UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ROBIN HOUSTON, Plaintiff, v. PUBLIX SUPER MARKETS, INC., Defendant.	)	CASE NO.: 1:13-CV-00206-TWT

NON-PARTY ML HEALTHCARE SERVICES, LLC'S MOTION TO QUASH SUBPOENAS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Non-party ML Healthcare Services, LLC ("MLH") files this Motion to Quash two Subpoenas issued by Publix Super Markets, Inc. ("Publix"), one on Brian Craver, CEO of MLH, and another on MLH as a company. The subpoenas are for the trial of this matter currently scheduled for June 8, 2015. True and correct copies of these Subpoenas are attached hereto as Exhibit "1" and "2."

The subpoenas are part of a continuing effort by Publix to introduce inadmissible collateral source information. The subpoenas are infirm for the reasons stated in more detail below, and MLH respectfully requests that the Court quash the subpoenas.

I. Subpoena Number One to Brian Craver

The first subpoena seeks to compel the appearance and testimony of Brian Craver, CEO of MLH. Defendant, however, did not serve Mr. Craver in accordance with Federal Rule of Civil Procedure 45, which requires personal service. *See Klockner Namasco Holdings Corp. v. Daily Access.Com, Inc*., 211 F.R.D. 685, 687 (N.D. Ga. 2002) (requiring personal service on the witness being subpoenaed and holding service at residence on spouse was insufficient); *see also Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (holding service of subpoena must be on person named therein, service on his attorney is not sufficient); *Tidwell–Williams v. N.W. Ga. Health Sys*., 1998 WL 1674745, at *1–2, *6 (N.D.Ga. Nov. 19, 1998) (holding mailed or faxed subpoena is not sufficient).

The subpoena to Mr. Craver was just "dropped off" at ML Healthcare's offices, and no proof of service was ever filed with the Court. The subpoena should be quashed for not being personally served on Mr. Craver.

In addition to being quashed for not being personally served on Mr. Craver, the subpoena should be quashed because the testimony sought from Mr. Craver would be inadmissible under Georgia's collateral source rule. The Georgia Supreme Court has held that evidence of a third-party's payment of medical bills incurred by a plaintiff allegedly as a result of a tort is not admissible or relevant as

to the issue of damages, and the Court found that a former Georgia statute rendering such evidence admissible was unconstitutional. *See Denton v. Con-Way Couthern Exp., Inc.*, 261 Ga. 41, 43 & 45-46 (1993); *see also Wardlaw v. Ivey*, 297 Ga. App. 240, 244 (2009) ("a claimant may sue a tortfeasor and seek recovery for damages caused by tortious conduct even if the claimant has been reimbursed by his insurer"); *Hoeflick v. Bradley*, 282 Ga. App. 123, 124 (2006) ("[A] tortfeasor is not allowed to mitigate its liability by collateral sources provided by others. The collateral source rule applies to payments made by various sources including insurance companies, beneficent bosses, or helpful relatives."); *Adkins v. Knight*, 256 Ga. App. 394, 396 (2002) ("A tortfeasor cannot diminish the amount of his liability by pleading payments made to the plaintiff under the terms of a contract between the plaintiff and a third party who was not a joint tortfeasor.").

Recently, the Georgia Court of Appeals held that the type of payment information sought by Defendant in this case is not relevant to the reasonableness of the cost of medical care and is not discoverable or admissible. *See Medical Center, Inc. v. Bowden*, 327 Ga. App. 714 (2014). In *Bowden*, the hospital sued on its lien for medical charges for a defendant who had not paid such charges. The defendant, Bowden, sought information on the discounts the hospital gave to its insured patients and its agreements with providers, and the trial court ordered

production. The case was certified for immediate appeal and the Court of Appeals reversed the trial court, holding that the requested discount information and provider agreements were not relevant to the issue of the reasonableness of the charges.

Three rulings that have been handed down since *Bowden* in MLH cases and they have ruled that the key information sought by defendants in those cases – information about how much MLH paid providers – was not discoverable or admissible.

