At an IAS Term, MM TRP , of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of July, 2005

P R E S E N T:

HON. GERARD H. ROSENBERG,
Justice.

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TAMARA MOSEZHNIK,

Plaintiff,

- against -

Index No. 17799/02

ANNA BERENSTEIN, M.D., et ano,

Defendants.

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The following papers numbered 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	5 - 6
Reply Affidavits (Affirmations)	7
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Tamara Mosezhnik moves for an order: (1) pursuant to CPLR 2221 (d), granting leave to reargue the order and decision of this court dated January 14, 2005 (the January 2005 Order), (2) pursuant to CPLR 3124 and 3115, compelling defendant Doshi Diagnostic Imaging Services (Doshi) to produce Tariq R. Shaikh for further deposition and pursuant to CPLR 3126, requiring counsel for Doshi to pay for said deposition, including stenographic and attorneys' fees, and (3) pursuant to CPLR

3124, directing Doshi to produce three additional witnesses in compliance with the January 2005 Order and permitting an onsite discovery and inspection of the Doshi computer system with the assistance of a technologist expert.[1]

Facts and Procedural Background

Plaintiff commenced this action seeking to recover damages for defendants' alleged failure to timely diagnose and treat her for cancer of her left breast. A detailed account of her treatment is set forth in the January 2005 Order and will not be repeated herein except as is necessary to dispose of the issues now before the court. As is relevant, that Order granted plaintiff's application for leave to amend her complaint to separately assert a claim premised upon negligence and directed that the amended complaint, in the form annexed to the moving papers, be deemed served *nunc pro tunc;* dismissed the claims of medical malpractice as against Doshi to the extent that they are premised upon plaintiff's 1999

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[1] By order dated May 17, 2005, the cross motion made by defendant Anna Berenstein, M.D., seeking an order vacating plaintiff's note of issue was granted and the parties were directed to appear for a compliance conference in CCP on September 7, 2005.

In addition, Doshi's demand for further discovery from plaintiff with respect to the new claims made in her amended complaint and for reconsideration of the January 2005 Order with respect to the 2000 mammogram, as sought in its affirmation in opposition, will not be addressed herein inasmuch as the demands for relief are not properly before the court, since they are not raised in a motion or cross motion (*see generally* CPRL 2214 and 2215; *Chun v North American Mort. Co.*, 285 AD2d 42 [2001] [the court was without jurisdiction to grant the relief afforded to defendants where there was an absence of a notice of cross motion or any other notice to plaintiff that she would be required to respond to a motion to dismiss]; *Bauer v Facilities Dev.*, 210 AD2d 992 [1994] [affidavits submitted in opposition to defendants' motions were insufficient to constitute a cross motion]; *Guggenheim v Guggenheim*, 109 AD2d 1012 [1985] [it was not sufficient to demand relief in opposing affidavits or in a memoranda; an outright notice was required to avoid surprise to the original movant]; *Braver v Nassau County Office of Administrative Servs.*, 67 Misc 2d 120 [1971] [an affidavit in opposition to a motion was not sufficient to constitute a cross motion]).

mammogram; dismissed the claim of negligence as against Doshi to the extent that it is premised upon 1999 and 2001 mammograms; and denied plaintiff's cross motion to preclude Doshi from introducing letters advising plaintiff of the results of her mammogram (the Letters), on the conditions that Doshi appear for deposition and pay a sanction of $5,000.[2]

Following the deposition of Doshi, the instant motions were made.

Plaintiff's Demand for Further Discovery

Plaintiff's Contentions

In support of that branch of her motion seeking additional discovery, plaintiff argues that in accordance with the January 2005 Order, Doshi produced Shaikh for deposition on March 8, 2005. During the course of his testimony, Doshi's counsel directed Shaikh not to answer numerous questions posed to him, including questions regarding the documents that are given to a technician performing a mammography, the procedures utilized to dictate reports, the printing of the reports, the reports contained in plaintiff's file and the request by Doshi's counsel for copies of the Letters, arguing that the January 2005 Order limited the questions that plaintiff could ask of Doshi's witness. Plaintiff argues that counsel's actions in limiting Shaikh's testimony misinterpreted the previous order of this court. Morever, plaintiff contends that counsel is not permitted to obstruct a deposition by blocking testimony.

