

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEWIS S. SMALL : CIVIL ACTION
 :
 v. :
 :
 PROVIDENT LIFE AND ACCIDENT :
 INSURANCE COMPANY : NO. 98-2934

MEMORANDUM AND ORDER

HUTTON, J.

December 8, 1999

Presently before the Court is Defendant, Provident Life's, Motion to Quash Plaintiff's Subpoena (Docket No. 16), joined by Dr. Jonathan Bromberg and Orthopedic Associates, P.C., (Docket No. 18), and Plaintiff's responses thereto. For the reasons stated below, the Movants' Motions are **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

On or about July 12, 1999 Plaintiff served upon Dr. Bromberg and his associates a subpoena requesting, in effect, "any and all" medical records, billing records, reports, statements, or scheduling books pertaining to or in connection with any forensic independent medical evaluations performed by Dr. Bromberg or his associates in connection with any civil litigation or on behalf of any insurance company, agency or law firm, for essentially an unspecified time period. (See July 12, 1999 Subpoena ¶¶ 1-7).

Plaintiff asserts that said information is necessary to the development of his bad faith claim under 42 Pa. Cons. Stat. § 8371, in as much as it will evidence a pattern and practice by Dr. Bromberg of incorrectly making unfavorable and biased determinations against claimants for the purpose of allowing insurance companies to then improperly and unreasonably terminate policy-holders' benefits. (See Pl.'s Mem. of Law in Opp. to Def.'s Mot. to Quash at 6-8). Movants object to the demand of such information on the grounds that it is overly broad, not likely to lead to admissible evidence, and that the disclosure of said information violates the privacy interests of non-party patients. (See Def.'s Mot. to Quash at 9-16; see also Bromberg Mot. to Quash at 6). As such, Movants in the instant motions are seeking a protective order pursuant to 45(c)(3)(A).

II. DISCUSSION

Under the Federal Rules of Civil Procedure and in the United States Court of Appeals for the Third Circuit, district courts have broad discretion to manage discovery. See Sempier v. Johnson, 45 F.3d 724, 734 (3d Cir. 1995). Rule 45(c)(3)(A) of the Federal Rules of Civil Procedure authorizes a court to quash or modify a subpoena that subjects a person to undue burden. See Fed. R. Civ. P. 45(c)(3)(A)(iv); see also Composition Roofers Union Local 30 Welfare Trust Fund v. Graveley Roofing Enter., 160 F.R.D. 70, 72 (E.D. Pa. 1995). Accordingly, a court may quash or modify

a subpoena if it finds that the movant has met the heavy burden of establishing that compliance with the subpoena would be "unreasonable and oppressive." Id.

Furthermore, Rule 26(b)(1) provides that discovery need not be confined to matters of admissible evidence but may encompass that which "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Relevancy is to be broadly construed for discovery purposes and is not limited to the precise issues set out in the pleadings. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Rather, discovery requests may be deemed relevant if there is any possibility that the information may be relevant to the general subject matter of the action. See id. As this Court has noted, "[r]elevance is broadly construed and determined in relation to the facts and circumstances of each case." Hall v. Harleysville Ins. Co., 164 F.R.D. 406, 407 (E.D. Pa. 1996). Once the party opposing discovery raises its objection, the party seeking discovery must demonstrate the relevancy of the requested information. See Momah v. Albert Einstein Med. Ctr., 164 F.R.D. 412, 417 (E.D. Pa. 1996). The burden then shifts back to the objecting party, once this showing is made, to show why the discovery should not be permitted. See id. Courts have imposed broader restrictions on the scope of discovery when a non-party is targeted. See Thompson v. Glenmede Trust Co., No. CIV.A.92-5233,

1995 WL 752422, at *2 n.4 (E.D. Pa. Dec. 19, 1995). Nevertheless, discovery rules are to be accorded broad and liberal construction. See American Health Sys. v. Liberty Health Sys., No. CIV.A.90-3112, 1991 WL 30726, *3 (E.D. Pa. Mar. 5, 1991). Because the precise boundaries of the Rule 26 relevance standard will depend on the context of the particular action, the determination of relevance is within the district court's discretion. See Thompson, 1995 WL 752422, at *2 n.4.

A. Relevancy Of The Information Requested by Plaintiff

As an initial matter, Movants contend that Plaintiff's subpoena seeks information that is wholly irrelevant to any bad faith claim. (See Def.'s Mot. to Quash at 11-16; see also Bromberg Mot. to Quash at 3). Plaintiff, however, is not seeking to use the contents of the requested information to prove the substance of his bad faith claim, but rather to establish a biased pattern and practice of Dr. Bromberg. The thrust of Plaintiff's claim is that, Provident Life obtained in bad faith an inaccurate and unreliable medical report for the sole purpose of terminating Plaintiff's benefits. (See Pl.'s Mem. of Law in Opp. to Def.'s Mot. to Quash at 8-9). In this respect, the existence of a pro-insurance bias on the part of Dr. Bromberg is germane to Plaintiff's claim and cannot be dismissed as lacking relevancy to Plaintiffs underlying bad faith action. See, e.g., Greco v. Paul Revere Life Ins. Co., No. CIV.A.97-6317, 1999 WL 95717, at *5 (E.D. Pa. Feb. 12, 1999)

(holding that a plaintiff survived summary judgment on a bad faith claim when evidence existed that defendant did not have a reasonable basis for denying plaintiff's benefits and that it knew or recklessly disregarded its lack a of reasonable basis in the conclusion of a independent medical report).

Although certain information requested by Plaintiff, which will be discussed in further detail below, may be overly broad or irrelevant, the Court cannot broadly conclude that all information requested by Plaintiff is not reasonably calculated to lead to admissible evidence.

B. The Scope Of Plaintiff's Subpoena

Plaintiff's subpoena is quite extensive, it not only requests substantial information from Dr. Bromberg, but also several of his associates. Plaintiff, however, admits that his dispute only concerns the use of Dr. Bromberg's independent medical exam, and not those of his associates. (See Pl.s Opp. to Def.'s Mot. to Quash ¶ 8). The foundation for Plaintiff's claim is admittedly based upon Dr. Bromberg's alleged reputation as a "medical mercenary." (See Pl.'s Opp. to Def.'s Mot. to Quash ¶ 8). As such, to the extent that Plaintiff's subpoena requests information from or about individuals other than Dr. Bromberg it is overly broad and not likely to lead to admissible evidence.

In addition, Plaintiff's subpoena requests that Dr. Bromberg provide information related to forensic evaluations

completed on behalf of any "insurance company, agency or law firm" (See July 12, 1999 Subpoena ¶ 1). Plaintiff, however, admits that this dispute is limited to Dr. Bromberg's reputation within the insurance community. (See Pl.'s Opp. to Def.'s Mot. to Quash ¶ 8). Thus, information related to Dr. Bromberg's employment for entities other than insurance companies is not reasonably at issue and is not calculated to lead to admissible evidence. As such, the Court limits the information requested in Plaintiff's subpoena to only instances where Dr. Bromberg was employed by, or acting on behalf of, an insurance company.

Aside from the nature of the information requested, Plaintiff's subpoena, for the most part, fails to set any temporal limits on the scope of the information requested. Although Plaintiff seeks to establish a pattern and practice of denial and bias, Movants assert that the production of such extensive information without a temporal limitation is broad and unduly burdensome. (See Def.'s Mot. to Quash at 10; see also Bromberg Mot. to Quash at 6). Unfortunately, despite such objections neither party opposing Plaintiff's subpoena suggests a reasonable time-frame for the Court to consider. The Plaintiff, however, does place a 1990 temporal restriction on the request for scheduling books in paragraph six of his subpoena. (See July 12, 1999 Subpoena ¶ 6). As such, given the Movants' reasonable objection to

Plaintiff unlimited time-frame, the Court will apply Plaintiff's 1990 limitation to all requested information.

C. The Privacy Interest In Non-Party Medical Reports

Movants suggest, without citing any legal authority, that the requested medical records are protected and unobtainable because non-party patients have a right to privacy concerning their respective medical records. (See Def.'s Mot. to Quash at 10; see also Bromberg Mot. to Quash at 6). While such an assertion is not wholly incorrect, this right to privacy is not absolute. See United States v. Westinghouse Electric, 638 F.2d 570 (3d Cir. 1980).

In Westinghouse, the Third Circuit recognized that medical records were well within the ambit of privacy protection. Id. at 577. Nevertheless, the Third Circuit allowed the disclosure of employee medical records in order to facilitate investigations by OSHA regarding suspected health hazards. Id. at 580-81. In doing so the court adopted a balancing test which required that the societal interest in disclosure be balanced against the privacy interest in the records.¹ Id. at 598.

More recently, in Ruiz v. Royer Pharmacy, the court considered the propriety of disclosing "[a]ny and all Patient

1. The factors which should be considered are:

the [1] type of record requested, the [2] information it does or might contain, the [3] potential for harm in any subsequent nonconsensual disclosure, [4] the injury from disclosure to the relationship in which the record was generated, [5] the adequacy of safeguards to prevent unauthorized disclosure, [6] the degree of need for access, [7] articulated public policy, or other recognizable public interest militating toward access.

