2018 IL App (1st) 171957-U

SIXTH DIVISION
Order filed: March 2, 2018

No. 1-17-1957

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MILORAD DIMITROVSKI, Plaintiff-Appellee, v. JEFFREY P. SCHWARTZ, M.D.; JASON W. SMITH, M.D.; LOYOLA UNIVERSITY MEDICAL CENTER; and CARDIAC SURGERY ASSOCIATES, S.C., Defendants, (Cardiac Surgery Associates, S.C., Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County No. 15 L 011758 Honorable Daniel T. Gillespie, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm that part of the circuit court's discovery order directing Cardiac Surgery Associates, S.C. (CSA), to produce Dr. Jeffrey P. Schwartz's compensation agreement, reverse that part of the order directing production of Dr. Schwartz's W-2 forms, and vacate the contempt order entered against CSA. Cause remanded.

¶ 2 The defendant, Cardiac Surgery Associates, S.C. (CSA), appeals from orders of the circuit court of Cook County holding it in direct civil contempt for refusing to produce in discovery the compensation agreement and W-2 forms of Dr. Jeffrey P. Schwartz. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand for further proceedings.

¶ 3 The following factual and procedural history is derived from the pleadings and exhibits of record.

¶ 4 On May 2, 2011, the plaintiff, Milorad Dimitrovski, underwent a "redo thoracoabdominal aneurysm repair surgery" at Loyola University Medical Center (Loyola), which was performed by Drs. Schwartz and Jason W. Smith. Following surgery, Dimitrovski sustained a loss of blood flow to his spine that resulted in paralysis. On May 2, 2013, he filed a complaint in the circuit court of Cook County, alleging, in relevant part, medical negligence by Dr. Schwartz (count I), Loyola (count III), and CSA (count IV). Counts III and IV alleged that Dr. Schwartz, on the date of surgery, was a "duly authorized agent[ ]" or "employee[ ]" of both Loyola and CSA.

¶ 5 On January 8, 2014, Loyola filed an answer in which it admitted employing Dr. Schwartz on the date of surgery. Dr. Schwartz, in response to Dimitrovski's interrogatories, likewise stated that Loyola "employed" him on the date of surgery but that he also was "affiliated" with CSA at that time. Dimotrovski, in his deposition, testified that another physician, Dr. Mamdouh Bakhos, directed him to consult with Dr. Schwartz in connection with the instant surgery, and that, together, Drs. Bakhos and Schwartz had also operated on him in 2007. Dimitrovski subsequently dismissed and re-filed his complaint; both the re-filed complaint and Loyola's answer thereto were identical to the original filings in all aspects relevant to this appeal.

¶ 6 On September 2, 2016, CSA filed a motion for summary judgment and sanctions, arguing that Loyola's answers to both the original and re-filed complaint established that Dr. Schwartz was an agent or employee of Loyola, rather than CSA, when he performed the surgery. Consequently, CSA submitted that Dimitrovski "should have known," when he re-filed his complaint, that Dr. Schwartz did not treat him in his capacity as CSA's agent or employee, and that allegations to that effect in the re-filed complaint were baseless.

¶ 7 On September 15, 2016, Dimitrovski's counsel filed an affidavit pursuant to Supreme Court Rule 191(b) (eff. Jan. 4, 2013), attesting that he could not respond to CSA's summary judgment motion without presenting "evidence of an employment and or agency relationship" between Dr. Schwartz and CSA. Counsel requested additional discovery, including, *inter alia*, "[e]mployment [c]ontracts," "records evidencing payment to or between" Dr. Schwartz and CSA, and the depositions of CSA's officers or directors. CSA filed its response on September 30, 2016, arguing that Loyola's admissions in its answer, along with Dr. Schwartz's answers to the interrogatories, constitute "judicial admissions" that "dispense[ ] wholly with need for proof regarding the employment of Dr. Schwartz ***." With the circuit court's leave, Dimitrovski served CSA with notice for the deposition of its chief financial officer, John Barakat, and a subpoena *duces tecum* for Dr. Schwartz's "[c]ompensation contracts" and W-2 forms.

¶ 8 At Barakat's deposition on November 11, 2016, he testified that Dr. Bakhos incorporated CSA and that Dr. Schwartz is a shareholder and director. Barakat stated that Dr. Schwartz is also an employee of Loyola, but denied the existence of a financial or contractual relationship between Loyola and CSA. He further stated that CSA did not bill Dimitrovski or Loyola for services that Dr. Schwartz provided Dimitrovski, nor did it "expect" compensation for such, as

he was not CSA's patient and Dr. Schwartz treated him in his capacity as Loyola's employee. Barakat refused to provide copies of Dr. Schwartz's compensation agreement and W-2 forms.

