

Murphy v Kaleida Health
2024 NY Slip Op 35398(U)
August 30, 2024
Supreme Court, Erie County
Docket Number: Index No. 806545/2020
Judge: J. David Sampson
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JERRY MURPHY,

Plaintiff

ORDER

v.

Index No. 806545/2020

KALEIDA HEALTH d/b/a
MILLARD FILLMORE SUBURBAN HOSPITAL

Plaintiff, Jerry Murphy, having moved this Court by Notice of Motion dated July 19, 2024, for an order striking the defendant's answer; and the defendant, Kaleida Health, d/b/a Millard Fillmore Suburban Hospital, having cross-moved by Notice of Cross Motion dated August 15, 2024, for a protective order and affirmative relief pertaining to correspondence plaintiff sent to a treating physician; and

UPON reading the Attorney Affidavit of Jason M. Telaak, sworn to July 19, 2024, with attached exhibits; and the Attorney Affidavit in Opposition to Motion and in Support of Cross Motion of Michael J. Roach, sworn to August 15, 2024, with attached exhibits; and the Reply Affidavit of Jason M. Telaak, sworn to August 20, 2024; and

UPON appearances by Jason M. Telaak, from Campbell & Associates, on behalf of the plaintiff, and Bryan P. Kroetsch, from Connors, LLP, on behalf the defendant, for oral argument of the motion, and having had due deliberation thereon, the Court makes the following findings:

FACTS

The complaint alleges that the plaintiff, Jerry Murphy, was a patient at Millard Fillmore Suburban Hospital (the hospital) from November 7, 2017 through November 27, 2017, and that as

a result of defendant's negligence, he developed significant pressure ulcers.¹

After the deposition of former Kaleida Health nurse manager Nichole Melcher, RN, plaintiff served a letter request for the staffing plan, the staffing schedule, and the Kronos time records for hospital ICU employees in November 2017 (Attorney Affidavit of Jason M. Telaak, sworn to July 19, 2024 [Telaak affidavit], exhibit E [Nov. 3, 2023 correspondence]). Nurse Melcher testified that there were 20 ICU beds and that the staffing plan provided for one nurse for every two patients, but that the ratio varied based upon the acuity of the patients (Telaak affidavit, exhibit D [videotaped examination before trial of Nichole Melcher, RN, Nov. 1, 2023], pp 18-19). According to Nurse Melcher, the staffing plan and schedule would show how the ICU was staffed in November 2017, and the Kronos records would show the dates and times worked by ICU employees, who included nurses, patient care assistants and medical office assistants (*id.* at pp 20-24).

Defendant timely objected to plaintiff's request for the ICU staffing plan, staffing schedule and Kronos records on several grounds, including that they were palpably improper, and not reasonably calculated to lead to the discovery of relevant evidence (Telaak affidavit, exhibit F [Dec. 1, 2023 correspondence]). Defendant also objected on the basis that there was no allegation of improper staffing in the bill of particulars (*id.*).

The dispute over the staffing records was discussed at Court conferences in February, March, May and June, 2024. Between the May and June Court conferences, counsel for the parties conferred to try to resolve their disagreement about the discoverability of these records, but did not reach an accord. Plaintiff served an amended verified bill of particulars on or about July 15, 2024, which added the allegation that defendant was negligent "in failing to properly hire, staff, train,

¹ Mr. Murphy was reportedly admitted to the hospital's intensive care unit (ICU).

educate, supervise and/or monitor” its employees (Telaak Affidavit, exhibit C [plaintiff’s amended verified bill of particulars], para 1). Plaintiff filed and served his motion seeking to strike defendant’s answer for its failure to provide the requested discovery just four days later, on July 19, 2024.

LAW & ANALYSIS

Plaintiff’s motion asks the Court to strike defendant’s answer based upon its alleged willful failure to comply with plaintiff’s discovery demands. The striking of a pleading is a drastic remedy imposed in limited circumstances, such as a willful failure to comply with a court order directing disclosure (*see* CPLR 3126 [3]; *Williams v Ryder TRS, Inc.*, 29 AD3d 784, 785 [2d Dept 2006] [striking of answer is drastic remedy, necessitating a showing of a willful, contumacious and deliberate failure to comply with disclosure]).

Defendant served a timely response objecting to plaintiff’s demand. At the time the discovery demand was served, when defendant served its objections, and when counsel met and conferred, there were no allegations that the defendant failed to adequately staff the ICU. The Court finds that defendant had a good faith basis for its objection that the materials requested were not reasonably calculated to lead to the discovery of relevant evidence. Plaintiff has not demonstrated that defendant’s timely objection was contumacious. As such, the motion to strike defendant’s answer will be denied.