On the Nov 25, 2014, in *Lazo v. Turner and Georgia Power* (copy attached as "Exhibit 3") Judge Bessen, in Fulton County State Court, ruled that MLH's payments were not discoverable, because under *Hoeflick*, they were collateral source information. Judge Bessen also ruled on the amount of MLH's provider payments stating "the issue of how much or how little MLH paid is completely and utterly irrelevant as a matter of law."

On Nov. 12, 2014, Judge Brantley in Gwinnett State Court in *Juarez and Villacorta v. Georgia Power* held that MLH is clearly a collateral source and that its information relative to payments to providers need not be produced. (Judge Brantley's decision is attached as "Exhibit 4.") Judge Brantley ruled that defendants could attack the reasonability of the charges through many different

methods, citing *Bowden*, and ruled that the payment information and discount information were irrelevant to reasonableness of charges and non-discoverable. Judge Brantley also ruled on plaintiffs' motion in limine that "all parties are precluded from arguing, implying, suggesting, mentioning, or otherwise introducing evidence at trial about MLH or its involvement in this case."

On April 2, 2015, Judge Roberts in Hall County in *Bostedt v. Brown* held that MLH's payment information and the provider agreements were collateral source information and need not be produced, again citing *Bowden*. (A copy of Judge Roberts' Order is attached as "Exhibit 5.")

Georgia's collateral source rule should be followed by federal courts sitting in Georgia. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938); see also *Southern v. Plumb Tools, a Div. of O'Ames Corp*., 696 F.2d 1321, 1323 (11th Cir. 1983) (per curiam) (holding that Alabama's common law collateral source rule was substantive law to be applied by federal courts in diversity cases); *Bradford v. Bruno's, Inc.*, 41 F.3d 625, 626-27 (11th Cir. 1995) (per curiam) (holding that Alabama's collateral source statute was substantive law and collecting cases for the proposition that "a federal court sitting in diversity must apply the collateral source rule of the state whose law governs the case"), withdrawn and superseded on other grounds by, 94 F.3d 621 (11th Cir. 1996). Applying the collateral source rule here

bars the admission of the information sought by Defendant in the subpoena. Thus, the Court should quash the subpoena served on Mr. Craver.

II. Subpoena Number Two on MLH

The second subpoena calls for the same information as the first, except it is addressed to ML Healthcare and Mr. Craver as ML Healthcare's registered agent. Thus, Subpoena Number Two should be quashed for the same reasons as Subpoena Number One.

In addition to being quashed for those reasons, Subpoena Number Two should be quashed because it is, in effect, a Rule 30(b)(6) subpoena, and a Rule 30(b)(6) subpoena cannot be used to compel trial testimony. *See Dopson-Troutt v. Novartis Pharm. Corp.*, 295 F.R.D. 536, 540 (M.D. Fla. 2013) (quashing Rule 30(b)(6) subpoena seeking trial testimony); *Hill v. National Railroad Passenger Corporation*, 1989 WL 87621 (E.D. La. July 28, 1989).

Hill, in particular, is directly on point. In that case, the Court held that:

> Rule 30(b)(6) specifically applies to the deposition of a corporation. Rule 45… provides the proper procedure by which a person may be compelled to testify at trial. There is no provision allowing the use of the 30(b)(6)-type designation of areas of inquiry or allowing service on a corporation through an agent for service of process in order to compel a particular person, who may be a corporate employee outside the subpoena power of the court, to testify at trial.

For the above reasons, Subpoena Number Two should also be quashed.

Respectfully submitted this 2nd day of June, 2015.

/s/Jason S. Alloy
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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the within and foregoing **NON-PARTY ML HEALTHCARE SERVICES, LLC'S MOTION TO QUASH SUBPOENAS AND MEMORANDUM OF LAW IN SUPPORT THEREOF** with the Clerk of Court using the CM/ECF system, which automatically sent counsel of record e-mail notification of such filing

This 2nd day of June, 2015.

/s/Jason S. Alloy
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