¶ 9 On November 23, 2016, Dimitrovski filed a motion to compel the production of Dr. Schwartz's compensation agreement and W-2 forms. In response, CSA argued that those documents were irrelevant to the litigation because both Dr. Schwartz and Loyola admitted that Loyola employed Dr. Schwartz on the date of surgery. Dimitrovski, in reply, denied that Dr. Schwartz's employment with Loyola "exonerates" CSA, and maintained that the compensation agreement and W-2 forms were relevant to whether Dr. Schwartz acted under CSA's "apparent authority."

¶ 10 On January 24, 2017, the circuit court held a hearing on Dimitrovski's motion to compel. At the hearing, Dimitrovski's counsel confirmed that he was proceeding on a theory of apparent authority. Counsel further represented that Dimitrovski treated with CSA "for years" before the surgery and that he had been directed to Dr. Schwartz by Dr. Bakhos, another CSA physician. Thus, according to counsel, Dimitrovski "was under the impression" that Dr. Schwartz treated him in his capacity as a CSA employee. Counsel submitted that the compensation agreement and W-2 forms were "crucial" to the litigation because those documents would reveal "the circumstances by which[ ] *** Dr. Schwartz works for *** [CSA or Loyola] on any given case and would give us a point in time where that relationship may have changed." In response, CSA's counsel maintained that none of the requested documents address whether Dr. Schwartz treated Dimitrovski in his capacity as either a CSA or Loyola employee, and that judicial admissions of record established that Dr. Schwartz "was not working in his scope of employment [with CSA] while he was treating Mr. Dimitrovski."

¶ 11 Following argument, the circuit court entered a written order directing CSA to produce Dr. Schwartz's compensation agreement and W-2 forms from 2009 to 2012. On April 7, 2017, the court denied CSA's motion to reconsider and ordered it to produce copies of the documents, both in unaltered form and with CSA's proposed redactions, for *in camera* inspection. On May 10, 2017, following *in camera* inspection, the court entered a written order directing CSA to provide the documents to Dimitrovski, redacted only for the names of other physicians and certain personal identifying information. CSA did not comply and, on May 24, 2017, filed a motion asking the court to find it in direct civil contempt for violating the orders of January 24 and May 10, 2017. On June 28, 2017, the court entered a written order finding CSA in direct civil contempt and imposing a $100 fine. The record does not indicate that CSA took any other action in the circuit court relative to the compensation agreement and W-2 forms. This appeal followed.

¶ 12 We note, at the outset, that during the pendency of this appeal, this court granted CSA's unopposed motion for leave to file Dr. Schwartz's compensation agreement and W-2 forms under seal, both in unaltered form and with proposed redactions, for our own *in camera* inspection. Although we recognize CSA's wish to keep this material private, which it characterizes as "confidential," our consideration of the issues and arguments it raises on appeal necessarily requires us to discuss certain details from those documents. See, *e.g.*, *Motorola Solutions, Inc. v. Zurich Insurance Company*, 2017 IL App (1st) 161465, ¶ 3. However, we include only those details necessary to our resolution of the issues.

¶ 13 On appeal, CSA contends that the circuit court abused its discretion in ordering the production of Dr. Schwartz's compensation agreement and W-2 forms where judicial admissions established that Dr. Schwartz treated Dimitrovski as an actual agent of Loyola, rather than CSA;

Dimitrovski proceeded in the circuit court under the theory that Dr. Schwartz acted under CSA's apparent authority; and none of the requested documents are relevant to whether apparent authority existed. Dimitrovski, in response, raises no argument regarding the documents' relevance to the issue of actual authority, but argues they are necessary to establish whether CSA knowingly acquiesced in conduct creating the appearance that his treatment occurred under its authority.

¶ 14 Generally, a discovery order issued by the circuit court is not appealable because it is not final. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). It is well-settled, however, "that the correctness of a discovery order may be tested through contempt proceedings." *Id.* Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016) provides that "[a]n order finding a person or entity in contempt of court which imposes a monetary or other penalty," such as the order entered in this case, is appealable without the special finding required for appeals under Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 15 When a party appeals contempt sanctions imposed for violating, or threatening to violate, a pretrial discovery order, the discovery order is subject to review. *Norskog*, 197 Ill. 2d at 69. Supreme Court Rule 201 (eff. July 1, 2014) defines the scope of discovery in civil cases. Rule 201(b)(1) provides, in relevant part, that a party generally "may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action ***." *Id.* Rule 401 of the Illinois Rules of Evidence defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Pursuant to Rule 402 of the Illinois Rules of

Evidence, all relevant evidence generally is admissible, and evidence that is not relevant is not admissible. Ill. R. Evid. 402 (eff. Jan. 1, 2011).

¶ 16 "Traditionally, the trial court is accorded great latitude in determining the scope of discovery, as discovery presupposes a range of relevance and materiality which includes not only what is admissible at trial, but also that which leads to what is admissible at trial." *D.C. v. S.A.*, 178 Ill. 2d 551, 561 (1997); see also *Zagorski v. Allstate Insurance Co.*, 2016 IL App (5th) 140056, ¶ 22 ("[T]he concept of relevance for purposes of discovery is broader than the concept of relevance for purposes of admissibility at trial."). Discovery rulings typically are reviewed for an abuse of discretion. *Klaine v. Southern Illinois Hospital Services*, 2015 IL 118217, ¶ 13. "Because wide discretionary power rests in the trial court regarding pretrial discovery matters, appellants have the burden of showing that there has been a clear abuse of discretion." *Profesco Corp. v. Dehm*, 196 Ill. App. 3d 127, 129 (1990). "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Seymour v. Collins*, 2015 IL 118432, ¶ 41. This standard of review is "highly deferential" to the circuit court's decision. *People v. Peterson*, 2017 IL 120331, ¶ 125.

¶ 17 In this case, the parties dispute whether Dr. Schwartz's compensation agreement and W-2 forms are relevant to his alleged status as an apparent agent of CSA and, therefore, subject to discovery. Apparent authority is the authority that a reasonably prudent person would naturally suppose the agent to possess, given the words or conduct of the principal. *State Security Insurance Co. v. Burgos*, 145 Ill. 2d 423, 431-32 (1991). The doctrine's rationale is that a principal who creates the appearance of authority "should be estopped from denying that authority where doing so would operate to the detriment of a third party." *Stone Street Partners*,

LLC v. City of Chicago Dep't of Administrative Hearings, 2017 IL 117720, ¶ 33. In order to establish apparent authority, a plaintiff must demonstrate that:

> "(1) the principal or its agent acted in a manner that would lead a reasonable person to conclude that the individual who was alleged to be negligent was an employee or agent of the principal; (2) the principal had knowledge of and acquiesced in the acts of the agent; and (3) the plaintiff acted in reliance upon the conduct of the principal or its agent, consistent with ordinary care and prudence." *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 18.

As to the element of knowledge and acquiescence, our supreme court has explained that "where the acts of the agent create the appearance of authority, the plaintiff must also prove that the *** [defendant] had knowledge of and acquiesced in them." (Internal quotation marks omitted.) *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 525 (1993) (discussing a hospital's liability for the negligence of physicians acting under its apparent authority). With these principles in mind, we consider the discoverability of Dr. Schwartz's compensation agreement and W-2 forms.

¶ 18 As a threshold matter, CSA maintains that neither the compensation agreement nor W-2 forms are relevant to the issue of apparent authority because Dimitrovski could not have known their content when he treated with Dr. Schwartz. Dimitrovski, however, contends that the documents are relevant to the *second element* of apparent authority, namely, whether CSA knowingly acquiesced in conduct creating the appearance that his treatment occurred under its authority. Although, in his brief on appeal, Dimitrovski does not identify the conduct at issue, the record shows that, in the circuit court, counsel argued that Dr. Schwartz's appearance of

authority originated in Dimitrovski's treatment history with Dr. Bakhos, another CSA physician, who directed him to consult with Dr. Schwartz in connection with this surgery.

¶ 19 Turning first to the compensation agreement, we find that the circuit court did not abuse its discretion in ordering CSA to produce that document in discovery. The relevance of the compensation agreement to the element of knowledge and acquiescence is apparent from its terms. The agreement provides, in pertinent part, that "*[u]nless otherwise permitted by CSA*, in its sole discretion, Dr. Schwartz agrees to devote all of his professional time[ ] *** to *this employment*." (Emphasis added.) Thus, per the compensation agreement, Dr. Schwartz's treatment of non-CSA patients requires CSA's knowledge and approval. The compensation agreement is, therefore, germane to CSA's knowledge of the claimant's treatment history, consultations, and referrals with Drs. Bakhos and Schwartz. Under these circumstances, the circuit court did not act arbitrarily in holding that the compensation agreement was discoverable.

