

Moline v Johnson & Johnson

2024 NY Slip Op 32040(U)

June 17, 2024

Supreme Court, New York County

Docket Number: Index No. 153220/2024

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART **13**

Justice

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DR. JACQUELINE MOLINE,

Petitioner,

- v -

JOHNSON & JOHNSON, JOHNSON & JOHNSON
HOLDCO (NA) INC., JANSSEN PHARMACEUTICALS,
INC., KENVUE, INC., LLT MANAGEMENT

Respondent.

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INDEX NO. 153220/2024

MOTION DATE 04/05/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

Upon the foregoing documents, and after oral arguments, it is ordered that the instant petition (mot. seq. no. 001), seeking to quash an out of state subpoena, is decided below along with the motions filed in a related proceeding as indicated below.

Petitioner, Dr. Jacqueline Moline, commenced the instant proceeding seeking to quash an out of state subpoena issued by respondents Johnson & Johnson, Johnson & Johnson Holdco (NA) Inc., Janssen Pharmaceuticals, Inc., Kenvue, Inc., and LLT Management (hereinafter collectively referred to as "J&J"), dated March 14, 2024, in relation to an action pending in New Jersey, *Clark and Clark v Cyprus Amax Minerals Co., et. al.*, Docket No. MID-L-003809-18 (hereinafter referred to as the "New Jersey Action"). Respondents J&J cross-move herein to compel the production of the keys which contain the identities of the individuals studied by petitioner Dr. Moline in two articles, "Mesothelioma Associated with the Use of Cosmetic Talc" published in 2020 (hereinafter referred to as the "2020 Moline Article") and "Exposure to Cosmetic Talc and Mesothelioma" published in 2023 (hereinafter referred to as the "2023

Moline Article”), and to compel the deposition of petitioner Dr. Moline. In a related proceeding, *In re Johnson & Johnson, et. al. to Compel Northwell Health Inc. to Produce Documents in Response to CPLR § 3119 Subpoena* (hereinafter referred to as the “Related Proceeding”), Index No. 153527/2024, mot. seq. no. 001, in which J&J are the petitioners, they move to compel Northwell Health, Inc., as respondent therein, to produce the identities of the individuals studied in the 2020 Moline Article and the 2023 Moline Article. In such related proceeding, J&J further move to consolidate these two proceedings. *See* Related Proceeding, mot. seq. no. 002. All three motions in both proceedings are addressed and decided herein.

Preliminarily, the Court notes that J&J move to consolidate the Related Proceeding with the instant proceeding, arguing that the out of state subpoena at issue herein relates to both Northwell Health and Dr. Moline, as an employee of Northwell Health. CPLR §602(a) states that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion ... may order the actions consolidated”. No opposition has been filed. It is undisputed that both proceedings arise out of the same out of state subpoena, involve the same two medical studies, and involve many of the same parties. Thus, J&J’s unopposed motion to consolidate is granted to the extent that these proceedings and motions are joined for consideration and decision. Each proceeding shall maintain separate pleadings, captions, and index numbers.

With regards to the two remaining motions, mot. seq. no. 001 in the instant proceeding and mot. seq. no. 001 in the Related Proceeding, J&J argues that the out of state subpoena has been signed by a justice in New Jersey, the Honorable Ana C. Viscomi. According to J&J, “when a court of another state has already reviewed the subpoena, a New York court should afford that court’s evaluation the widest possible latitude.” Related Proceeding, mot. seq. no.

