

Peck v Chung

2025 NY Slip Op 31493(U)

April 14, 2025

Supreme Court, New York County

Docket Number: Index No. 805430/2023

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**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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ROBERT PECK and SHARI SVENINGSON,

Plaintiffs,

- v -

SUSIE CHUNG, M.D., SUSIE CHUNG M.D., P.C.,
MAURICE RACHKO, M.D., MOUNT SINAI DOCTORS, and
MOUNT SINAI MEDICAL CENTER, also known as MOUNT
SINAI HEALTH SYSTEM,

Defendants.

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INDEX NO. 805430/2023

MOTION DATE 03/27/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for DISCOVERY.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, nursing home negligence pursuant to Public Health Law §§ 2801-d and 2803-c, and loss of consortium, the plaintiffs move pursuant to CPLR 3124 to compel the defendants Susie Chung, M.D., and Susie Chung, M.D., P.C. (together the Chung defendants), to provide an audit trail and metadata in connection with the medical records that they generated with respect to the care and treatment of the plaintiff Robert Peck (hereinafter the patient). The Chung defendants oppose the motion. The motion is granted to the extent that the plaintiffs may take the deposition of a person employed by or affiliated with the Chung defendants, who manages and has knowledge of information technology and recordkeeping referable to the generation, accessing, and tracking of access to and amendment of the Chung defendants' electronic medical records. Such deposition shall be limited to three hours, and further limited to questions concerning the details regarding the generation, accessing, and tracking of the access to and amendment of those records. The motion is otherwise denied, albeit without prejudice to renewal after the plaintiffs have taken the depositions both of that

witness and of the Chung defendants themselves, and upon a showing that the depositions did not yield sufficient information concerning the integrity and veracity of those records.

According to the plaintiffs, the relevant electronic medical records of the Chung defendants that the plaintiffs had obtained, both prior to commencing this action and in the course of discovery, revealed certain disparities and inconsistencies. The plaintiffs' attorney asserted that the "plaintiffs have developed a good faith concern about the completeness of what is asserted to be Dr. Chung's medical chart and a good faith basis to question whether there was a material alteration of Mr. Peck's medical chart after a copy was requested." Specifically, he alleged that, "[f]or example, the record purported by counsel to be a complete record of Defendant Chung's chart (Version 2) omits at least three separate office visits that had been included in the chart provided prelitigation (Version 1), including office visits from July 5, 2018, January 8, 2019, and July 22, 2019, laboratory results from those dates, and laboratory results from February 13, 2018." In addition, he asserted that,

"[o]n October 29, 2024 (the night before Plaintiff Robert Peck's deposition), counsel for Dr. Chung sent a medical note dated August 25, 2020, which had not been provided previously (despite Chung's counsel's inaccurate statement in his cover letter that it was 'a note of Dr. Chung's which I believe was provided to you previously'), adding further reasonable doubt as to the accuracy and completeness of Chung's chart. . . . Unlike all the other records already provided, this office note was not electronically signed."

To establish entitlement to an audit trail or metadata referable to electronic medical records, a plaintiff must demonstrate that the information to be obtained therefrom is material, relevant, or necessary to the prosecution of the action, and must show, "beyond mere conjecture, that there is relevant information to be gleaned from metadata and audit trails which cannot be obtained from other sources, including the medical records and deposition testimony," a showing that the court concludes they have yet to make here (*Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], *7, 2019 NY Misc LEXIS 1906, *16 [Sup Ct., N.Y County, Apr. 12, 2019] [Silver, J.], *affd* 191 AD3d 563 [1st Dept 2021]; see *Dennehy v Harlem Hosp. Cent.*, 2018 NY Slip Op 32496[U], 2018 NY Misc LEXIS 4370, *13

