Banker v Scherl
2025 NY Slip Op 34744(U)
December 9, 2025
Supreme Court, New York County
Docket Number: Index No. 800004/2022
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY**, *Justice* — **PART** **56M**

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SEAN B. BANKER and DANIELLE M. RADEL,

Plaintiffs,

- v -

ELLEN J. SCHERL, M.D., FABRIZIO A. MICHELASSI, M.D., NEW YORK-PRESBYTERIAN/WEILL CORNELL MEDICAL CENTER, NEW YORK-PRESBYTERIAN HOSPITAL, and THE JILL ROBERTS CENTER FOR INFLAMMATORY BOWEL DISEASE,

Defendants.

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INDEX NO. 800004/2022

MOTION DATE 08/15/2025

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for LEAVE TO PERMIT PLAINTIFFS TO ANNEX RIDER TO ARONS AUTHORIZATIONS.

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice, in particular, the defendants' alleged failure properly to diagnose and treat the medical conditions experienced by the plaintiff Sean B. Banker, and their alleged failure properly to generate and maintain medical and billing records, the plaintiffs move for permission to annex a rider to *Arons* authorizations (*Arons v Jutkowitz*, 9 NY3d 393 [2007]) informing relevant treating physicians that there are alleged errors in Banker's medical records, permitting Banker to be present for the otherwise ex parte interviews permitted by such authorizations, and alerting the treating physicians that the authorization is invalid if not accompanied by the rider. The defendants oppose the motion. The motion is denied.

"'A trial court is vested with broad discretion regarding discovery, and its determination will not be disturbed absent a demonstrated abuse of that discretion'" (*M.P. v Jewish Bd. of Family & Children's Servs.*, 211 AD3d 584, 584-585 [1st Dept 2022], quoting *148 Magnolia, LLC*

v Merrimack Mut. Fire Ins. Co., 62 AD3d 486, 487 [1st Dept 2009]; *see Mendez v Equities By Marcy*, 24 AD3d 138, 138, 805 N.Y.S.2d 57 [1st Dept 2005]). In *Arons*, the Court of Appeals gave its sanction to a procedure whereby a plaintiff in a personal injury action is required to provide defense counsel with authorizations permitting counsel to contact the plaintiff's treating physicians to request an ex parte interview to discuss medical issues relevant to the plaintiff's claims. Nonetheless, a nonparty treating physician who has been provided with an *Arons* authorization need not comply with the request (*see Arons v Jutkowitz*, 9 NY3d at 416 n 6; *Akalski v Counsell,* 29 Misc 3d 936, 939 [Sup Ct, Westchester County 2010]).

In the exercise of its discretion, this court concludes that it would be unwarranted for Banker, or his attorneys if he retains counsel, to compel his or their presence during the otherwise ex parte interview permitted by *Arons* (*see Sims v Reyes*, 195 AD3d 133, 134-135 [4th Dept 2021]). In *Sims*, the plaintiff included additional language on the standard *Arons* authorization form that included, in bold font that was larger than the text on the standard form, the following sentence: "If you decide to meet with their lawyers, I would ask that you let me know, because I would like the opportunity to be present or to have my attorneys present" (*id.* at 135). The defendant objected to that language, and requested the plaintiff to provide him with revised authorizations that did not include that language, which the plaintiff refused to do. The defendant offered, as a compromise, the following language: "the purpose of the requested interview with the physician is solely to assist defense counsel at trial. The physician is not obligated to speak with defense counsel prior to trial. The interview is voluntary" (*id.*).[1] After the plaintiff rejected that language, the defendant moved to compel the plaintiff to provide unrestricted authorizations. The court granted the motion in part, directing the plaintiff to

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[1] In *Porcelli v Northern Westchester Hosp. Ctr.* (65 AD3d 176, 184-185 [2d Dept 2009]), the Appellate Division, Second Department, held that, although nonparty treating physicians must be informed of defense counsel's identify, counsel's interest in the plaintiff's medical condition, that said counsel's inquiries must be limited to the condition at issue, and that that the physicians need not comply with the request for an interview, this information may be imparted either by defense counsel or by the plaintiff.

provide revised authorizations that were compliant with the Health Insurance Portability and Accountability Act of 1996 (42 USC § 1320d, *et seq*.), that set forth the defendant's proposed language, that included no emphasized words or phrases, and that was in the same size font as the remainder of the authorization (*see id*.).