¶ 20 In so holding, we reject CSA's argument that this determination encourages plaintiffs to raise frivolous claims of apparent agency in order to obtain "non-relevant, confidential and sensitive information" in discovery. The fact that a party characterizes commercial information as confidential does not necessarily render it non-discoverable. See *International Truck and Engine Corp. v. Caterpillar, Inc.*, 351 Ill. App. 3d 576, 580 (2004). More importantly, for reasons we have explained, the compensation agreement is, in fact, relevant under the circumstances of this case, and the circuit court did not abuse its discretion in ordering its production.

¶ 21 To the extent CSA argues that the circuit court erred in rejecting its proposed redactions, we have reviewed the redacted version of the compensation agreement and disagree. The parameters of protective orders are a matter of discretion for the circuit court, and a reviewing

court "will alter the terms of a protective order only if no reasonable person could adopt the view taken by the circuit court." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 224 (2000). In this case, the circuit court elected to redact only the names of other physicians from the compensation agreement. Because the agreement is relevant to the litigation, we do not believe the decision to order the production of a version of the document with redactions only for the names of the other physicians was so unreasonable or oppressive as to constitute an abuse of discretion. See Ill. S. Ct. R. 201(c)(1) (eff. July 1, 2014); see also *Willeford v. Toys "R" Us-Delaware, Inc.*, 385 Ill. App. 3d 265, 273 (2008) (recognizing that Supreme Court Rule 201 "gives trial courts broad discretion to determine that a protective order is *not* warranted just as *** [the rules gives] them broad discretion to determine that a protective order *is* warranted." (Emphasis in original.)).

¶ 22 As for Dr. Schwartz's W-2 forms, however, we are unable to say that they are relevant, in either their original or redacted form, to whether CSA knowingly acquiesced in conduct resulting in the appearance of authority. The only information contained in the W-2 forms pertains to the fact of Dr. Schwartz's employment with CSA from 2009 through 2012, his annual salary, and tax withholding. Dimitrovski, in his brief on appeal, concedes, correctly, that the amount of Dr. Schwartz's compensation is irrelevant to the issue in this case. Moreover, Dimitrovski has raised no argument that the W-2 forms would lead to the discovery of other information that would be relevant and admissible at trial. Despite the broad discretion afforded to the circuit court in determining the scope of discovery, "[a] discovery request must meet the threshold requirement of relevance to the matters at issue in the case, and the trial court should deny discovery where insufficient evidence is shown that the discovery is relevant." *Antonacci v. Seyfarth Shaw, LLP*, 2015 IL App (1st) 142372, ¶ 40. Because, in this case, the W-2 forms do not meet the threshold

requirement for relevance, the circuit court's order directing CSA to provide those documents to Dimitrovski constituted an abuse of discretion and is, therefore, reversed.

¶ 23 Finally, CSA contends that the circuit court's contempt order of June 28, 2017, should be vacated because it did not act contumaciously in refusing to comply with the court's discovery orders of January 24, 2017, and May 10, 2017. We agree. As noted, requesting the court to enter a contempt order is a proper procedure to seek immediate appeal of a discovery order. See *Adler v. Greenfield*, 2013 IL App (1st) 121066, ¶ 39. "In such situations, where the party sought the order in good faith and was not contemptuous of the trial court's authority, we may vacate the contempt order even when we find that the trial court's discovery order was proper." *Webb v. Mount Sinai Hospital & Medical Center of Chicago, Inc.*, 347 Ill. App. 3d 817, 828 (2004). Here, the record indicates that the circuit court entered its contempt order not because CSA's conduct was contemptuous, but because CSA sought, through a written motion, a contempt finding for purposes of taking an immediate appeal of the court's discovery order. Accordingly, we vacate the circuit court's contempt order and the fine imposed against CSA.

¶ 24 For all the foregoing reasons, we affirm that part of the circuit court's order directing CSA to produce Dr. Schwartz's compensation agreement, reverse that part of the court's order directing CSA to produce Dr. Schwartz's W-2 forms, and vacate the order holding CSA in direct civil contempt. The cause is remanded for further proceedings.

¶ 25 Affirmed in part; reversed in part; vacated in part; and remanded.