

82 A.D.3d 947, 919 N.Y.S.2d 64, 2011 N.Y. Slip Op. 01987

Emily Muzio, Appellant

v

Anthony R. Napolitano, M.D., P.C., et al., Respondents.

Supreme Court, Appellate Division, Second Department, New York

March 15, 2011

CITE TITLE AS: Muzio v Anthony R. Napolitano, M.D., P.C.

HEADNOTE

Disclosure

Medical Records and Reports

Federal Health Insurance Portability and Accountability Act—Interview with Plaintiff’s Treating Physician

Miller, Montiel & Strano, P.C., Roslyn Heights, N.Y. (Thomas Torto of counsel), for appellant.

Schiavetti, Corgan, DiEdwards, Weinberg & Nicholson, LLP, New York, N.Y. (Samantha E. Quinn of counsel), for respondents.

In an action to recover damages for medical malpractice, the plaintiff appeals, as limited by her brief, from (1) so much of an order of the Supreme Court, Queens County (O’Donoghue, J.), entered December 28, 2009, as denied that branch of her pretrial motion which was pursuant to CPLR 3103 (c) for a protective order precluding the defendants from calling her treating physician to testify at trial as an expert witness in support of the defense, and from introducing, at trial, information obtained during their interview with her treating physician, and (2) so much of an order of the same court entered July 13, 2010, as denied her motion for leave to reargue.

Ordered that the appeal from the order entered July 13, 2010, is dismissed, as no appeal lies from an order denying reargument; and it is further,

Ordered that the order entered December 28, 2009, is reversed insofar as appealed from, on the law, and that branch of ***948** the plaintiff’s pretrial motion which was pursuant to CPLR 3103 (c) for a protective order precluding the defendants from calling her treating physician to testify as an expert witness in support of the defense, and from introducing, at trial, information obtained during their interview with her treating physician is granted; and it is further,

Ordered that one bill of costs is awarded to the plaintiff.

The defendants in this medical malpractice action conducted an interview of the plaintiff’s treating physician, a nonparty, without obtaining a valid authorization pursuant to the Health Insurance Portability and Accountability Act of 1996 (Pub L No 104-191, 110 Stat 1936 [1996]). Notwithstanding the fact that the plaintiff placed her medical condition in controversy, the defendants were required to obtain an authorization expressly permitting an interview with her treating physician prior to conducting the interview (*see Arons v Jutkowitz*, 9 NY3d 393 [2007]; *Porcelli v Northern Westchester Hosp. Ctr.*, 65 AD3d 176 [2009]). ****2**

Since any information obtained by the defendants from the interview was “improperly . . . obtained” (CPLR 3103 [c]), the Supreme Court should have granted that branch of the plaintiff’s pretrial motion which was pursuant to CPLR 3103 (c) for a protective order precluding the defendants from calling her treating physician to testify at trial as an expert witness for the

defense, and from introducing, at trial, the information obtained from the interview (*see Straub v Yalamanchili*, 58 AD3d 1050 [2009]; *Surgical Design Corp. v Correa*, 21 AD3d 409 [2005]; *Keshecki v St. Vincent's Med. Ctr.*, 5 Misc 3d 539 [2004]).

The plaintiff's remaining contention is without merit. Angiolillo, J.P., Chambers, Austin and Miller, JJ., concur.

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