

O'Connor v Hospital for Special Surgery

2006 NY Slip Op 30835(U)

September 6, 2006

Supreme Court, New York County

Docket Number: 103612/04

Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

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TIMOTHY F. O'CONNOR and MARY F. O'CONNOR,

Plaintiffs,

Index No.: 103612/04

-against-

THE HOSPITAL FOR SPECIAL SURGERY,
CHARLES B. GOODWIN, ORTHOPEDIC
SPECIALISTS OF NEW YORK, PLLC, GARY A.
FANTINI, ANDREW C. LEE and EAST RIVER
MEDICAL ANESTHESIOLOGY, P.C.,

Defendants.

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SKLAR, J.:

The principal issue presented is whether to allow post-note of issue depositions of non-party subsequent treating out of state physicians when the purpose of the depositions is to lay a foundation for the admissibility of their medical records at trial.

Defendants Drs. Goodwin and Fantini move by order to show cause for commissions to a Florida court and to an Idaho court to take the depositions of three non-party witnesses, Dr. Cowan and Adaptive Mobility Services, Inc., both of Orlando, Florida, and St. Luke's Wood River Medical Center ("St. Luke's"), Ketchum, Idaho for the purpose of making their medical records of treatment of the plaintiff admissible at trial.

Plaintiff, Timothy F. O'Connor ("O'Connor"), claims he suffered bilateral optic neuropathy and vision changes as a result of the moving-defendants' negligence in the performance of lumbar spine surgery upon him in June 2002. He also claims to have suffered damage to his peripheral vision as a result of ischemic optic neuropathy allegedly cause by lack of adequate perfusion and oxygenation of the optic nerves during surgery.

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Defendants served a notice to admit regarding O'Connor's treatment. Defendants asked plaintiffs to stipulate that a copy of the medical records of Dr. Cowan documenting his treatment of O'Connor was a true and accurate copy and could be admitted into evidence in its entirety. Plaintiffs declined, and denied that plaintiff was the source of history provided to Dr. Cowan during his St. Luke's treatment or that the history was a true and accurate account of how he fractured his arm in March 2004.

O'Connor claims in his bill of particulars that he has developed bilateral vision compromise which causes him difficulties in his work, physical and social activities, and causes restriction and decrease in activities such as travel, communication, driving, horseback riding and golf. However, at his deposition in October 2004, he testified that, after the operation, he fractured his wrist while ice skating. When asked if he told Dr. Cowan that he fell while playing ice hockey, he responded, "We were not playing ice hockey, I had a hockey stick in my hand, but we were not playing ice hockey." Motion, Ex E

In like fashion, defendants assert that the St. Luke's emergency room report documents that plaintiff said he "fell ice skating onto his right arm earlier today after he had been playing a hockey game...." Motion, Ex G The same history was allegedly given at Adaptive Mobility, whose records state that plaintiff "drove a taxi in N.Y., Nascar School, developed good instincts and reactions, played ice hockey, fx (fracture) Rt. Wrist." Motion, Ex H

Since plaintiffs have declined to stipulate to allow these medical records into evidence, defendants seek to depose the three non-party witnesses. Plaintiffs urge that, unless a motion to strike from the calendar is timely made, no further depositions may be held, citing, e.g., *Stella v Ahmed*, 223 A.D.2d 698 (2nd Dept, 1996) Plaintiffs further urge that defendants

delayed unduly after the filing of the Note of Issue before making this motion. However, defendants correctly urge that the deposition of a non-party treating physician after the Note of Issue is filed is permissible, since that deposition is not in the nature of discovery. *Brandes v North Shore University Hospital*, 22 AD3d 777 (2nd Dept, 2005); *Brandes v North Shore University Hospital, (Wayne Sebastiano, Nonparty Respondent)*, 22 AD3d 779 (2nd Dept, 2005), both citing, inter alia, CPLR 3101[d] [1] [iii]. That rule applies here with even greater force since defendants are not seeking to discover or learn anything they do not already know, but are simply trying to lay a foundation for the admission into evidence at the trial of medical records of which they already have copies. Those records are clearly material and necessary on the issue of damages. As is made clear in defense counsel's reply affirmation, this is not simply a collateral attack on O'Connor's credibility.

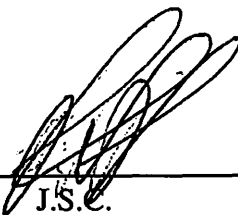
Finally, the First Department has permitted, under appropriate circumstances, a post-note of issue deposition of a non-party witness. *Woods v Daniella Realty Corp.*, 15 AD3d 231 (1st Dept, 2005). In the exercise of my discretion, I believe that appropriate circumstances exist to justify the post-note of issue non-party depositions of the three medical providers whose commissions are sought.

Plaintiffs have requested that in the event I permit these depositions I require defendants to pay plaintiffs' counsel's costs in attending the out of state depositions. Under all of the circumstances, I believe it is inappropriate to order that assumption of the costs at this time. Both sides will bear their own costs.

If plaintiffs, upon receipt of this decision, determine to obviate the need for the depositions by stipulating to the admissibility of the records in question, they shall promptly so notify counsel for defendants, and, by conference call, the Court.

Settle order, attaching copies of the proposed commissions.

Dated: September 6, 2006
60 Centre Street
New York, NY



J.S.C.