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[2] The Order also dismissed the action in its entirety as against Drs. Moallem, Beinart and Lugo-Santiago and dismissed the claims of medical malpractice as against Dr. Berenstein to the extent that they are premised upon the 1999 mammogram.

Doshi's Contentions

In opposition, Doshi argues that the deposition of Shaikh was properly limited in accordance with the language of the January 2005 Order, which provided that "[t]he remainder of the decision will accordingly address only the letter pertaining to the 2000 mammogram" (January 2005 Order, p 34), and that:

> "Accordingly, in the interest of balancing the competing interests of the parties, the court conditions the denial of plaintiff's motion to preclude upon Doshi producing for deposition a person with knowledge of: (1) the procedures utilized by Doshi in notifying patients of the results of mammograms; (2) the filing system utilized by Doshi in maintaining both paper copies of any such notifications and the computer files in which they are stored; (3) the search previously conducted in Doshi's efforts to locate the documents that were produced in response to the prior discovery demands; and (4) information explaining why the letter was only recently located."

(*id.* at 36).

Doshi further asserts that in accordance with the Order, it produced Shaikh, the executive vice president, who has been employed by Doshi since 1992 in various capacities and who is responsible for the operations of Doshi, including hiring, firing and marketing. Doshi thus argues that Shaikh had sufficient knowledge to testify about the concerns addressed in the January 2005 Order.

The Law

In accordance with 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" (*see generally Freedco Prods. v New York Tel. Co.*, 47 AD2d 654, 655 [1975]). Further, "[i]t is well settled that the scope of examination permissible at deposition is broader than the scope of examination permissible at trial" (*Horowitz v Upjohn Co.*, 149 AD2d 467, 468 [1989], citing *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]; *Wiseman v American Motors Sales*, 103 AD2d 230, 237 [1989]).

As is also relevant to the instant dispute, CPLR 3113 provides that:

> "All objections made at the time of the examination . . . to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness and parties present otherwise agree."

Inasmuch as there is always the possibility that the questions asked may infringe upon a privilege, are so improper that to answer them would substantially prejudice the parties, or are so palpably and grossly irrelevant or unduly burdensome that they should not be answered, the statutory language clearly provides that a deposition shall proceed "subject to the right of a person to apply for a protective order" (*see generally White v Martins*, 100 AD2d 805, 805 [1984], quoting CPLR 3113 [b]; *see also Tardibuono v County of Nassau*, 181 AD2d 879, 881 [1992] [all questions posed at depositions should be fully answered unless they invade a recognized privilege or are palpably irrelevant]).

In the recent case of *Orner v Mount Sinai Hospital* (305 AD2d 307 [2003], *rearg*

denied 2003 NY App Div LEXIS 10305 [2003]), the Appellate Division, First Department, addressed the issue of counsel's obstructionist tactics during depositions, stating that:

> "[I]t was not plaintiff's questions, but rather the defense counsel's instructions to the witnesses not to respond and his otherwise inappropriate and excessive interference, which were improper. Indeed, 'the evidentiary scope of an examination before trial is at least as broad as that applicable at the trial itself' (*Johnson v New York City Health & Hosps.*, 49 AD2d 234, 236 [1975]). Consequently, when faced with objections at a deposition, 'the proper procedure is to permit the witness to answer all questions subject to objections in accordance with CPLR 3115' (*White v Martins*, 100 AD2d 805 [1984]).
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> "Furthermore, general background questions . . . are routinely permitted at trial, and defense counsel improperly, and, it appears at times disingenuously, objected, interrupted and occasionally directed his witnesses not to answer these and other questions. That some of plaintiff's counsel's questions were inartful or otherwise imperfect did not give defense counsel license to react impatiently nor interfere as he did. . . . Indeed, '[d]efendants' counsel, in ordering his clients not to respond during depositions to questioning in areas which counsel unilaterally deemed to be irrelevant, and in continually objecting to matters other than form . . . effectively thwarted plaintiffs' efforts to depose defendants' (*Levine v Goldstein*, 173 AD2d 346 [1991])."

(*Orner*, 305 AD2d at 309-310).

Discussion

The court first finds that there is no merit to Doshi's assertion that the January 2005 Order limited the scope of discovery in any manner. To the contrary, the Order made in clear that plaintiff's claim is premised, in part, upon the alleged failure of defendants to notify her of the results of her mammograms. Accordingly, when Doshi allegedly discovered that it had

inadvertently failed to produce copies of the Letters sent to plaintiff advising her of the results late in the proceeding, on the eve of trial, plaintiff was given the right to depose Doshi with regard to these Letters. Nothing in the January 2005 Order, however, limited the issues that plaintiff could address at the deposition.

Rather, the language relied upon by Doshi was intended only to require that Doshi produce a witness having sufficient knowledge of the procedures and facts at issue herein. Further, that provision of the January 2005 Order which stated that the person deposed should have knowledge of "the filing system utilized by Doshi in maintaining both paper copies of any such notifications and the computer files in which they are stored" is broad enough to encompass all of the questions that counsel for Doshi directed Shaikh not to answer. In this regard, inquiry concerning the routine office practices of Doshi for a reasonable period of time both before and after the Letters at issue herein were allegedly mailed to plaintiff are also properly within the scope of the deposition.

Similarly, since the precise issue raised by the late production of the Letters includes the question of their authenticity, inquiry concerning when requests for production were made to Doshi by its counsel, if letters requesting production are a part of plaintiff's file and when the Letters were first produced are relevant to the issues that plaintiff was granted leave to explore at the deposition; the answers to these questions may be phrased in a manner that will not compromise the attorney-client privilege. Hence Doshi is directed to produce Shaikh for further deposition, at which time he shall respond to all the questions that counsel

previously refused to allow him to answer.

The court declines, however, to permit plaintiff to conduct depositions of any other representatives of Doshi. Although plaintiff seeks leave to depose two witnesses with regard to the operation of and changes to the computer program utilized by Doshi, plaintiff fails to offer any basis upon which the court may premise a finding that these individuals would have any information or knowledge specifically pertaining to the Letters notifying plaintiff of the results of her mammograms. Similarly, plaintiff offers no reason for this court to believe that the transcriber(s) of plaintiff's reports would be able to testify with regard to any information relevant to plaintiff, particularly since Shaikh testified that the transcribers printed out copies of the reports on the same day that they were dated and typed, that they were responsible for mailing the letters to the patients, and that the facility mailed out approximately 200 letters each day. Finally, although Shaikh could not answer many questions posed to the satisfaction of plaintiff, as, for example, when he testified that there was no procedure in place to check whether transcribers did, in fact, mail any given letter to the patient, this is not sufficient to entitle plaintiff to depose any other persons, particularly since Shaikh's testimony failed to establish that any other employee of Doshi would be in a better position than he to testify with regard to office procedures.

Similarly, although plaintiff seeks leave to have her expert inspect Doshi's computer system, she fails to advise the court of what procedures or methodology, if any, are available to uncover any relevant information with regard to the Letters allegedly sent to plaintiff or

what information the expert expects to find. Further, such an inspection would certainly inconvenience Doshi and put its equipment and software at risk of damage and/or compromise.