Plaintiff’s motion seeks alternatively other “appropriate relief”, to include compelling defendant to produce the staffing plan, schedule and Kronos records. The starting point for the Court’s analysis is CPLR 3101 (a), which provides that “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.” The Court of Appeals has

interpreted “[t]he words, ‘material and necessary’ . . . liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

The Court finds that staffing plan, schedule and Kronos records are not material and necessary to the prosecution of this matter. To prevail in this medical malpractice action, plaintiff must prove that defendant departed from good and accepted medical practice in connection with his care, and that those departures caused him injury (*Rosario v Our Lady of Consolation Nursing & Rehabilitation Care Ctr.*, 186 AD3d 1426, 1427 [2d Dept 2020]). Plaintiff alleges that he developed a pressure ulcer as a result of defendant’s negligence. This is not a situation where plaintiff suffered an acute injury on a specific day, such that staffing on that date may be relevant (*see Parise v Good Samaritan Hosp.*, 36 AD3d 678 [2d Dept 2007] [plaintiff who alleged that defendant failed to obtain proper consultations was entitled to discovery of healthcare providers who were available for consultation during her emergency department admission]; *Gourdine v Phelps Mem. Hosp.*, 40 AD2d 694 [2d Dept 1972] [plaintiff entitled to discovery of names of nurses on duty in the recovery room where she allegedly sustained injuries]). A pressure ulcer develops over time. The names of the nurses who participated in plaintiff’s care are included in his chart, which has been produced (*see Clement v Kateri Residence*, 60 AD3d 527, 528 [1st Dept 2009] [information about employees who had contact with plaintiff at nursing home was material and necessary where negligent hiring cause of action was asserted]).²

The Court finds that the staffing records are not material and necessary to prosecution of

² According to counsel, plaintiff has already deposed four nurses who participated in his care, in addition to the nurse manager.

plaintiff's allegation that he developed a pressure ulcer due to defendant's negligence.³ Without the patient census, which has not been requested, the staffing records are meaningless. In addition, because a pressure ulcer develops over time, the Court finds that the daily staffing records are not reasonably calculated to lead to the discovery of relevant evidence. Finally, plaintiff developed a pressure ulcer regardless of whether or not the ICU was adequately staffed. Defendant has not asserted as an affirmative defense that it was not negligent because the ICU was adequately staffed. To the extent plaintiff's motion seeks as alternative relief to compel defendant to produce ICU staffing records, it will be denied.

Defendant's cross motion seeks a protective order with respect to plaintiff's demand for staffing records. A protective order may be issued to limit disclosure and to prevent unreasonable annoyance, disadvantage or other prejudice (CPLR 3103 [a]). "Trial courts are vested with broad discretion to issue appropriate protective orders to limit discovery" (*Brignola v Pei-Fei Lee, M.D., P.C.*, 192 AD2d 1008, 1009 [3d Dept 1993]).

Defendant argues that a protective order should be issued because plaintiff's discovery demand seeks information about individuals not involved in plaintiff's care, it is not limited to the dates of his hospital admission, and it has already provided all material and necessary information. Defendant characterizes plaintiff's demand for the staffing records as a fishing expedition. The Court agrees.

The Court finds that because the staffing records are not likely to lead to the discovery of

³ Plaintiff cites *Grant v PALJR, LLC*, 64 AD3d 750 (2d Dept 2009) in support of his motion. In *Grant*, the Second Department compelled the defendant nursing home to produce staffing records. There is no indication in the decision what staffing records were requested (e.g. policies) or what injuries plaintiff's decedent allegedly suffered (other than wrongful death).

relevant evidence, the demands for these records are improper. In order to prevent disadvantage to the defendant, the Court will exercise its discretion and grant its cross motion seeking a protective order (*Provident Life & Cas. Ins. Co. v Brittenham*, 284 AD2d 518, 518 [2d Dept 2001] [“The supervision of discovery, and the setting of reasonable terms and conditions for disclosure, are within the sound discretion of the Supreme Court”]).

Finally, defendant’s cross motion seeks an order requiring plaintiff to rescind letters sent to his healthcare providers and preventing him from sending them any further litigation-related correspondence. Defendant’s request derives from a letter plaintiff sent to at least one of his healthcare providers (Attorney Affidavit in Opposition to Motion and in Support of Cross Motion of Michael J. Roach, sworn to Aug. 15, 2024, exhibit C [correspondence dated May 8, 2024]). In his letter, plaintiff writes that if the healthcare provider is contacted by the attorneys for defense counsel he “would prefer that you choose not to speak with them. I value and wish to protect the confidentiality of our physician-patient relationship” (*id.*). The letter goes on to state “[s]hould you choose to disregard my request, I ask that you notify me of the date and time of your conference with defense counsel so that I may attend the interview” (*id.*).

