

Calabria v Fonar Corp.
2007 NY Slip Op 30368(U)
March 9, 2007
Supreme Court, Suffolk County
Docket Number: 0018663
Judge: Denise F. Molia
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**SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY**

PRESENT:

Hon. **DENISE F. MOLIA,**
Justice

DONNA M. CALABRIA,

Plaintiff,

- against -

FONAR CORPORATION, MELVILLE MRI, P.C.,
DAMADIAN MRI AT MELVILLE, DAMADIAN
MRI, P.C., STAND-UP MRI OF MELVILLE, P.C.,
and HEALTH MANAGEMENT CORPORATION OF
AMERICA,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 11/28/06
SUBMISSION DATE: 1/5/07
MOTION SEQUENCE No.: 002 MOT D

ATTORNEY FOR PLAINTIFFS

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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated May 30, 2006 (001); Affirmation in Support dated May 30, 2006; Exhibits A through F annexed thereto; Affirmation in Opposition dated January 18, 2007; Exhibits A through D annexed thereto; Reply Affirmation dated February 5, 2006; Exhibits A through C annexed thereto; Order to Show Cause dated August 7, 2006 (002); Affirmation in Support dated July 27, 2006; Exhibits A and B annexed thereto; Affirmation in Opposition dated November 17, 2006; Affirmation in Opposition dated October 9, 2006; Notice of Cross-Motion dated October 11, 2006 (003); Affirmation in Support dated October 11, 2006; Affirmation in Opposition dated November 1, 2006; Reply Affirmation dated November 3, 2006; and upon due deliberation; it is

The underlying action arises from an accident that occurred on January 17, 2003, in which it is alleged that the plaintiff fell from a seat assembly or chair connected to an MRI

machine manufactured by Fonar Corporation and installed at Melville MRI, P.C. The complaint alleges that the accident occurred because the seatbelt provided by Fonar to be used with the MRI was defectively designed as it did not fit around the plaintiff. The complaint further alleges that as a result, the technician did not strap the plaintiff in and consequently, the plaintiff fell, thereby sustaining serious injuries.

At the inception of the instant motion practice, the defendant Fonar Corporation moved for summary judgment dismissing the complaint. At that time, the parties agreed to adjourn said motion to allow the plaintiff's expert to conduct a physical inspection of the subject MRI machine. It was the attempted inspection of the machine which has resulted in the plaintiff's motion to provide for an inspection of the subject machine and Fonar's cross-motion to preclude the expert from testifying at trial.

Accepting the facts as set forth by Laurence Shiff, counsel for defendant Melville MRI, P.C., plaintiff's attorney contacted Shiff to arrange for an inspection of the MRI machine involved with plaintiff's accident. Shiff then discussed available dates with Fonar's counsel, so that she could be present when the machine was inspected by plaintiff's expert. Shiff arranged for the inspection to be held at Melville MRI on June 29, 2006. Neither plaintiff's counsel nor Fonar's counsel was apprised of the inspection date. In fact, Shiff forgot the date himself and was not present when the expert arrived at the inspection site.

The expert was directed to a certain MRI machine and proceeded with the inspection of that machine. He also had a conversation with a technician employed by Melville MRI concerning operation of the examined machine. As it turns out, the expert had been directed to a machine which was not the subject machine, and which operated in a manner different than the subject machine. Shiff maintains that the technician was not aware of the expert's purpose in presenting himself and mistook the expert for a representative of Melville MRI. He further maintains that the expert failed to properly identify himself as such, leading to the confusion of the defendant's employee.

Plaintiff now seeks to conduct an inspection of the correct machine. The defendants seek to deny the plaintiff the opportunity to inspect the correct machine and to suppress the information obtained by the expert in his conversation with defendant's employee, thereby precluding the expert from testifying at trial.

The plaintiff made a proper request for the examination of the actual machine which is alleged to have caused plaintiff's accident. The counsel for Melville MRI made the arrangements for the inspection and was aware of the date of the inspection. When the plaintiff's expert arrived for the inspection, he was directed by an employee to a machine other than the subject machine. Through no fault of his own, an inspection was conducted of the wrong MRI machine. The Court finds that the plaintiff should not now be penalized by being denied the opportunity to inspect the subject machine, as originally requested. In addition, inasmuch as there is no record of the conversation between the expert and the technician, and the fact that any information imparted to the expert was about a model of a machine different than the machine which is the subject of the instant litigation, the plaintiff's expert shall not be precluded from

testifying at trial

ORDERED, that within twenty (20) days of the date of entry of this Order, the defendant, Melville MRI, P.C., is directed to produce the subject MRI machine for inspection by plaintiff's expert; and it is further

ORDERED, that the portion of plaintiff's motion directing the defendants or its counsel to bear the expense of the June 29, 2006 inspection of the wrong MRI machine, is denied; and it is further

ORDERED, that within thirty (30) days of the date of the inspection of said MRI machine, the depositions of the defendants, Melville MRI, P.C., Damadian MRI at Melville, Damadian MRI, P.C., Stand-Up MRI of Melville, P.C., and Health Management Corporation of America, shall be held; and it is further

ORDERED, that pursuant to the original agreement of the parties, the motion for summary judgment by defendant, Fonar Corporation, shall be stayed until after the plaintiff's expert has inspected the subject machine and the depositions of all defendants have been held.

The foregoing constitutes the Order of this Court.

Dated: March 9, 2007

DENISE F. MOLIA

HON. DENISE F. MOLIA J.S.C.