001, Memorandum of Law in Support of Petitioners Johnson & Johnson Et Al.'s Order to Show Cause to Compel Northwell Health Inc. to Produce Documents in Response to a CPLR § 3119 Subpoena, p. 13 (internal quotations and citations omitted). However, such argument is inapposite as Judge Viscomi stated at a conference in the New Jersey Action that she "want[s] to be clear... [that she has] not ordered the production of the keys. The question right now is the location of the keys." Related Proceeding, mot. seq. no. 001, Aff. of Michael R. Gordon, dated May 7, 2024, Exh. 5, NYSCEF doc. no. 70, Asbestos Litigation Transcript of Conference, dated March 4, 2024, p. 19, ln.18-20. Judge Viscomi went on to explicitly state that she "never resolved the issue on the merits because [she thought] that notice had not been given to the potential keeper of the keys who would then address any legal arguments relative to the position. That information is protected by HIPAA." *Id.* at p. 19, ln. 24 - p. 20, ln. 3. As such, J&J's contention that the subpoena was already reviewed on the merits by another state fails. CPLR §3119(f) states that "consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it". As the out of state subpoena has not been considered on the merits, this Court must review the subpoena anew and make its own determination on the merits.

According to J&J, the out of state subpoena must be honored, and Northwell Health and Dr. Moline must be compelled to produce the subpoenaed documents, because New York has a policy favoring broad discovery and the production of all documents that are material and necessary. J&J further argues, *inter alia*, that the identity of litigation plaintiffs which were included in the 2020 Moline Article and the 2023 Moline Article are not protected by HIPAA in that the individuals put their medical condition at issue by filing a lawsuit, Northwell Health has allegedly failed to cite any rules stating that the names of the individuals are protected health

information shielded by HIPAA, and that the names of the individuals is critical to J&J's defense in the New Jersey Action.

With regard to J&J's argument that no cited rules state that the names of the individuals are protected health information shielded by HIPAA, such argument fails. Here, Dr. Moline conducted two secondary research studies and published the two articles at issue herein based upon the secondary research she conducted. The Code of Federal Regulations states that certain research is exempt from HIPAA under specific circumstances. §46.104(d)(4) of the Code of Federal Regulations states that

“[s]econdary research for which consent is not required: Secondary research uses of identifiable private information or identifiable biospecimens, if at least one of the following criteria is met: ... (i) [t]he identifiable private information...are publicly available; (ii) [i]nformation, which may include information about biospecimens, is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers linked to the subjects, the investigator does not contact the subjects, and the investigator will not re-identify subjects”. 6 CFR 46.104(d)(4)(i) and (ii).

Here, the subjects of both of Dr. Moline's secondary research studies did not consent to participate in the studies. In conducting the secondary research, and in publishing the two articles, Dr. Moline obscured the identities of the individuals in the study as was required by federal regulations. Moreover, Dr. Moline and Northwell Health are objecting to the discovery sought herein precisely so that they do not re-identify the subjects to the study, which is explicitly required of them in order to be an exception to HIPAA.

However, even if J&J's argument regarding the HIPAA protections is correct, the requested information is still not discoverable. In support of their application to compel discovery, J&J relies heavily upon a federal action, *Bell v Am. Int'l. Indus., et. al.*, 627 F.Supp.3d 520 (M.D.N.C. 2022). According to J&J, in the *Bell* case, the plaintiff therein was revealed to have been one of the individuals studied for the 2020 Moline Article in which Dr. Moline stated

the only source of asbestos exposure for the 33 individuals in the study was through talcum powder. J&J argues that the federal court in the *Bell* case found that plaintiff Bell “reported to a state agency that she did have another known asbestos exposure... [and given the 2020 Moline Article’s] express premise that all individuals studied had no known alternative asbestos exposures, the fact that one of the individuals claimed otherwise has direct bearing on the study’s credibility.” *Id.* at 530. The Court notes that the issue of compelling the disclosure of the identities sought herein was not decided in the *Bell* action. Rather, J&J argues that in another federal action, *In Re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Product Liability Litigation*, MDL No. 2738 (MAS)(RLS), the Special Master therein relied on the *Bell* decision in stating that “[i]f the articles are relied upon by plaintiffs, the articles should be fair game for discovery.” Related Proceeding, Affirmation of Thomas P. Kurland in Support of Petition to Enforce Subpoena, Exh. 8, NYSCEF doc. no. 14, *In Re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2738, Special Master Order No. 19 (Deciding Plaintiff’s Motion for Protective Order Regarding Subpoena Directed at Northwell Health, Inc.), p. 6. The Special Master therein continued to state that “[i]f plaintiff’s experts rely on Moline’s study, the SM agrees with Bell that, ‘[t]he absence of any specific information on the identities of the individuals studied precludes inquiry into the basis of the factual underpinning of no known exposure to asbestos other than talcum powder’ ”. *Id.* at p. 7.