The court further declines to condition the additional deposition of Shaikh upon Doshi's payment of plaintiff's expenses. In this regard, it is well settled that CPLR 3126 affords the court discretion in imposing sanctions upon a party for refusal to comply with an order to disclose where the delay or the failure to comply was the result of willful or contumacious behavior (*see generally Frost Line Refrigeration v Frunzi*, ___ AD3d ___, 795 NYS2d 741 [2005]); *Devito v J & J Towing*, ___ AD3d ___, 794 NYS2d 74, 75 [2005]); *Anzalone v Scientific Exterminating Servs*, 163 AD2d 348 [1990]). It is equally well settled that the burden of establishing that a failure or refusal to disclose was the result of willful, deliberate, or contumacious conduct rests with the party seeking relief (*see Goodman, Rackower & Agiato v Lieberman*, 260 AD2d 599, 600 [1999], citing *Florio v Newmark & Lewis*, 248 AD2d 504 [1998]). Plaintiff herein has failed to satisfy this burden.

Plaintiff's Request for Reargument

Plaintiff's Contentions

In support of her demand for reargument, plaintiff contends that the court's determination that her appearance for further testing after the 1999 mammogram was performed negates her claim that she was not advised of the results of the test was reached in error, since Doshi cannot establish that a letter setting forth the results was sent to her.

Moreover, although Doshi found that the 1999 mammogram revealed a distortion in the right breast, it failed to detect any abnormality in the left breast, which plaintiff's expert claims was visible. With regard to the 2001 letter, plaintiff argues that the evidence tendered by Dr. Lugo-Santiago does not establish that plaintiff received the Letter advising her of the results. Plaintiff further claims that the test results were not properly summarized in any of the Letters purportedly mailed to plaintiff, since the nature of the findings was not set forth.

Doshi's Contentions

In opposition, Doshi contends that any claims premised upon medical malpractice with regard to the 1999 mammogram have been dismissed as untimely and accordingly should not be considered herein. Doshi further argues that even assuming that plaintiff can establish a violation of the Mammographic Quality Standards Act (21 CFR § 900.12) (MQSA) with regard to plaintiff's claim that Doshi failed to advise her of the results of the 1999 mammogram with regard to her left breast, she cannot establish proximate cause, a necessary element of her cause of action.

The Law

"It is well settled that '[a] motion for reargument is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision'" (*Hoey-Kennedy v Kennedy*, 294 AD2d 573, 573 [2002], quoting *Long v Long*, 251 AD2d 631 [1998]).

Discussion

Plaintiff has failed to establish that the court overlooked or misapprehended the law or the facts and adheres to its original determination. In the first instance, in view of plaintiff's appearance at Doshi for re-testing following her 1999 mammogram, her claim that she was not advised of the results is specious. Further, as was discussed at length in the January 2005 Order, only plaintiff's claim of negligence with regard to the 1999 mammogram is timely, so that her assertions that Doshi failed to detect abnormalities in the left breast, which sounds in medical malpractice, are time barred (*see* January 2005 Order, pp 14-15; 17-19).

The court also adheres to its determination that the Letters allegedly mailed to plaintiff by Doshi adequately conform to the MQSA. Inasmuch as the Letters stated that additional testing was necessary to complete the evaluation, a more detailed summary of the findings could only be misleading, since without such testing, there could be no definitive conclusion, finding or recommendation.

Finally, the court also adheres to its determination that Doshi complied with the requirements of the MQSA by the proof tendered by Dr. Lugo-Santiago that she mailed the test results to plaintiff and discussed the findings with plaintiff's primary care physician. In so holding, the court notes that although the MQSA requires that a facility send a patient the results of a mammography, there is no requirement that the facility follow up to determine if the mailing is received.

Conclusion

That branch of plaintiff's motion seeking further discovery is granted only to extent of directing Doshi to produce Shaikh for further deposition and directing him to answer the questions that counsel refused to allow him to answer, along with additional relevant questions as may be indicated by his responses; said deposition shall be noticed by plaintiff within 10 days of service upon her of a copy of this decision with notice of entry and the deposition shall be noticed for a date within 10 days thereof. That branch of plaintiff's motion seeking to reargue is denied in its entirety.

The foregoing constitutes the order and decision of this court.

E N T E R,

HON. GERARD H. ROSENBERG
J. S. C.