16 2023

NASSAU COUNTY
COUNTY CLERK'S OFFICE