[Sup Ct, N.Y. County, Oct. 2, 2018]; *Czyz v Scherl*, 2017 NY Slip Op 31465[U], 2017 NY Misc LEXIS 2651, *8 [Sup Ct, N.Y. County, Jul. 10, 2017] [Shulman, J.]; *see generally Aguilar v Immigration & Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, 255 FRD 350, 354 [SD NY 2008]; *cf. Vargas v Lee*, 170 AD3d 1073 [2d Dept 2019] [on renewal, plaintiff sustained the threshold burden of demonstrating that the portion of the audit trail at issue was reasonably likely to yield relevant evidence]). As the Appellate Division, First Department, explained in *Punter*, “the reversal of a Kings County trial order [in *Vargas v Lee* denying production of an audit trail] mentioned in the order on appeal did not effect a change in the law; the Second Department simply applied long settled principles of discovery” (*Punter v New York City Health and Hosps. Corp.*, 191 AD3d at 563). For a court to direct the production of an audit trail before other discovery methods are exhausted, a plaintiff must make a good faith showing that the subject electronic records clearly had pages missing or lost, or were altered or amended (see *Punter v New York City Health and Hosps. Corp.*, 2019 NY Slip Op 31065[U], *7-8, 2019 NY Misc LEXIS 1906, *16-17; *see generally Heinrich v State of New York*, 73 Misc 3d 650, 656 [Ct Claims 2021]; *Moss v Mumford*, 2021 NY Slip Op 30427[U], *5, 2021 NY Misc LEXIS 578, *8 [Sup Ct, N.Y. County, Feb. 11, 2021] [Kelley, J.]; *Carbone v Mount Sinai Beth Israel Med. Ctr.*, 2020 NY Misc LEXIS 45032, *5 [Sup Ct, N.Y. County, Dec. 23, 2020] [Kelley, J.]).

Although the plaintiffs alleged that the records that they obtained from the Chung defendants prior to commencing this action included entries for certain office visits, while the records produced during discovery omitted them, and that the attorneys for the Chung defendants produced a note that was not included in the electronic records, the court concludes that these disparities are insufficient to trigger the production of an audit trail or metadata at this juncture, particularly because the plaintiffs have yet to conduct a deposition of the Chung defendants themselves, let alone an information technology employee or agent of those defendants. At those depositions, they could question the witnesses about those perceived

disparities, and those witnesses may be able to explain the disparities without the need for production of an audit trail or metadata.

Hence, the procedure that the court concludes is warranted would be for the plaintiffs to conduct the deposition of the Chung defendants, and also a short deposition of any information technology employee or agent of the Chung defendants who managed and had knowledge of those records, in which the plaintiffs would question those witnesses about any alleged incompleteness or disparities in the records that had been produced. If the plaintiffs could thereafter show that the answers given at the depositions were insufficient fully to explain such incompleteness or disparities, then the court, upon renewal, would direct the production of an audit trail and metadata and, upon a further proper showing, might also direct a further limited deposition of those witnesses after the audit trail is produced.

Accordingly, it is,

ORDERED that the plaintiffs' motion is granted to the extent that they may take the deposition of a person employed by or affiliated with the defendants Susie Chung, M.D., and Susie Chung, M.D., P.C., who manages and has knowledge of information technology and recordkeeping referable to the generation, accessing, and tracking of access to and amendments of those defendants' electronic medical records, with the deposition of the information technology witness limited to three hours, and further limited to questions concerning the details regarding the generation, accessing, and tracking of the access to and amendment of those records, and the motion is otherwise denied, without prejudice to renewal after the plaintiffs have taken the depositions both of the defendants Susie Chung, M.D., and Susie Chung, M.D., P.C., and of that witness, and upon a showing that the depositions did not yield sufficient information concerning the integrity and veracity of those records; and it is further,

ORDERED that the depositions of the defendants Susie Chung, M.D., and Susie Chung, M.D., P.C., and of the information technology specialist employed by or affiliated with those defendants, as described above, shall be conducted on or before June 24, 2025.

This constitutes the Decision and Order of the court.

4/14/2025
DATE



JOHN J. KELLEY, J.S.C.

MOTION:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE