SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

RENATO A. DELEON, Individually and as the Administration of the Estate of ELISA S. DELEON,

Plaintiff(s),

- against -

MERCY MEDICAL CENTER, SZE-FONG NG, MD, MERCY INTERNAL MEDICINE ASSOCIATES, JOANNE McDEVITT, R.P.A-C. and CHERYL MOELLER, N.P.,

Defendant(s).

TRIAL/IAS PART 7

INDEX NO. 3806/09

MOTION SEQUENCE NO. 8 & 9

MOTION SUBMISSION DATE: November 8, 2010

The following papers read on this motion:

Order to Show Cause	**X**
Notice of Motion	**X**
Affirmation in Opposition	**XX**
Reply Affirmation	**XX**

Upon the foregoing papers, the motion by plaintiffs, brought by Order to Show Cause, for an Order directing that the defendants designate a specific attorney who shall be named in the previously court ordered Arons authorizations and the motion by the defendant Sze-Fong Ng, MD for an Order dismissing this action pursuant to CPLR §3126 against defendant, Sze-Fong Ng, MD for plaintiffs' demonstrated willful and contumacious behavior and for plaintiff's failure to comply with the Order of this Court dated September 21, 2010, are both determined as hereinafter provided:

The Court initially observes that the plaintiffs in support of the plaintiff's Order to Show Cause has failed to submit an affidavit of service attesting to service fo the Order to Show Cause as directed in the Order to Show Cause. As such, the plaintiffs' application for an Order directing that the defendants designate a specific attorney who shall be named in the previously court ordered Arons authorizations, is **dismissed**.

Explicit upon review of the respective submissions in relation to the defendant Ng's application is the holding of the Appellate Division, Second Department in **Mahr v Perry**, 74 AD3d 1030, 903 NYS2d 148 (Second Dept., 2010). In its entirety, said Decision and Order sets forth:

"In an action to recover damages for medical malpractice, etc., the defendants Manuel Perry, Angela Krisel, Pamela Murphy, Robert Dinsmore, and Crystal Run Heathcare, LLP, appeal (1) as limited by their brief, from so much of an order of the Supreme Court, Rockland County (Weiner, J.), dated September 18, 2009, as denied that branch of their motion which was to compel the plaintiffs to serve an amended bill of particulars, and (2) from an order of the same court entered September 15, 2009, which denied their application to compel the plaintiffs to provide authorizations compliant with the Health Insurance Portability and Accountability Act of 1996 (42 USC §1320d et seq.) as to non-parties Ronald Roshe, Zurich Insurance Company, and Empire Health Choice, and to provide "law firm specific," rather than "Attorney specific," authorizations pursuant to *Arons v Jutkowitz (9 NY3d 393 [2007])*.

Ordered that the order dated September 18, 2009, is affirmed insofar as appealed from; and it is further, Ordered that on the Court's own motion, the notice of appeal from the order entered September 15, 2009, is treated as an application for leave to appeal form that order, and leave to appeal is granted (*see CPLR 5701[c]);* and it is further

Ordered that the order entered September 15, 2009, is affirmed; and it is further,

Ordered that the plaintiffs are awarded one bill of costs.

Contrary to the appellants' contention, the plaintiffs' bill of particulars with respect to demand number five, was as responsive as the presently available level of information permitted, stated that they did not presently have the information requested, and set forth that the plaintiffs would provide further information upon completion of disclosure (*see Berger v Feinerman, 203 AD2d 407 [1994]; Byrnes v New York Hosp., 91 AD2d 907 [1983].* The plaintiffs' response to demand number five also apprised the appellants "of an adequate number of claimed negligent acts of commission or omission" (*Benn v O'Daly, 202 AD2d 464, 465 [1994])*, and set forth the condition or conditions that the appellants failed to diagnose and improperly treated or failed to treat (*cf. Caudy v Rivkin, 109 AD2d 725, 726 [1985])*.

The appellants' objections to the plaintiffs' responses to demands number 4, 14, 18 and 19 are without merit, since none of the information sought in those demands is expressly authorized under CPLR 3043 (*see Feraco v Long Is. Jewish-Hillside Med. Ctr., 97 AD2d 498 [1983]; Williams v Shapiro, 67 AD2d 706 [1979]; Johnson v Charow, 63 AD2d 668 [1978])*.

The appellants' objections to the plaintiffs' responses to demands number 3, 8, and 10 are also without merit. The plaintiffs properly objected to each of these demands, as they improperly sought evidentiary material (*see, Toth v Bloshinsky, 39 AD3d 848, 849 [2007]; Benn v O'Daly, 202 AD2d at 465)*. Demand 8 also was improper on the ground that it sought to compel the plaintiffs to "set forth the manner in which the physician failed to act in accordance with good and accepted medical practice," which is knowledge "a physician is chargeable with knowing" (*Toth v Bloshinsky, 39 AD3d at 849;*

see Dellaglio v Paul, 250 AD2d 806 [1998]).

The appellants' remaining contentions are without merit. Mastro, J.P. Covello, Belen and Hall, JJ., concur."

Mahr v Perry, supra at 148

The plaintiff maintains that the holding of the Court in **Mahr v Perry**, supra necessitates that the plaintiff is required only to serve an "Arons" authorization that is specific as to one attorney in an advisory's office that may conduct interviews with a treating provider. While not accepting the plaintiff's interpretation of the Court's holding, the defendant Ng through counsel contends that multiple attorneys in the defendant's counsel's office will be involved with the defense of the action.

Clearly the Appellate Division Second Department held:

"(2) from an order of the same court entered September 15, 2009, which denied their application to compel the plaintiffs to provide authorizations compliant with the Health Insurance Portability and Accountability Act of 1996 (42 USC §1320d et seq.) as to non-parties Ronald Roshe, Zurich Insurance Company, and Empire Health Choice, and to provide "law firm specific," rather than "Attorney specific," authorizations pursuant to *Arons v Jutkowitz (9 NY3d 393 [2007]).*

Ordered that the order dated September 18, 2009, is affirmed insofar as appealed from"

Mahr v Perry, supra at 148

While the Court's holding is clear that "Arons" authorizations that are law firm specific are not proper, the Court does not address the issue raised by the defendant that authorizations should be provided that contain multiple attorneys one of whom may property conduct an interview. In the absence of a clear delineation from the Second Department, the Court believes that it is reasonable for the defendant's firm to designate three attorneys whose name shall appear on the authorizations. Such a number takes into account the vagaries of practice and allows the defendant to manage the defendant's defense rather than the plaintiff. The Court notes that while the plaintiff has provided authorizations, the plaintiff had determined which attorney in the defendant's counsel's office will be allowed to conduct the interview.

As such, based upon the foregoing the defendant Ng's counsel shall designate three attorneys to conduct "Arons" interviews and shall provide those names to plaintiff's counsel within 20 days of the date of this Order. Thereafter within 20 days the plaintiff shall provide the defendant with the appropriate authorizations.

Based upon all of the foregoing, the defendant Ng's application for an Order dismissing this action pursuant to CPLR §3126 against defendant, Sze-Fong Ng, MD for plaintiffs' demonstrated willful and contumacious behavior and for plaintiff's failure to comply with the Order of this Court dated September 21, 2010, is **denied without prejudice to renew** if the requisite authorizations have not been provided.

SO ORDERED.

DATED: 1/25/2011

Roy S. Mahon
J.S.C.

ENTERED
FEB 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE