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Supreme Court of the State of New York
County of Kings

I.A.S. PART 2

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MENACHEM LIPSCHITZ and AIDA LIPSCHITZ

Plaintiffs,

ARNOLD J. STEIN, M.D.

Defendant

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Hon. Joseph S. Levine

Memorandum and Order

Index No. 47446/98

THE FOLLOWING PAPERS NUMBERED 1 to __4__ READ ON THIS MOTION

	Papers Numbered
NOTICE OF MOTION - ORDER TO SHOW CAUSE - PETITION(S) AFFIDAVIT(S) - AFFIRMATION(S)	1,2
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EXHIBITS AND OTHER PAPERS	

Following an appeal granting plaintiff a new trial and upon the foregoing papers, Plaintiffs Menachem LIPSCHITZ and Aida LIPSCHITZ (herein LIPSCHITZ or plaintiff), move to compel the non-party deposition of Yael GORDON, to compel further deposition of defendant, Dr. Arnold J. STEIN, M.D. (herein "STEIN" or "Dr. STEIN") and to disqualify and depose defense counsel, Neil H. EKBLOM, Esq, as a material witness. In reply, defense counsel submits no opposition to the deposition of Ms. Yael GORDON, provided deposition testimony is limited to interrogatories regarding the patient's log. Alternatively, defendant opposes the deposition of defendant, Dr. STEIN. Defendant maintains that plaintiff had a full and complete opportunity to question him during the five-hour deposition before trial, as well as during trial and further contends

that additional questioning before trial would constitute harassment. Defense counsel vehemently denies the allegations of fraudulent conduct as unfounded and contends that plaintiff has no valid basis to disqualify counsel.

On cross-motion, defendant moves to preclude plaintiff's expert from testifying that plaintiff's vision could have been saved when he arrived at defendant's office. The defendant contends that plaintiff's expert theory is novel and not a generally accepted scientific theory. In the alternative, if the court is unable to determine the novelty of plaintiff's expert theory, defendant requests a hearing pursuant to *Frye v. United States,* 293 F 103 [1923] to determine whether plaintiff's expert theory is an accepted scientific theory.

FACTS

This is a medical malpractice action, which was tried in Supreme Court, Kings County, before the Honorable Randolph Jackson in May 2002, for failure to timely diagnose post-operative infectious endophtalmis during a November 11, 1997 post-operative office visit. Following an appeal, the matter was remanded for retrial. A matter in dispute at trial was the time upon which plaintiff presented at the post-operative doctor visit. During trial and on motion plaintiff maintains that he arrived at 9:00am, but was not seen until 11:00am. Alternatively, defendant maintains that plaintiff arrived at 10:00am and was seen at or about 10:45 am. Prior to trial, defendant did not produce nor mentioned any office records establishing plaintiff's alleged arrival time. However, during the course of the trial the defense presented the testimony of defendant's office manager, Yael GORDON, in an attempt to rebut the plaintiff's testimony regarding arrival time. Ms. GORDON testified that plaintiff arrived at 10:00am. She also testified that she had a record, a patient log, that proved that

plaintiff arrived at 10:00am. However, in violation of the best evidence rule, the patient log was never produced during trial nor during pre-trial discovery despite plaintiff's requests for all records pertaining to plaintiff. Plaintiff alleged that during the charge conference, defense counsel, Mr. Ekblum, conceded that he knew of the document and that the office manager had altered the log. On appeal, the court noted that there was sufficient evidence for an inference of fraud to be considered on remand. Upon remand the plaintiff moved to depose defendant and his office manager, as well as to disqualify and depose defense counsel.

ANALYSIS

In the case at bar, the court is presented with three issues. First, the court must determine whether based on allegations of fraud, plaintiff is entitled to re-depose the defendant. Second, whether pursuant to the New York State Code of Professional conduct plaintiff has presented sufficient evidence of fraud to entitle him to question defense counsel and whether such questioning requires the disqualification or withdrawal of counsel. Finally, the court must determine whether the defendant has presented sufficient evidence to disqualify plaintiff's expert testimony or whether a hearing pursuant to *Frye v. United States* is necessary.

I.

Regarding the issue of whether plaintiff should be entitled to redepose the defendant the court looks to CPLR Article 31, which contains the basic requirements for deposition discovery. Section 3103(a) grants the court the discretion to "make a protective order denying, limiting, conditioning or regulating the use [of deposition] disclosures. Such order shall be designed to prevent unreasonable annoyances...or

other prejudice to any person or the courts." (*CPLR 3103 sub a*)

Generally, the use of depositions as governed by CPLR 3117(d), allows the use of depositions for any purpose against a party to the action and for impeachment or contradiction. Here, prior deposition was taken of defendant, as well as trial transcripts are available that would provide plaintiff with sufficient evidence to substantiate contradictions, if any, against the defendant. The court finds that plaintiff will have sufficient opportunity to examine defendant during retrial. Therefore, pursuant to CPLR 3103(a) the motion to redepose defendant is denied.

II

As a general rule, "the court has the discretion to determine whether an attorney acting as an advocate may appear as a witness without withdrawing from the case." *(AAA v. St Paul*, 1995 WL 608548). Therefore, the court has full discretion at any time to "decide to permit an attorney to be called as a witness and may also forbid it." *(Dack* 747 F2d 1172, 1176). Plaintiff's current motion to dispose and disqualify defense counsel is based on defense counsel's alleged involvement in concealing or altering of evidence. Plaintiff contends that defense counsel's alleged involvement in altering or concealing of the patient log makes defense counsel a necessary witness in the remanded action. Plaintiff argues that under New York State Disciplinary Rules of Professional Conduct (herein Code of Professional Conduct) defense counsel must be disqualified from representing defendant in the remanded case.

Section 1200.21 [DR 5-102] of the Code of Professional Conduct deals with the issue of Lawyers as witnesses. It provides in pertinent parts that "[i]f after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer...or her firm may be called as a witness on a significant issue other than on

behalf of the client, *the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client* at which point the lawyer and the firm must withdraw acting as an advocate before the tribunal." (*Code of Professional Responsibility Section 1200.21 [DR 5-102] [d]*) (emphasis added) In granting the motion to depose counsel, the court cites the finding of the Appellate Division, Second Department finding that at minimum "[i]t may be inferred from the defense counsel's silence that the document in fact was altered (citation omitted), giving rise to a permissive inference of fraudulent intent", which this court finds is sufficient to allow the deposition of counsel. (*Lipschitz et al v Stein,* 10 AD3d 634, 638 781 NYS23 773 [2004]) Although, defense counsel's silence is sufficient to allow the deposition of counsel, pursuant to the Code of Professional Conduct, the court finds counsel's silence is insufficient to require, disqualification, at this point, since a "lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client." (*Code of Professional Responsibility Section 1200.21 [DR 5-102] [d]*).

Therefore, in accord with the Code of Professional Conduct, the court, at this time, denies plaintiff's motion to disqualify counsel, but grants plaintiff's motion to depose defense counsel.

III

Defendant on cross motion seeks to disqualify plaintiff's expert testimony or in the alternative, requests a hearing pursuant to *Frye v. United States.* Conversely, plaintiff contends that defendant has no basis to preclude plaintiff's expert testimony nor any basis to request a hearing pursuant to *Frye v. United States.*

New York adheres to the test for admissibility of expert testimony and opinion set forth in *Frye v. United States,* which provides that "expert testimony based on scientific

principles or procedures is admissible but only after a principle or procedure has 'gained general acceptance' in its specified field." *(People v. Wesley,* 83 NY2d 417, 422, 611 NYS2d 97, [1994]) citing *Frye v. United States,* 293 F. 1013, 1014 [1923]). Generally, "[a] *Frye* hearing will be held to determine the admissibility of scientific evidence only where a party seeks to submit innovative 'novel' scientific, medical or technical evidence." (*Lambadarios v. Kobren*, 191 Misc.2d 86, 89, 739 NYS2d 549 [2002] citing *Frye v. United States*, 293 F 1013 [1923]).

As defense counsel, so eloquently states, pursuant to *Frye v. United States* and its progenies, a party challenging expert testimony must make a prima facie showing that the challenged testimony is novel and generally not accepted, by submitting an expert affidavit. After the movant's prima facie showing the burden shifts to the respondent to provide evidence showing general acceptance. (*see People v. Fortin,* 184 Mis.2d 10, 706 NYS2d 611 [2000] *see also DeMeyer v. Advantage Auto*, 9 Misc.3d 306, 797 NYS2d 743 [2005])

In support of his challenge, the defendant submitted the affidavit of Bruce E. HIRSCH, M.D., a licensed, Board Certified physician in the State of New York. Dr. HIRSCH maintains that plaintiff's expert testimony is novel. He concludes, based on his experience, that there is no recorded case or formal study either in the medical or scientific community that would support the claim of a patient salvaging vision twenty four hours after contracting Bacillus cereus following cataract surgery.

In opposition to defendant's challenge, plaintiff submits transcript testimony of defendant's trial expert, M. BARZA, affirming that a patient who has a Bacillus cereus infection who is taken to the operating room and operated on before there is extensive damage to the eye may be able to salvage vision.

In *Del Maestro v. Grecco*, et al, the Appellate division, Second Department,

proffered that "the [reliability] burden of proving general acceptance rests upon the party offering the disputed expert testimony." (*Del Maestro v. Grecco et al*, 16 AD3d 364, 366, 791 NYS2d 139 [2005]). The reliability can be "established by a particular concept being so notorious or obvious that judicial notice should be taken of its general acceptance" or by establishing by reference to legal writings and opinions the general acceptance of the theory. (*DeMeyer v. Advantage Auto*, 9 Misc.3d 306, 312-313, 797 NYS2d 743 [2005] *see also People v. Fortin,* 184 Mis.2d 10, 706 NYS2d 611 [2000]) Here, plaintiff has only submitted transcript testimony that defendant's expert agreed that in some cases a patient who has a Bacillus cereus infection who is taken to the operating room and operated on before there is extensive damage to the eye, may be able to salvage vision. However, the plaintiff has failed to provide the court with any proof establishing that plaintiff's expert testimony is generally accepted or whether there are legal writings and opinions establishing general acceptance. Therefore, the court grants defendant's motion for a hearing pursuant to *Frye* v. United States.

The foregoing constitutes the decision and Order of the Court.

J.S.C.

January 3, 2006