

**Mattler v Holden**

2007 NY Slip Op 30876(U)

April 5, 2007

Supreme Court, Suffolk County

Docket Number: 0020981/2004

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 20981/2004

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PHILIP MATTLER and ANNA MATTLER,

MOTION DATE: 01/18/2007

Plaintiffs,

MOT. NO.: 003 MG

004 MG

005 MG

006 MG

-against-

MELVIN HOLDEN, M.D., ISLAND  
PULMONARY INTERNISTS, P.C., ASVIN M.  
PATEL, M.D., ASVIN M. PATEL, PHYSICIAN,  
P.C., HUNTINGTON HILLS CENTER FOR  
HEALTH AND REHABILITATION and NORTH  
SHORE UNIVERSITY HOSPITAL AT  
PLAINVIEW,

**DEFENDANTS' ATTORNEYS:**  
WAGNER, DOMAN AND LETO, P.C.  
By: Diana M. D'Alessio Di Leo, Esq.  
227 Mineola Boulevard  
Mineola, New York 11501

Defendants.

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**PLAINTIFF'S ATTORNEY:**

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Health & Rehabilitation  
128 East Main Street  
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Smithtown, New York 11787

**DEFENDANTS' ATTORNEYS:**

SHAUB, AMUTY, CITRIN & SPRATT, LLP

By: William J. McDonald, Esq.

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1983 Marcus Avenue

Lake Success, New York 11042

IVONE, DEVINE & JENSEN, LLP  
By: Debora G. Nobel, Esq.  
Atty. for Defts. Asvin M. Patel, M.D.,  
Asvin M. Patel, Physician, P.C.  
2001 Marcus Avenue  
Lake Success, New York 11042

Upon the following papers numbered 1 to 30 read on this motion for protective order and cross-motions directing plaintiffs to post security for costs: Notice of Motion and Affirmation 1 to 5 and supporting papers; Affirmation in Opposition 6 to 8 and supporting papers; Affirmation in Opposition 9 to 11; Notice of Cross-Motion and Affidavit 12 to 14 and supporting papers; Notice of Cross-Motion and Affidavits 13 to 24 and supporting papers; Notice of Cross-Motion 25 to 27; Reply Affirmation 28 to 30; it is

**ORDERED** that the motion (motion sequence no. 003) of plaintiffs PHILIP MATTLER and ANNA MATTLER for an order pursuant to CPLR §3103 and §3113 directing that plaintiffs' depositions be conducted in Colorado is granted as set forth herein; and it is further

**ORDERED** that the cross-motions (motion sequence nos. 004, 005 and 006) of defendants ASVINKUMAR M. PATEL, M.D. and ASVINKUMAR M. PATEL, M.D., PHYSICIANS, P.C., defendant NORTH SHORE UNIVERSITY HOSPITAL AT PLAINVIEW, and defendant HUNTINGTON HILLS CENTER FOR HEALTH & REHABILITATION, respectively, for an order pursuant to CPLR §8501 directing plaintiffs to post security for costs in the above entitled action in the amount of \$1,000.00 on the grounds that plaintiffs are residents of Colorado and have not been granted permission to proceed as poor people are granted as set forth herein.

The submissions establish that on September 9, 2004, plaintiffs commenced this medical malpractice action in which they allege that as a result of defendants' failure to properly and timely prevent and treat multiple decubitus ulcers suffered by plaintiff PHILIP MATTLER (hereinafter referred to as "plaintiff," the claim of his wife, co-plaintiff ANNA MATTLER, being merely derivative), plaintiff developed gangrene which necessitated the amputation of both of his legs above the knee. The submissions further establish that in March 2006, plaintiff relocated with his wife to an assisted living facility in Broomfield County, Colorado, assertedly in order to be near their daughter. Plaintiff has submitted the "affirmation" of his treating physician in Colorado, who alleges that in addition to being a double-amputee, the 83-year-old plaintiff suffers from diabetes and hearing loss and requires assistance with many aspects of daily living, and opines that it would be a hardship for plaintiff to travel to New York for a deposition in this matter. Plaintiffs move for a protective order requiring that plaintiffs' depositions be conducted in Colorado.

Defendants all cross-move for an order directing plaintiffs to post security for costs pursuant to CPLR §8501. Plaintiffs have submitted no substantive opposition to the cross-motions. Accordingly, it appearing from the submissions that plaintiffs are not "residents of the state," the cross-motions are granted and, in accordance with CPLR §§8501 and 8503, plaintiffs are ordered to post security for costs in the sum of \$250.00 within thirty days of the date of entry of this order. (Defendants have offered no basis for their request that plaintiffs post security for costs in the amount of \$1,000.00.) Upon the failure of plaintiffs to post such security as ordered herein, the complaint shall be dismissed upon any defendants' motion. All proceedings herein (other than to vacate or review this order) are hereby stayed for a period of thirty days from the date of entry of this order.

As to plaintiffs' motion for a protective order, the Court finds that the facts alleged in the purported affirmation of plaintiff's Colorado physician are sufficient to establish that traveling to New York would constitute a "hardship" for plaintiff. *Rogovin v. Rogovin*, 3 A.D.3d 352, 770 N.Y.S.2d 342 (1st Dept. 2004). Accordingly, the motion for a protective order is granted to the extent that plaintiffs' depositions are directed to be held in Colorado. However, in light of the fact that the preliminary conference order dated September 21, 2005 required plaintiffs' appearance for deposition no later than December 5, 2005, that plaintiffs' depositions did not take place as scheduled, and that plaintiffs thereafter voluntarily relocated out of the state before their depositions could be taken within the state, it is reasonable that plaintiffs bear the reasonable expenses, including air fare, lodging, and other transportation expenses, of defendants and their counsel for taking plaintiffs' depositions in Colorado. Alternatively, if all parties agree, plaintiffs' depositions may be taken in Colorado by video conference, the costs of which shall likewise be borne by plaintiffs. The foregoing determination is subject to and conditioned upon plaintiffs' timely posting the security directed above, and upon providing the Court and defendants' counsel