Although the Court, like the court in *Bell*, is troubled by the potential discrepancy in the studies at issue herein, which goes to the credibility of such studies, the instant out of state subpoena should only be enforced if it meets the standards for discovery. Here, J&J argues that these two federal actions make clear that the discovery sought herein, and the subpoena they are

currently seeking to enforce, is relevant to their defense in the New Jersey Action. Moreover, J&J argues that “there is no question that plaintiffs’ experts [in the New Jersey Action] rely on Dr. Moline’s articles extensively.” Related Proceeding, mot. seq. no. 001, Memorandum of Law in Support of Petitioners Johnson & Johnson Et Al.’s Order to Show Cause, *supra*, fn. 3. However, despite J&J’s counsel’s bald statement that the plaintiff’s experts in the New Jersey Action rely extensively on Dr. Moline’s articles, J&J has wholly failed to support and establish such statement. In fact, it is undisputed that Dr. Moline is not listed as an expert being called by plaintiff in the New Jersey Action and her two articles are not being used as evidence by such plaintiff. Here, similar to the holding of the Special Master in *In Re Johnson & Johnson Talcum Powder Product Marketing, supra*, “J&J has not shown that plaintiffs’ experts rely on Moline’s articles to support their expert opinions. At best, the record shows that plaintiffs’ experts merely considered Moline’s articles along with a wealth of other material in connection with their reports. ... The mere fact that Moline’s articles may have been considered by plaintiffs’ experts and included on a list of materials received and perhaps reviewed does not equate to a reliance on the articles.” Related Proceeding, mot. seq. no. 001, NYSCEF doc. no. 14, Special Master Order No. 19, *supra* at p. 7. As such, J&J has failed to establish that the 2020 Moline Article and the 2023 Moline Article are so heavily relied upon by plaintiff’s experts in the New Jersey Action that the identities of the subjects in such medical studies must be compelled even absent the use of the actual articles, and of Dr. Moline, at the trial in the New Jersey Action. While J&J argue that the names of the individuals is critical to their defense, J&J has failed to establish that absent such names, J&J is unable to defend the New Jersey Action. There is no indication that J&J could not obtain their own experts to review prior litigation plaintiffs’ cases to support their defense. There is also no indication that J&J could not obtain experts to oppose the reports of the

experts that the plaintiff in the New Jersey Action will actually rely upon. Here, the requested documents are too attenuated from the proofs relied upon by the plaintiff in the New Jersey Action. Thus, Dr. Moline's order to show cause seeking to quash the out of state subpoena is hereby granted. As the out of state subpoena is hereby quashed, J&J's cross-motion seeking to compel compliance with such out of state subpoena, and seeking a deposition of Dr. Moline, is hereby denied. Similarly, J&J's order to show cause against Northwell Health seeking to compel compliance with the out of state subpoena is also denied.

Accordingly, it is

ORDERED that J&J's motion to consolidate is granted as indicated above; and it is further

ORDERED that Dr. Moline's order to show cause to quash the out of state subpoena is hereby granted; and it is further

ORDERED that J&J's cross-motion seeking to enforce compliance with the out of state subpoena, and seeking a deposition of Dr. Moline, is hereby denied; and it is further

ORDERED that J&J's order to show cause against Northwell Health seeking to enforce compliance with the out of state subpoena is hereby denied; and it is further

ORDERED that within 30 days of entry, Dr. Moline shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

6/17/2024

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE