Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Kevin J. Kerrigan Part 10
Justice

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NORRIS NELSON,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, DAVID FRIEDLAND, JUAN MOSCOSO and DAVID MANDELL,

Defendants.

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Index No. 17390/01

Motion Date: 03/20/07

Calendar No. 14

Motion Seq. No. 4

The following papers numbered 1 to 16 read on this motion by plaintiff to strike the answers of New York City Health and Hospitals Corporation (HHC) and Juan Moscoso, dismiss Moscoso's affirmative defense of statute of limitations, renew plaintiff's prior "undecided" summary judgment motion and grant summary judgment against defendants, "clarifying" that plaintiff was not discharged against medical advice (AMA), "recognizing" that plaintiff's discharge AMA raises an issue of fact to be decided at trial, vacating the stay of the trial and ordering a trial forthwith and for costs and attorneys fees, and cross-motion by Moscoso for summary judgment.

	Papers Numbered
Notice of Motion-Affirmations-Exhibits	1-6
Notice of Cross-Motion-Affirmation-Exhibits	7-11
Affirmation in Opposition to Cross-Motion-Exhibits	12-14
Reply Affirmation	15-16

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Plaintiff's counsel had requested that the instant motion and cross-motion be referred to Justice David Elliot, inasmuch as he had issued two previous orders in this matter. This Court is deciding the instant motion because Justice Elliot has been reassigned to another part. Moreover, since plaintiff is neither moving to reargue nor renew the orders issued by Justice Elliot, pursuant to CPLR 2221, the instant motion and cross-motion are not properly referable to him.

Motion by plaintiff to strike the answers of New York City Health and Hospitals Corporation (HHC) and Juan Moscoso, dismiss Moscoso's affirmative defense of statute of limitations, renew plaintiff's prior "undecided" summary judgment motion and grant summary judgment against defendants, "clarifying" that plaintiff was not discharged against medical advice (AMA), "recognizing" that plaintiff's discharge AMA raises an issue of fact to be decided at trial, vacating the stay of the trial and ordering a trial forthwith and for costs and attorneys fees is granted solely to the extent that defendants are directed to furnish, within 20 days after service of a copy of this order with notice of entry upon the attorney for defendants, the identity of signatures 7 through 11 in question or both 1.) an affidavit from Omawattie Ghamandy setting forth the specific details of her personal investigation and of her consultation with the ENT department of Elmhurst Hospital Center and 2.)either the names of the physicians working in said department between March 31 and April 5, 2000, inclusive, or an affidavit from an individual in the ENT department of Elmhurst Hospital Center with personal knowledge articulating the reasons why it cannot be determined what doctors worked in said department during the dates in question and setting forth in detail what procedures were employed to find out what physicians were working in the ENT department during said period. In all other respects, the motion is denied.

Cross-motion by Moscoso for summary judgment on the issue of statute of limitations is also denied, without prejudice, since there remains outstanding the aforesaid discovery, which may bear upon the issue of continuous treatment.

In the order issued by Justice David Elliot on September 27, 2004, that Court granted defendants' motion for leave to amend Moscoso's answer to interpose the affirmative defense of statute of limitations and for summary judgment dismissing the complaint as against Moscoso on the ground of statute of limitations solely to the extent of 1.) allowing the amendment, 2.) directing further disclosure with respect to the issue of continuous treatment raised by plaintiff in response to Moscoso's newly-asserted limitations defense, and 3.) granting leave to defendants to renew their motion for summary judgment upon completion of said further disclosure. Specifically, HHC was directed to serve a statement identifying the signatures on the progress notes concerning plaintiff between March 31 and April 5, 2000, if identification was possible. The parties were further directed to arrange for the deposition of Moscoso, limited to the issue of whether or not he continued to treat plaintiff during the aforesaid period of March 31 to April 5, 2000.

Upon defendants' failure to comply with the September 27, 2004 order of the Court, plaintiff moved to strike Moscoso's affirmative defense of statute of limitations. Justice Elliot issued a second order on July 14, 2006 granting plaintiff's motion solely to the extent of directing defendants to identify the signatures or provide an affidavit of a person with personal knowledge of the attempts to identify the signatures and directing the deposition of

Moscoso solely with respect to the issue of continuous treatment.

In the instant motion, plaintiff alleges that defendants have again failed to comply with the July 14, 2006 order of the Court, in that they failed to identify all the signatures in question, failed to articulate what efforts were made to obtain the signatures and obstructed Moscoso's deposition by making improper objections.

An affidavit, dated October 30, 2006, was furnished to plaintiff of Omawattie Ghamandy, an employee of Elmhurst Hospital Center ("the hospital") in their risk management department, whose job it is to review requests for identification of signatures appearing on hospital charts and records. She reviewed the 11 signatures in question and consulted with the ENT (Ear Nose and Throat) department, and based upon her consultation and her investigation, she identified signatures 1-6. She also averred that after "an exhaustive and diligent investigation" the authors of signatures 7-11 could not be identified, but that they were working with the ENT department to identify the physicians who were working in that department on April 1-4, 2000.

With respect to the unidentified signatures 7-11, this Court is not satisfied that defendants are in full compliance with the September 27, 2004 and July 14, 2006 orders of the Court. Although the first order directed the identification of the signatures if such was possible, the second order also specified that defendants must either identify the signatures or, if they could not do so, provide an affidavit to that effect "by a person with personal knowledge of the attempts to identify such." Although the first six signatures were identified, the remaining five were not. As to those latter signatures, Ghamandy fails to set forth what attempts were made to identify them. She merely states that she conducted an investigation and consulted with the ENT department. However, she fails to specify what her personal investigation entailed and what the scope and extent of her consultation was with the ENT department. Moreover, although Ghamandy states that they were working with the ENT department to identify the physicians who worked in that department on the relevant dates, no such information has, to this date, been provided to plaintiff.

Pursuant to the orders of Justice Elliot, Moscoso appeared for a deposition on November 17, 2006. The scope of the deposition was limited by the Court to the issue of continuous treatment from May 31 to April 5, 2000. Mr. Jaros, plaintiff's attorney, clearly overstepped the bounds of the Court's directive by asking questions as to plaintiff's treatment after April 5, 2000, and by attempting to re-examine the issue, already decided by the Court, of whether plaintiff discharged himself from the hospital against medical advice ("AMA").

Pursuant to §221.2 of the Uniform Rules for the Conduct of Depositions, a deponent shall answer all questions at a deposition, except, inter alia, "to enforce a limitation set forth in an order

of a court." It was, therefore, not improper of defendants' attorney, Mr. Patel, to instruct Moscoso not to answer questions relating to treatment after April 5, 2000 or to the issue of whether plaintiff discharged himself AMA. Justice Elliot, in his 2004 decision, found that plaintiff discharged himself AMA on April 5, 2000 and, therefore, there could not have been any continuing treatment after this date, as a matter of law. Jaros improperly attempted to re-visit this issue in the deposition. His intention to revive the issue of AMA and continuing treatment after April 5, 2000 is not only clear from his line of questioning at the deposition, but is also underscored by the considerable space he devotes in his reply affirmation arguing why Justice Elliot was in error in his decision on this issue. Moscoso was allowed to answer all questions posed to him that were relevant and within the limited scope of the deposition circumscribed by the Court.

Plaintiff's request to "renew" his prior "undecided" cross-motion for summary judgment is without merit and borders on the frivolous. Plaintiff's summary judgment cross-motion was decided: it was denied. The order dated September 27, 2004 states, "The plaintiff's cross-motion for summary judgment is denied. . . . The court is satisfied that the conflicting affirmations of the parties' expert witnesses demonstrate that there are triable issues of fact. . . These factual issues cannot be resolved by the court without a trial, and so the motion and cross-motion for summary judgment on the merits of the treatment rendered are denied."

Even had plaintiff moved to renew the order of Justice Elliot, pursuant to CPLR 2221[e], which he did not do, such application would have had to be based upon additional material facts which existed at the time the prior cross-motion was made, but were not then known to plaintiff and, for that reason, were not made known to the court (see, Pahl Equip. Corp. v. Kassis, 182 AD2d 22 [1st Dept 1992] lv to app dismissed in part and denied in part 80 NY2d 1005, reargument denied 81 NY 2d 782 [1993]; Foley v. Roche, 68 AD2d 558 [1st Dept 1979]).Plaintiff has failed to show any new facts that were unavailable at the time of the original cross-motion so as to merit renewal.

Similarly, those branches of the motion seeking an order "clarifying" that plaintiff was not discharged AMA and "recognizing" that plaintiff's alleged discharge AMA raises an issue of fact for trial are without merit and border on the frivolous. Plaintiff is, in fact, seeking to craft a substitute for reargument of the September 27, 2004 order without moving for such relief pursuant to CPLR 2221. Since said order was entered on September 30, 2004, and a copy thereof with notice of entry was served on October 13, 2004, a motion to reargue, at this juncture, would have been untimely by almost three years (see CPLR 2221[d]). Recognizing, therefore, that he is precluded from seeking reargument, plaintiff's counsel attempts, in effect, to re-package reargument under the euphemistic labels of "clarification" and "recognition", a remedy which has no basis in New York jurisprudence and a tactic which this Court cannot countenance.

The remaining branches of plaintiff's motion are denied.

Dated: April 16, 2007

KEVIN J. KERRIGAN, J.S.C.