

55 A.D.3d 566
Supreme Court, Appellate Division, Second Department, New York.

Kimberly LIEW, etc., et al., plaintiffs,
v.
NEW YORK UNIVERSITY MEDICAL CENTER, defendant third-party plaintiff-appellant;
Juan B. Gabriel, Jr., etc., et al., third-party defendants-respondents.

Oct. 7, 2008.

Synopsis

Background: Representative of decedent brought wrongful death action against medical center arising from decedent's death from kidney cancer after receiving kidney from non-party donor treated at third-party defendant hospital. The Supreme Court, Queens County, O'Donoghue, J., denied medical center's application to compel hospital to produce donor's medical records. Medical center appealed.

Holdings: The Supreme Court, Appellate Division, held that:

^[1] donor's records were covered by physician-patient privilege, even after her death, and

^[2] Health Insurance Portability and Accountability Act (HIPAA) did not preempt state statutory physician-patient privilege.

Affirmed.

Attorneys and Law Firms

****278** Bartlett, McDonough, Bastone & Monaghan, LLP, White Plains, N.Y. (Edward J. Guardaro, Jr., and Patricia D'Alvia of counsel), for defendant third-party plaintiff-appellant.

Schiavetti, Corgan, Diedwards & Nicholson, LLP, New York, N.Y. (Samantha E. Quinn and Angela M. Ribaldo of counsel), for third-party defendants-respondents.

STEVEN W. FISHER, J.P., MARK C. DILLON, WILLIAM E. McCARTHY, and ARIEL E. BELEN, JJ.

Opinion

566** In an action, inter alia, to recover damages for wrongful death, etc., the defendant third-party plaintiff, NYU Hospitals Center, s/h/a New York University Medical Center, appeals (1), by permission, from an order of the Supreme Court, Queens County (O'Donoghue, J.), dated May 29, 2007, which denied its application to compel the third-party defendant St. Luke's Hospital to produce the medical records of a nonparty organ donor, and (2) from an order of the same court dated *279** October 17, 2007, which denied its motion, in effect, for reargument.

ORDERED that the appeal from the order dated October 17, 2007, is dismissed, as no appeal lies from an order denying reargument; and it is further,

ORDERED that the order dated May 29, 2007, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the third-party defendants-respondents.

The plaintiff's decedent, Vincent Liew, a/k/a Vincent Eng Guan Liew, a/k/a Vincent E. Liew, died of kidney cancer after he received a kidney transplant at a facility of the defendant third-party-plaintiff, NYU Hospitals Center, s/h/a New York University Medical Center (hereinafter NYU). The kidney was donated by a patient who was treated and died at a facility of the third-party defendant St. Luke's Hospital (hereinafter St. Luke's) which provided the kidney to NYU. The plaintiff commenced this action against NYU, which thereafter commenced a third-party action against St. Luke's and Juan B. Gabriel, Jr., M.D., alleging that they were negligent, inter alia, in failing to adhere to proper transplant protocol. NYU sought an order compelling disclosure of the donor's medical *567 records, but the Supreme Court denied the application. We affirm.

^[1] ^[2] The donor's medical records were covered by the physician-patient privilege (*see* CPLR 4504[a]), even after her death (*see* CPLR 4504[c]; *Prink v. Rockefeller Ctr.*, 48 N.Y.2d 309, 314, 422 N.Y.S.2d 911, 398 N.E.2d 517; *cf. Mayorga v. Tate*, 302 A.D.2d 11, 11–12, 17–18, 752 N.Y.S.2d 353), and we reject NYU's contention that the donor must be deemed to have waived the privilege with respect to subsequent litigation merely by offering to donate an organ pursuant to Public Health Law article 43 (*cf. Green v. Montgomery*, 95 N.Y.2d 693, 699, 723 N.Y.S.2d 744, 746 N.E.2d 1036). Although the privilege may be waived by a personal representative when the patient is deceased (*see* CPLR 4504[c][1]), there was no such waiver here. Moreover, the Health Insurance Portability and Accountability Act of 1996 (*see* Pub. L. 104–191, 110 U.S. Stat. 1936; hereinafter HIPAA) does not preempt state law with respect to the confidentiality of the donor's records here inasmuch as it does not mandate disclosure under these circumstance and the confidentiality afforded the donor's medical records by New York's statutory physician-patient privilege is stricter than that provided by HIPAA (*see Arons v. Jutkowitz*, 9 N.Y.3d 393, 414–415, 850 N.Y.S.2d 345, 880 N.E.2d 831). Accordingly, the donor's medical records may not be disclosed.

The parties' remaining contentions either are without merit or need not be reached in light of our determination.

Parallel Citations

55 A.D.3d 566, 865 N.Y.S.2d 278, 2008 N.Y. Slip Op. 07631