Westinghouse, 638 F.2d at 578.

profiles for all customers of Royer Pharmacy." No. CIV.A.97-4831, 1999 WL 124470, at *1 (E.D. Pa. Feb. 26, 1999). Here the court concluded that such information could be properly disclosed "because it can protect the privacy interests of the pharmacy's customers by issuing a discovery order that is narrowly tailored to reveal only those facts that may be relevant to Plaintiffs' claims." 1999 WL 124470, at *2; see also Fed. R. Civ. P. 26(c); Fed. R. Civ. P. 45(c)(3)(A); Wilson v. Pennsylvania State Police Dep't, No. CIV.A.94-657, 1999 WL 179692 (E.D. Pa. Mar. 11, 1999) (holding that non-party vision related information was discoverable in table form upon extraction from medical records).

The Court first recognizes that the records requested by Plaintiff were generated for the purpose of evaluating the medical condition of patients for third-parties and for the preparation of civil litigation.² Such records were not the result of private medical examinations or that of a treating doctor-patient relationship. Thus, any non-party privacy expectations in the contents of such non-therapeutic medical reports prepared only for the purpose of preparation for civil litigation, or for determining one's eligibility for insurance benefits, clearly enjoys a somewhat reduced expectation of privacy. Cf. Ney v. Axelrod, 723 A.2d 719, 722-23 (Pa. Super. 1999) (stating "where there is no therapeutic

2. Title 42 Section 5929 of the Pennsylvania Consolidated Statutes exempts from its non-disclosure requirements any patient information acquired in a professional capacity "in civil matters brought by such patient, for damages on account of personal injuries." 42 Pa. Cons. Stat. § 5929.

purpose for medical services provided and no evidence of a resulting professional relationship between the medical provider and the plaintiff, we will impose no duty, and therefore no resultant liability on the provider"). Movants present no argument that such disclosure will cause non-party patients to be harassed, embarrassed, discriminated against, or otherwise adversely effected. Further, the Court finds that such an occurrence is extremely unlikely given the ability to protect the identity of the effected individuals and the limited context for which the Plaintiff explains said records are sought.

Despite the Defendant's assertion to the contrary (see Def.'s Mot. to Dismiss at 10-11), the Court can protect the identity of the effected non-party patients by fashioning a remedy which will cause the personal and irrelevant information contained in the non-party records to be redacted before disclosure to Plaintiff. See, e.g., Ruiz, 1999 WL 124470, at *2; see also Varghese v. Royal MacCabbes Life Ins. Co., 181 F.R.D. 359, 361-62 (S.D. Ohio 1998) (finding that the redacting of information from medical records will adequately protect the privacy interests of non-party patients). Given the reduced scope that the Court has imposed on Plaintiff's subpoena, the burden on Dr. Bromberg in performing such redactions has been substantially mitigated. Further, Plaintiff has agreed to pay the "reasonable administrative

costs of reproducing the relevant documents." (See Pl.'s Opp. to Def.'s Mot. to Quash at 7).

Lastly, it is clear that Plaintiff's bad faith claim puts Dr. Bromberg's bias and evaluation practices directly at issue. Thus, to preclude the discovery of such information would hinder Plaintiff's ability to prove his claim under 42 Pa. Cons. Stat. § 8371. As such, the Court finds that the necessity of allowing Plaintiff access to the requested medical records, in accordance with this memorandum, outweighs any risk of disclosure surrounding the to non-party patients' records.

An appropriate Order follows.

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O R D E R

AND NOW, this 8th day of December, 1999, upon consideration of Defendant's Motion to Quash Plaintiff's Subpoena (Docket No. 16), joined by Dr. Jonathan Bromberg and Orthopedic Associates, P.C., (Docket No. 18), and Plaintiff's responses thereto, IT IS HEREBY ORDERED that Movants' Motions are **GRANTED** in part and **DENIED** in part:

(1) Pursuant to Fed. R. Civ. P. 45(c)(3)(A), the scope of Plaintiff's subpoena is limited to Jonathan Bromberg, M.D.;

(2) Pursuant to Fed. R. Civ. P. 45(c)(3)(A), the scope of Plaintiff's subpoena is limited in scope to only occasions where Jonathan Bromberg, M.D., was employed by or was acting on behalf of an insurance company;

(3) Pursuant to Fed. R. Civ. P. 45(c)(3)(A), the scope of Plaintiff's subpoena is limited to the time period from January 1, 1990 forward;

(4) Pursuant to Fed. R. Civ. P. 45(c)(3)(A), all medical records shall be redacted to remove any patient name, address, telephone number, social security number, date of birth, and dates

of visit other than the year. In addition, all medical records shall be redacted so that they contain only the name of the insurance company for whom the record was prepared, Dr. Bromberg's analysis, and the recommendation made; and

(5) Jonathan Bromberg, M.D. shall comply with Plaintiff's subpoena, as modified by this Order, on or before January 7, 2000. Plaintiff shall pay reasonable administrative expenses incurred in reproducing and redacting the relevant documents.

BY THE COURT:

HERBERT J. HUTTON, J.