In its determination affirming the Supreme Court in *Sims*, the Appellate Division, Fourth Department, explained that

> "when a plaintiff has affirmatively put his or her medical condition in controversy, he or she must, upon the defendant's request, furnish HIPAA-compliant authorizations permitting plaintiff's treating physicians to speak to defendant's attorney (*see Arons*, 9 NY3d at 415). The furnishing of such an authorization to the defense is not designed to further the rights of either party to the litigation; it is merely a 'procedural prerequisite' of an interview with the nonparty physician (*id.* at 402), who is free to decline the interview (*see id*. at 416)"

(*Sims v Reyes*, 195 AD3d at 136). Although the Fourth Department explained that parties need not scrupulously adhere to the language contained in the standard *Arons* authorization form approved by the Office of Court Administration (OCA), it concluded that the motion court did not improvidently exercise its discretion in granting the defendant's motion to compel the plaintiff to employ the OCA form, with no limitations, restrictions, or requirements that the plaintiff's treating physician inform him of any upcoming interview, so as to permit him to be present therefor or to participate in that interview (*see id*. at 137; *see also Sky v Catholic Charities of Buffalo, NY,* 194 AD3d 1417, 1417 [4th Dept 2021] [motion court did not abuse its discretion by directing plaintiff to execute the standardized authorization form, as modified, and by rejecting most of plaintiff's proposed alterations and an addendum to the authorization form]).

> "While a *physician* may insist that the plaintiff be present for such an interview, that is a decision *for the physician alone to make*. Just as a defendant's attorney has no right to interview the physician informally (*see Sims*, 195 AD3d at 136 n), a plaintiff has no right to attend the interview (the plaintiff has only the right to ask the physician for permission to attend an interview)"

(*Murphy v Kaleida Health*, ______AD3d______, 2025 NY Slip Op 06421, *4 [4th Dept, Nov. 21, 2025] [emphasis added]). Hence, there is no basis for the plaintiffs themselves to limit an *Arons* authorization by including a requirement that they be present for the subject interview.

The plaintiffs have cited, and research has revealed, no authority for their contention that an *Arons* authorization must or should contain what is effectively a "warning" to treating physicians who agree to an ex parte interview that Banker's medical records may contain errors. If there are errors in the medical or hospital records generated by the defendants, the plaintiffs may question them about such purported errors at those defendants' depositions. If there are errors in the medical or hospital records generated by nonparty physicians who treated Banker, those physicians may be subpoenaed for a deposition to testify as to their understanding of whether any chart entries were erroneous. Once again, the court concludes that the plaintiffs evince a fundamental misunderstanding of the discovery process. Parties are not permitted, during the discovery process, to "work the referee," as it were, by making certain contentions to disinterested witnesses that must be established by other means.

The plaintiffs' remaining contentions are without merit.

Accordingly, it is,

ORDERED that the plaintiffs' motion is denied.

This constitutes the Decision and Order of the court.

12/9/2025
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:	[ ] **CASE DISPOSED**		[X] **NON-FINAL DISPOSITION**		
	[ ] **GRANTED**	[X] **DENIED**	[ ] **GRANTED IN PART**	[ ] **OTHER**	
APPLICATION:	[ ] **SETTLE ORDER**		[ ] **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ] **INCLUDES TRANSFER/REASSIGN**		[ ] **FIDUCIARY APPOINTMENT**	[ ] **REFERENCE**	