

Okon v Rezek
2024 NY Slip Op 35685(U)
September 27, 2024
Supreme Court, Onondaga County
Docket Number: Index No. 004322/2022
Judge: Rory A. McMahon
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STATE OF NEWYORK
SUPREME COURT COUNTY OF ONONDAGA

KRYSTAL OKON, and BRETT OKON,
Plaintiffs,

vs.

DECISION ON MOTION
Index No: 004322/2022

ALIA REZEK, CNM;
CATHYJ. BERRY, M.D., P.C. d/b/a
CATHYJ. BERRY, M.D. & ASSOCIATES;
Defendants.

Defendant brought a motion seeking an order precluding Plaintiff from offering any evidence at trial of any text messages by Plaintiff regarding purported statements made by Defendant(s) regarding the underlying treatment at issue. Defendant further seeks redaction of the Plaintiff's January 2021 medical records with regard to the same purported statements.

The statement at issue is one allegedly made by Defendant Rezek during a visit on December 22, 2020. Specifically, Plaintiff was complaining of shortness of breath. Plaintiff contends that she was told by Defendant Rezek that the shortness of breath she was experiencing was the result of her "organs shifting back into place" after the c-section birth of her daughter. It is that alleged statement which is the basis for the motions herein. Specifically, Plaintiff texts recited the statement allegedly made by Defendant Rezek that Plaintiff's shortness of breath was caused by her "organs shifting back into place." Hearsay is an out of court statement of a declarant offered to prove the truth of the matter asserted. Guide to New York Evidence §8. The Court finds that the statement that the shortness of breath Plaintiff was experiencing was due to the organs shifting back into place is not hearsay. It is not offered to prove that the organs were, in fact, shifting back into place. Instead, in this case, the witness' state of mind is relevant

to the issue of treatment and “the witness may testify to out-of-court statements made by others which would indicate circumstantially what the witness believed at that time.” [Ferrara v. Galluchio, 5 N Y 2d 16(1958)] Such an out-of-court statement is not offered assertively, to prove the truth of the matter asserted (ie. that the shortness of breath was caused by the organs shifting), just that the statement was allegedly made. [Bergstein v. Board of Education, 34 N.Y.2d 318, 324 (1974)] Therefore, the statement is not hearsay at all. [Id.]

We next move onto the issue of whether the texts themselves which contain the same alleged statements are hearsay. With respect to the texts, Plaintiff’s counsel states that the texts constitute a present sense impression. A present sense impression exception “permits a court to admit hearsay testimony of a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter” [L.M. v. Consol. Edison Co. of N.Y., 2021 N.Y. Misc. LEXIS 2640 (2021)]. There is nothing in the record which would indicate that the texts at issue were sent so immediately after the visit, that they could be considered a present sense impression. Plaintiff’s EBT testimony simply offers the time of the alleged texts, which range from a text to Linda Wicks at 2:48 p.m. to (at or around) 5:23 p.m., to Plaintiff’s mother. There is no context offered as to the time of the Plaintiff’s December 22, 2020 appointment or the time frame between the alleged statement by Defendant Rezek and the texts in question. Therefore, without more, there is no way for the Court to determine whether the texts were sent immediately after the statement was made, as required to be a present sense impression.

The Plaintiff next states that the texts may constitute the hearsay exception of State of Mind. “The mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the hearer or of the declarant.” **Prince-Richardson on**

Evidence §8-1-06. The statements, were made without regard to the truth of the assertion (ie that the organs were shifting back), but rather that the Plaintiff was relieved by the explanation allegedly given. In Ferrara v. Galluchio, 5 N.Y.2d 16, 19-20 (1958), “the plaintiff’s statement that the dermatologist told her she should have the shoulder checked every six months because there was a possibility that cancer might develop was not adduced to establish the fact that the site of the burn might become cancerous.” Instead, it was introduced to establish “a basis for her mental anxiety.” Id. The Court found that such testimony was not objectionable hearsay and the statement was found to be properly permitted in evidence. Id. Again, here, the statement is not adduced to establish that the organs were shifting but merely to establish the Plaintiff’s state of mind at the time (ie not seeking further treatment until the Well Now visit in January of 2021).

In People v. Ortega, 15 NY3d 610(2010) the Court of Appeals found that “the hearsay rule should not exclude an out of court statement which includes another out of court statement when each part of the combined statements is separately admissible.” [**Guide to New York Evidence, §8.21, Hearsay or Non hearsay within Hearsay**]. Here, the initial statement is not hearsay and the text messages come within a recognized hearsay exception. Therefore, the Court will allow for the text messages to come in.

Defendants also seek to redact the Plaintiff’s January 2021 medical records relative to the same alleged statement. The Court finds that the statements contained in the January 2021 medical records were made for the purpose of treatment and diagnosis and, as such, are appropriate under the hearsay exception for diagnosis and treatment. [Davidson v. Cornell, 132 NY 228, 237-238 (1892)]. Plaintiff’s statements to her medical providers in January 2021, including statements she alleges Defendant Rezek made on December 22, 2020 regarding “organs shifting back,” clearly fall within the hearsay exception as they were used for the purpose

of diagnosis and treatment. Therefore, the motion to redact the medical records is also denied.

NOW, on motion of this Court, it is

ORDERED, that Defendant's motion for an order precluding Plaintiff from offering text messages regarding statements purportedly made by Defendant(s) regarding treatment is hereby DENIED, and it is further

ORDERED, that Defendant's motion for an order seeking redaction of the Plaintiff's January 2021 medical records with regard to the same purported statements is hereby DENIED.

ENTER:

Dated: September 27, 2024



HONORABLE RORY A. McMAHON, JSC