

Posada v Pelaez

2007 NY Slip Op 31535(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0106387/2004

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey
Justice

PART 40 D

MARGARITA POSADA,

Plaintiff,

Index No.: 106387/04

MOTION DATE _____

-v-

MOTION SEQ. NO. 14

MOTION CAL. NO. _____

OSCAR PELAEZ, M.D., MOUNT SINAI MEDICAL CENTER, "F. NASEH", a/k/a "F. NACEL", a/k/a "F. NASER", DANIEL GAINSBURGH, M.D., CENTRO MEDICO DE LAS AMERICAS, ALBERTO ROZO, M.D., GREGORY LOPEZ, M.D., THE PARKWAY HOSPITAL, and JOHN DOE,

Defendants.

The following papers, 1- 9, were read on this motion by non-party Farhad Naseh s/h/a "F. NASEH", a/k/a "F. NACEL", a/k/a "F. NASER" for a protective order against a second non-party deposition.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits
Answering Affidavits
Answering Affidavits
Replying Affidavits

Papers Numbered	
1-5	_____
6-7	_____
8	_____
9	_____

FILED

APR 20 2007

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

The instant action was brought to recover damages for medical malpractice for the alleged negligent performance of cataract surgery on plaintiff's right eye on or about October 30, 2001. This action, which was commenced on or about April 23, 2004, by the filing of a summons and complaint, was brought against, among others, Drs. Oscar Pelaez and Farhad Naseh¹, the two ophthalmologists alleged to have performed the surgical

¹ It is noted that by decision and order, dated July 20, 2005, Dr. Naseh's motion to dismiss pursuant to CPLR 3211(a)(8) (want of personal jurisdiction) was granted and the complaint was dismissed as asserted against him.

procedure, as well as Mount Sinai Medical Center ("Mount Sinai"), the medical treatment facility at which the subject surgery was performed.

Based upon representations made to this court by counsel for Mount Sinai that both of the ophthalmologists alleged to have performed plaintiff's surgery, i.e., Dr. Pelaez and Dr. Naseh, were private attending physicians who were in no way connected to the facility, the court advised counsel for Mount Sinai that it would permit it to submit a summary judgment motion, despite the fact that depositions had not yet been completed. By motion, dated September 2, 2005, Mount Sinai moved for summary judgment dismissing the complaint as asserted against it, arguing, inter alia, that it could not be liable for the alleged medical malpractice committed by Dr. Naseh or Dr. Pelaez as they were private attending physicians. By decision, dated October 21, 2005, the court granted Mount Sinai's motion, holding that Mount Sinai could not be held liable for the alleged malpractice of plaintiff's private attending physicians, i.e., Dr. Naseh or Dr. Pelaez, as plaintiff failed to allege that the orders and/or decisions of these physicians were clearly contradicted.

Thereafter, in August of 2006, upon application by plaintiff, the Court issued an open commission to conduct the out of state deposition of non-party Dr. Naseh, who resides in Maryland. Following the non-party deposition of Dr. Naseh, wherein Dr. Naseh stated that at the time of the subject surgery he was employed by Mount Sinai, plaintiff moved to renew Mount Sinai's prior summary judgment motion. Plaintiff argued that as a result of Dr. Naseh's status as an employee of Mount Sinai at the time of the surgery, Mount Sinai may be held vicariously liable for Dr. Naseh's malpractice. Dr. Naseh testified that in June of 2000 he was employed by Mount Sinai as a Clinical Instructor². According to Dr. Naseh, he was employed by Mount Sinai at the time of plaintiff's surgery in October of 2001. Based upon the aforementioned testimony, the Court, by order and decision, dated January 18, 2007, granted renewal of Mount Sinai's summary judgment motion, and, upon renewal, amended the prior decision and order, dated October 21, 2005, to the extent that defendant Mount Sinai's motion for summary judgment was denied.