Defendant argues that by bringing suit, plaintiff has waived the physician-patient relationship and that his letter is an attempt to circumvent the Court of Appeals’ holding in *Arons v Jutkowitz*, 9 NY3d 393 (2007), which affirmed a defense attorney’s ability to conduct ex parte interviews with willing treating physicians. Defendant characterizes plaintiff’s letter as threatening and asks this Court to issue an order requiring plaintiff to rescind any litigation-related correspondence he sent to treating physicians for whom speaking authorizations have been requested and precluding plaintiff from sending any further litigation-related correspondence to his healthcare providers. The Court

will grant defendant's request, in part.

The Court of Appeals held in *Arons, supra*, that upon request, an attorney for a party is entitled to authorizations permitting the adverse party's treating physicians to speak to the attorney when the adverse party's medical condition has been placed in issue. Since that time, courts have been tasked with deciding whether conditions placed on speaking authorizations or in related correspondence are consistent with *Arons* (see e.g. *Charlap v Khan*, 41 Misc 3d 1070 [Sup Ct, Erie County 2013]). When a dispute arises with regard to admonitions on speaking authorizations or related correspondence, "its resolution falls comfortably within the court's broad discretion to control discovery" (*Sims v Reyes*, 195 AD3d 133, 137 [4th Dept 2021] [internal citation omitted]).

The Court finds the above-referenced language in the letter sent by plaintiff to be confusing, misleading and intimidating (compare *Miller v Kingston Diagnostic Ctr.*, 33 Misc 3d 496, 498 [Sup Ct, Ulster County 2011] ["Here, the letter from plaintiff's counsel is not threatening or intimidating"]). By bringing suit, plaintiff has waived the physician-patient privilege with regard to those medical conditions affirmatively placed in issue (*Dillenbeck v Hess*, 73 NY2d 278, 287 [1989]). Based upon this waiver, the Court finds the language stating that plaintiff "wish[es] to protect the confidentiality of our physician-patient relationship" to be both confusing and misleading. The Court also finds the language "[s]hould you choose to disregard my request" to be intimidating (compare *Porcelli v Northern Westchester Hosp. Ctr.*, 65 AD3d 176, 185 [2d Dept 2009] [admonitions placed on speaking authorizations by plaintiff's counsel were facially neutral and consistent with *Arons*]). For these reasons, the Court will exercise its discretion and grant that portion of defendant's cross motion seeking an order requiring plaintiff to send a letter rescinding all prior letters sent to his healthcare providers containing this language.

The Court declines to issue an order preventing plaintiff from sending any further litigation-related correspondence to this healthcare providers. The Court finds defendant's request to be overly broad and to impinge on plaintiff's freedom of speech.⁴ In plaintiff's letter to his healthcare providers rescinding the earlier letter, plaintiff may include language consistent with *Arons* and this Court's decision.

Based upon the foregoing, it is hereby

ORDERED, that plaintiff's motion seeking staffing records is denied; and it is further

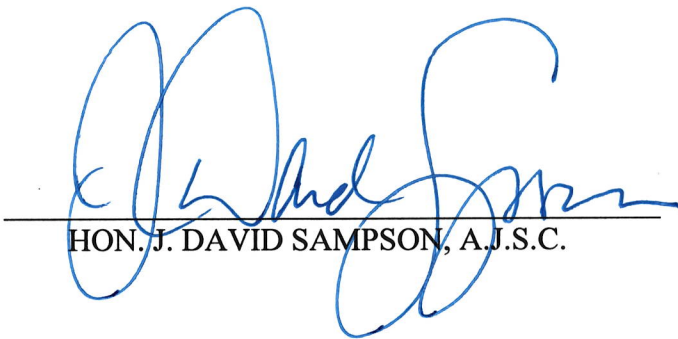
ORDERED, that defendant's cross motion is granted, in part, as follows:

1. A protective order for the staffing records is granted; and
2. Plaintiff is directed to send correspondence to his treating physicians rescinding all prior letters sent containing the language that the Court has deemed to be confusing, misleading and/or intimidating;

and it is further

ORDERED, that the portion of defendant's cross motion seeking to prevent plaintiff from sending further litigation-related correspondence to his treating physicians is denied.

DATED: August 30, 2024



HON. J. DAVID SAMPSON, A.J.S.C.

⁴ Granting this aspect of relief would appear to prevent plaintiff from sending the very letters rescinding his earlier letters requested by defendant or writing a provider an email confirming that the litigation had ended.