

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, PETER J. O'DONOGHUE IAS PART MD  
Justice

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LISA KLEIN and HOWARD KLEIN,

Plaintiffs,

-against-

MOISES TENEMBAUM, M.D., MICHAEL DREW,  
M.D., MATTHEW MEDWICK, M.D., SERGIO  
MARTINEZ, M.D., RICHARD LIBES, M.D.,  
CHRIS MILLER, M.D. and NORTH SHORE  
UNIVERSITY HOSPITAL AT FOREST HILLS,

Defendants.  
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Index No.: 10408/06

Motion Date: 4/16/08

Motion Cal. Nos.: 17 & 18

Motion Seq. Nos.: 003 & 004

Motions bearing calendar numbers 17 and 18 of April 16, 2008 are hereby consolidated for disposition. The following papers numbered 1 to 10 read on this motion by defendants Moises Tenenbaum, M.D. ("Dr. Tenenbaum") and Michael Drew, M.D. ("Dr. Drew") for an Order: (1) pursuant to CPLR § 3126, dismissing plaintiffs' complaint for plaintiffs' persistent refusal to fully comply with the court's order that required plaintiffs to timely and meaningfully respond to defendants' interrogatories; (2) pursuant to CPLR § 3126, precluding plaintiffs from introducing any evidence of damages due to plaintiffs' persistent disregard of the court's order that required plaintiffs to timely and meaningfully respond to defendants' interrogatories; or (3) pursuant to CPLR § 3126, 22 NYCRR § 202.21(e), and/or 22 NYCRR § 212.17(d), striking plaintiffs' Note of Issue and directing plaintiffs to answer defendants' interrogatories fully and meaningfully; and this motion by defendant Richard Libes, M.D. ("Dr. Libes") for an Order: (1) pursuant to CPLR § 3126, dismissing plaintiffs' complaint for failure to obey a court order that required plaintiffs to respond to defendants' interrogatories; or (2) pursuant to CPLR § 3126, 22 NYCRR § 202.21(e), and/or 22 NYCRR § 212.17(d), striking plaintiffs' Note of Issue and directing plaintiffs to appear for further examinations before trial due to plaintiffs' failure to obey a court order that required plaintiffs to respond to defendants' interrogatories.

	<u>PAPERS</u> <u>NUMBERED</u>
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Upon the foregoing papers it is ordered that the branches of these motions by defendants Dr. Tenenbaum, Dr. Drew, and Dr. Libes for Orders pursuant to CPLR § 3126, dismissing plaintiffs' complaint are denied.

The branch of this motion by defendants Dr. Tenenbaum and Dr. Drew for an Order pursuant to CPLR § 3126, precluding plaintiffs from introducing any evidence of damages due to plaintiffs' persistent disregard of the court's order that required plaintiffs to timely and meaningfully respond to defendants' interrogatories is denied.

The branches of these motions by defendants Dr. Tenenbaum, Dr. Drew, and Dr. Libes for Orders pursuant to CPLR § 3126, 22 NYCRR § 202.21(e) and/or 22 NYCRR § 212.17(d), striking plaintiffs' Note of Issue and directing plaintiffs to appear for further examinations before trial due to plaintiffs' failure to obey a court order that required plaintiffs to respond to defendants' interrogatories are denied. Plaintiffs are directed to be produced for further examinations before trial with respect to plaintiff Howard Klein's ("Mr. Klein") extramarital affairs and plaintiff Lisa Klein's ("Mrs. Klein") informed consent discussions with the first gastric surgeon within 20 days of service upon plaintiffs of a copy of this Order with notice of entry. Trial is scheduled for June 9, 2008.

In the case at bar, on August 20, 2004, plaintiff Mrs. Klein underwent gastric bypass surgery. Plaintiffs alleged that the defendants improperly performed gastric bypass surgery and failed to diagnose a postoperative infection (see Exhibit A annexed to moving papers). As a result of defendants' departure, plaintiffs alleged that Mrs. Klein underwent additional surgeries. Some of the alleged injuries sustained by Mrs. Klein were depression, insomnia, embarrassment, humiliation, emotional anxiety and distress, and loss of self-esteem (see Exhibit C annexed to moving papers). Plaintiffs' counsel blocked questions relating to plaintiff Mr. Klein extramarital affairs at Mrs. Klein's deposition and questions relating to whether Mrs. Klein had informed consent discussions with the first gastric surgeon at Mr. Klein's deposition. Subsequently, in January 2008, the

defendants served plaintiffs with Interrogatories. Plaintiffs have failed to provide responses to the defendants.

The defendants contended that those questions were relevant to determine the nature and extent of Mrs. Klein's pre-existing depression prior to the alleged medical malpractice to which plaintiffs' attribute her alleged injuries sustained and the nature and extent of Mrs. Klein's knowledge of risks, benefits, alternatives, and complications of gastric bypass surgery prior to undergoing the operation performed by defendants.

Pursuant to CPLR 3101(a), "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The Court of Appeals has stated that the statutory language is: "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason. CPLR 3101(a) should be construed, as the leading text on practice puts it, to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable'." (See Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 [1968].)

Although the discovery provisions of the CPLR are to be liberally construed and the trial court possesses wide discretion in deciding whether the information sought is "material and necessary" (see Id. at 406), "this is not to say that carte blanche demands are to be honored, and those demands which are unduly burdensome or lack specificity or seek privileged matter or seek irrelevant information or are otherwise improper must be denied" (see Capoccia, P.C. v Spiro, 88 AD2d 1100, 1101 [3rd Dept 1982]).

Thus, under CPLR 3101(b), "[u]pon objection of a party privileged matter shall not be obtainable," and, under CPLR 3103(a), "[t]he court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." (See Scalone v Phelps Mem. Hosp. Ctr., 184 AD2d 65 [2nd Dept 1992].)

In the case at bar, plaintiff Mrs. Klein "affirmatively placed her entire medical condition in controversy through the broad allegations of physical injury and mental anguish contained in her bill of particulars ... In addition, the nature and severity of the plaintiff's previous injuries and medical

conditions are material and necessary to the issue of damages, if any." (See Diamond v Ross Orthopedic Group, P.C., 41 AD3d 768 [2nd Dept 2007].) The nature and extent of Mrs. Klein's knowledge of risks, benefits, alternatives, and complications of gastric bypass surgery prior to undergoing the operation performed by defendants are also material and necessary to the issue of liability.

Dated: May 19, 2008

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J.S.C.