The Court also found that the deposition testimony of both Dr. Pelaez and Dr. Naseh evidenced that an unorthodox relationship existed between Dr. Pelaez, Dr. Naseh and Mount Sinai. It appears that around the time of the plaintiff's surgery some sort of arrangement existed where patients of Dr. Pelaez's would undergo cataract surgeries performed by Dr. Naseh at Mount Sinai. Although Dr. Pelaez was listed as the number one

² As a Clinical Instructor on the Faculty of the Department of Ophthalmology at the Mount Sinai School of Medicine Dr. Naseh instructed residents with respect to clinical and surgical skills. It is noted that Dr. Naseh could not recall whether resident David Shu was present during the plaintiff's cataract surgery, however, a perioperative note states that D. Shu was the surgical resident/fellow in connection with her surgery.

attending surgeon in connection with these procedures and billed the patient and/or third party payers for the performance of the surgery through his office, it was actually Dr. Naseh who performed the surgery. With respect to this relationship, Dr. Naseh testified at his deposition as follows: "Doctor Pelaez originally asked me to do cases and we bill them and I would do them for him and then he didn't want his name there because I was doing the surgery and he said that he was not comfortable with that."

Following the granting of plaintiff's motion to renew Mount Sinai's summary judgment motion, and, upon renewal, denying the motion, Mount Sinai made an application to the Court to conduct depositions of plaintiff and Dr. Naseh. The Court granted Mount Sinai's application and issued an open commission to conduct a second non-party deposition of Dr. Naseh, providing Mount Sinai an opportunity to question Dr. Naseh with respect to his relationship with Mount Sinai, Dr. Pelaez and his role in the subject surgery. Dr. Naseh seeks to avoid a further deposition and presently moves for a protective order.

Under CPLR 3108, a party may take oral depositions outside the State pursuant to an "open commission" issued by the court (see Direct Media/DMI, Inc. v. Rubln, 258 AD2d 290 [1st Dept. 1999]; Kekis v. Park Slope Emergency Physician Service, P.C., 244 AD2d 463 [2d Dept. 1997]; Stanzione v. Consumer Builders, Inc., 149 AD2d 682 [2d Dept. 1989]; Wiseman v. American Motor Sales Corp., 103 AD2d 230 [2d Dept. 1984]). Where the deposition testimony sought is "material and necessary in the prosecution or defense of an action" an application for an open commission to obtain that testimony should be granted (CPLR 3101[a]; see Allen v. Crowell-Collier Publ. Co., 21 NY2d 403 [1968]; Direct Media/DMI, Inc. v. Rubln, *supra*, Stanzione v. Consumer Builders, Inc., *supra*). The deposition testimony sought by Mount Sinai is clearly material and necessary to its defense of this action. Mount Sinai's potential liability in this action arises solely out of Dr. Naseh's relationship with Mount Sinai, as well as Dr. Pelaez. Therefore, Mount Sinai is entitled to an opportunity to conduct a non-party deposition of Dr. Naseh. Accordingly, Dr. Naseh's motion for a protective order is denied.

It is noted that Dr. Naseh argues that a second non-party deposition would be a serious imposition to him, as he would be forced to disrupt his medical practice, and states that interrogatories or an affidavit would be more appropriate discovery vehicles. Although a commission to examine a witness out of State may permit the use of written questions (sealed commission), courts have recognized that oral interrogation (open commission) is the more effective method for eliciting information at an examination before trial (see Stanzione v. Consumer Builders, Inc., *supra*; Wynkoop v. County of Nassau, 139 AD2d 731 [2d Dept. 1988]; Wiseman v. American Motor Sales Corp., *supra*).

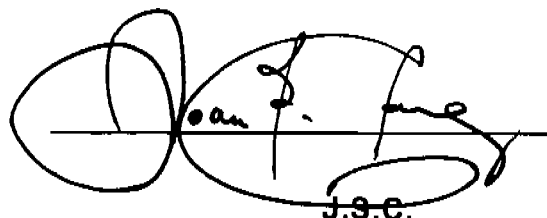
Lastly, since plaintiff's counsel has already had a full opportunity to depose Dr. Naseh, he may only question the doctor with respect to information newly revealed through the questioning by counsel for Mount Sinai. He will not be provided an opportunity to conduct another complete deposition of Dr. Naseh and ask questions he has, or should have, asked the doctor during his first deposition.

Based on the foregoing, it is hereby

ORDERED that non-party Farhad Naseh's motion is denied; and it is further

ORDERED that counsel for all parties are to appear before the court on May 21, 2007, at 9:30am, at 100 Centre Street, room 1306, Part 40D, for jury selection.

Dated: 4/12/2007



Check one: FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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