

Seldon v St. Luke's-Roosevelt Hosp. Center
2002 NY Slip Op 30040(U)
January 10, 2002
Supreme Court, New York County
Docket Number: 0011870/2000
Judge: Sheila Abdus-Salaam
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***SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

PRESENT: Hon. SHEILA ABDUS-SALAAM PART 13

Justice

Philip Seldon

- v -

St. Luke's-Roosevelt Hosp. Center

INDEX NO. 118701/00

MOTION DATE 9117/01

MOTION SEQ. NO. 005 & 006

MOTION CAL. NO. 133 & 134

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

SCANNED
JAN 24 2001

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that motions bearing sequence numbers 005 and 006 are, along with defendant's cross-motion, consolidated for disposition as follows:

J.S.C. Pro se plaintiff's motion to amend his complaint to include causes of action for fraud, fraudulent inducement, invasion of privacy and breach of confidentiality of plaintiff's medical records (sequence number 005) is denied. As an initial matter, plaintiff has failed to submit the proposed amended complaint with the motion, a requirement for seeking the court's permission to amend a pleading (see, Sirohi v. Lee, 222 AD2d 222, 223). Moreover, the proposed causes of action as set forth in plaintiff's affidavit have no merit.

Regarding the fraud and fraudulent inducement claims, " '[i]t is only when the alleged fraud occurs separately and subsequent to the malpractice that a plaintiff is entitled to allege and prove a cause of action for intentional tort ..., and then only where the fraud claim gives rise to damages separate and distinct from those flowing from the malpractice'" (Abbodandolo v. Hitzig, 282 AD2d 224, 225, quoting Coopersmith v. Go, 172 AD2d 982). Here, as in Abbodandolo v. Hitzig

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATE:

(282 AD2d 224, supra), plaintiff's proposed fraud allegations are "part and parcel" of the alleged malpractice (id.), and do not allege any damages distinct from the claimed damages flowing from the alleged malpractice.

Distilled to their essence, plaintiff's fraud allegations, at most, sound in lack of informed consent, a cause of action not included in the complaint. Plaintiff may renew his motion to amend his complaint to include such a cause of action if he is so inclined. The renewed motion must include a proposed amended complaint and be filed within 60 days of the date of this decision, which is being mailed to plaintiff and defendant's counsel.

Plaintiff's proposed invasion of privacy and breach of confidentiality claims, are based on Dr. Hertz, a non-party witness, reviewing plaintiff's medical chart before being deposed by plaintiff on the hospital's pain management policy. Plaintiff has placed his medical condition at issue by alleging that defendant hospital committed malpractice in connection with the management of plaintiff's pain after a right hemicolectomy. Dr. Hertz is the Director of the hospital's pain management department. It was neither a breach of confidentiality nor an invasion of plaintiff's privacy for Dr. Hertz to review plaintiff's medical chart in preparation for the deposition. In any event, plaintiff has not alleged any damages in connection with these purported claims.

Plaintiff also seeks to amend his complaint to name **10** individual doctors as additional defendants to this lawsuit (motion sequence number 006). No proposed amended complaint is included with this motion. As noted, this is a fatal defect. Although defendant included a copy of an earlier version of an amended complaint that names some of the individuals plaintiff now wishes to add as defendants, inclusion of that amended complaint in defendant's papers does not cure plaintiff's failure to include a proposed amended pleading in his motion papers. Nor could it, as that earlier pleading is also defective in that it failed to include the appropriate affidavits of merit as to each individual (see, Schroeder v. Brooklyn Hosp., 119 AD2d 564) and could not serve as a basis for allowing plaintiff to name the **10** individuals he now wishes to add.

Defendant's cross-motion for a protective order and to quash the subpoenas signed on August 10, 2001 is granted with respect to **Drs.** Kim, Hussein, and

Mizrachi, as well as, Jackie Andrews Lewis. Drs. Kim and Hussein are unknown to defendant. Although Dr. Mizrachi allegedly refused to turn over to plaintiff the tissue specimen taken during the hemicolectomy, his deposition would be cumulative, as plaintiff will be allowed to depose Dr. Coleman, defendant's Chief of Pathology, regarding an alleged agreement he made with plaintiff to give plaintiff the tissue specimen. Plaintiff has not demonstrated that **Ms.** Lewis, a secretary and not a doctor, has any information relevant to his claims.

By contrast, plaintiff has shown the need for depositions of Drs. Coleman, Catalano, **Alaeli**, Thomas, Lasheen and Krasienko, as well as Joseph Donegon. Plaintiff alleges that these doctors, with the exception of Dr. Coleman, all treated him for pain during his hospital stay. **Dr.** Hertz testified only to the hospital's pain management policy and expressed his inability to testify to plaintiff's specific pain management, stating that the individual doctors who treated plaintiff's pain are best qualified to provide such testimony. Plaintiff is not precluded from deposing these doctors because he did not request their depositions at the preliminary conference. The lack of dates and other defects in the subpoenas pointed out by defendant are curable, especially given plaintiff's explanation that he tried to accommodate defendant and the witnesses by staggering their depositions. If plaintiff cures these defects, there is no reason why he cannot depose these Individuals.

Regarding Dr. Coleman and Mr. Donegon, their testimony on the tissue specimen is still relevant. Plaintiff alleges that **Mr.** Donegon, defendant's Risk Manager, wrote plaintiff a letter stating that giving plaintiff his tissue specimen was against the hospital's policy but that defendant has failed to provide any documents regarding this policy in response to plaintiff's notice to produce. Contrary to the arguments in defendant's counsel's August 8, 2001 letter, Justice Moskowitz did not rule at the October 26, 2000 oral argument of plaintiff's summary judgment motion that the hospital is not required to turn over the tissue specimen. Rather, Justice Moskowitz ruled that she had no authority to direct the hospital to perform a discretionary act, as she construed the provisions of the Public Health Law and Department of Health regulations regarding disposal of medical waste as allowing the hospital to keep plaintiff's tissue specimen if the

hospital has a practice of not turning over such specimens: "[the statute and regulation] says that the hospital can not turn it over if it's the hospital practice not to turn it over" (Transcript, p. 15). Thus, what the hospital's policy or practice is regarding such specimens remains a relevant issue. Mr. Donegon's deposition will be confined to this limited issue. His and Dr. Coleman's depositions shall proceed if plaintiff cures the technical deficiencies in their subpoenas.

Accordingly, it is

ORDERED that plaintiff's motion for leave to amend his complaint to include new causes of action for fraud, fraudulent inducement, invasion of privacy and breach of confidentiality is denied without prejudice to renewing the motion within 60 days of this order for leave to include a new cause of action limited to lack of informed consent, upon the conditions set forth in this decision; and it is further

ORDERED that plaintiff's motion to amend his complaint to name additional defendants is denied; and it is further

ORDERED that defendant's cross-motion for a protective order is granted as to subpoenas for the depositions of Drs. Grace Kim, Dilber Hussein, and Howard Mizrahi, as well as Jackie Andrews Lewis. The subpoenas signed as to these individuals are hereby quashed; and it is further

ORDERED that defendant's cross-motion for a protective order is denied as to subpoenas for the depositions of Dr. Marjan Alaieli, Elizabeth Catalano, Neville Coleman, Baeta Krasienko, Sammy Lasheen, and Kurian Thomas, as well as Joseph Donegon.

The parties are directed to appear for a status conference on February 7, 2002, at 9:30 A.M.

ENTER:

Dated: January 10, 2002

SA-S
SHEILA ABDUS-SALAAM
 J.S.G.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION