

Chidekel v Cabrini Med. Ctr.

2007 NY Slip Op 32358(U)

July 24, 2007

Supreme Court, New York County

Docket Number: 0106404/2005

Judge: Eileen Bransten

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

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 6

Peter Chioekel
- v -
Cabrini Medical Centers
ET AL.

INDEX NO. 106404/03
MOTION DATE 6-12-07
MOTION SEQ. NO. 3
MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for disqualify counsel and cross-motion

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 31 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-24-07

Eileen Bransten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X
PETER CHIDEKEL,

Plaintiff,

Index No.: 106404/05

Motion Date: 6/12/07

-against-

Motion Seq. No.: 03

CABRINI MEDICAL CENTER and
GREGORY MAZARIN,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

Pursuant to 22 N.Y.C.R.R. 1200.21, defendants Cabrini Medical Center and Gregory Mazarin (collectively "Defendants") move for an Order disqualifying David M. Chidekel ("Mr. Chidekel"), the attorney for plaintiff Peter Chidekel ("Plaintiff"), on the ground that "counsel is a witness on a significant issue in this case." Affirmation in Support ("Supp."), at ¶ 2. Plaintiff opposes the motion and cross-moves for sanctions.

Background

In this medical malpractice action, which was commenced on July 11, 2006, Plaintiff alleges that Defendants' negligence on November 11, 2003 resulted in septic shock and various systemic injuries including brain damage. Supp., at ¶ 3; Plaintiff's Counsel's Affirmation in Opposition to Defendant's Motion and in Support of Cross Motion ("Opp."), at ¶ 18.

Mr. Chidekel, Plaintiff's attorney, is also Plaintiff's brother. Defendants, represented by new counsel, now seek to disqualify him from serving as counsel, urging:

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“The records do not merely mention [Mr. Chidekel], but demonstrate that he was present for several discussions regarding treatment between the Plaintiff and Defendants, and participated in some of those discussions. Furthermore, despite the apparent estrangement between the brothers, [Mr. Chidekel] signed two (2) consent forms on Plaintiff’s behalf during the course of the treatment which is the subject of this action, and made important decisions regarding his care. In fact, he agreed to become Plaintiff’s health care proxy.”

Supp., at ¶ 4 (emphasis added).

According to Defendants, Plaintiff initially attempted to bar Mr. Chidekel from decision making with respect to his care, but eventually he assumed a “critical role regarding decisions to be made about Plaintiff’s treatment.” Supp., at ¶ 6. Subsequently, Plaintiff indicated that he did not want Mr. Chidekel making decisions on his behalf. “These facts,” Defendants posit, “indicate strongly that [Mr. Chidekel--Plaintiff’s counsel] witnessed many of the events which form the basis of this action, spoke to defendants and their staff regarding Plaintiff’s care, and took an active role with respect to making decisions about Plaintiff’s treatment.” *Id.* (emphasis added). Indeed, in the consent forms that he signed, Mr. Chidekel acknowledged that his brother’s treatment options were discussed with him.

Defendants argue that Mr. Chidekel “is an indispensable witness on various significant matters, including, but not limited to, Plaintiff’s health and overall condition immediately prior to, during, and immediately after the events complained of; Plaintiff’s discussions with Defendants and their agents, servants, and/or employees regarding his condition and care; Plaintiff’s counsel’s discussions with Defendants and their agents,

servants, and/or employees regarding Plaintiff's condition and care; the decisions Plaintiff's counsel made with respect to Plaintiff's care and how he arrived at them; and the reasons why Plaintiff objected to his brother's participation in formulating treatment-related decisions." Supp., at ¶ 7 (emphasis added).

Defendants assert:

"Clearly, * * * Plaintiff's attorney [Mr. Chidekel] not only observed the events claimed to be the basis of this action, but took an active role in making decisions about Plaintiff's care. He had discussions with Plaintiff regarding his treatment--in his capacity as Plaintiff's brother and health care proxy, rather than his attorney--as well as with Defendants and Defendants' staff. Defendants absolutely intend to call Plaintiff's counsel [Mr. Chidekel] as a witness, and it is very likely that at least some of his testimony will be prejudicial to his client. Accordingly, disqualification is clearly appropriate in this case."

Supp., at ¶ 11 (emphasis added).

Plaintiff vehemently opposes disqualification, countering that the malpractice occurred in its entirety on November 11, 2003 at Cabrini Medical Center and that Mr. Chidekel never had any conversations with Defendants nor did he observe the alleged malpractice. Opp., at ¶¶ 18-22. Plaintiff points out that Mr. Chidekel was only involved with his care at St. Vincent's Hospital, where he was hospitalized after the malpractice, and therefore, that he never observed or participated in any events forming the basis of the lawsuit. *Id.*, at ¶ 20.

Mr. Chidekel, moreover, informed Defendants' counsel that he "did not have any intention of testifying" and insists that there are other witnesses who could testify and provide the same information that he possesses. *Opp.*, at ¶¶10, 27.

Plaintiff further explains that he interviewed numerous attorneys before filing suit but chose his brother to represent him because he "was comfortable with him and trusted him." Affidavit of Plaintiff in Support of the [Cross] Motion and Opposing Defendants' Motion, at ¶ 9.

Plaintiff contends that this motion is simply an effort to delay the case after this Court imposed deadlines that were not agreeable to Defendants and that there was no reason to cancel scheduled depositions other than "to buy Defendants more time and for the Defendants to attempt to intimidate[] and harass the Plaintiff and his counsel." *Opp.*, at ¶ 33. Arguing that this is a frivolous application, Plaintiff seeks sanctions, costs and fees associated with this motion.

On reply, Defendants concede that Mr. Chidekel did not have any communications with Defendants but their argument amazingly remains unchanged. Affirmation in Opposition to Cross-Motion ("Reply"), at ¶ 3. Defendants assert that Mr. Chidekel "participated in discussions with treating doctors * * * signed two consent forms * * * [and] was his brother's health care proxy during some of the care and treatment which is relevant to this lawsuit." Reply, at ¶ 4. Defendants explain that other witnesses cannot provide the

same information as Mr. Chidekel because he signed the consent forms, acted as the health care proxy and discussed his brother's care and treatment with treaters; thus, he "is the only person who is able to speak on the issue of his involvement in his brother's care and treatment. To the extent that there is a claim that the Plaintiff * * * was at times near comatose, his brother, Plaintiff's counsel, acting in his best interest as his health care proxy, is not only the best person to speak to the decision making process, but in fact the only person able to speak to the process." Reply, at ¶ 7. Defendants further point out that Mr. Chidekel may be able to shed light on Plaintiff's medical status before November 2002 and during subsequent hospitalizations through the present.

Because Defendants have not established that disqualification is warranted, their motion is denied.

Analysis

"A party is entitled to be represented by the attorney of his or her choice. This is a valued right which should not be abridged absent a clear showing that disqualification is warranted." *Eisenstadt v. Eisenstadt*, 282 A.D.2d 570, 570 (2d Dept. 2001); *see also, S & S Hotel Ventures Limited Partnership v. 777 S. H. Corp.*, 69 N.Y.2d 437, 443 (1987). Restrictions on the right to counsel of choice must be "carefully scrutinized" and the movant bears the burden of establishing that the attorney's testimony at trial will be "necessary." *S*

& S Hotel Ventures Limited Partnership v. 777 S. H. Corp., 69 N.Y.2d, at 443, 445; *Eisenstadt v. Eisenstadt*, 282 A.D.2d, at 570. "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence." *S & S Hotel Ventures Limited Partnership v. 777 S. H. Corp.*, 69 N.Y.2d, at 446.

Indeed, 22 N.Y.C.R.R. 1200.21 ("Lawyers as witnesses") provides:

- "(a) A lawyer shall not act * * * as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:
- "(1) If the testimony will relate solely to an uncontested issue.
- "(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
- * * *
- "(4) As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case."
- "(d) If after undertaking employment * * * a lawyer learns or it is obvious that the lawyer * * * may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer * * * must withdraw acting as an advocate before the tribunal."

Defendants have not met their burden.

The assumptions underlying their motion are admittedly wrong. Mr. Chidekel did not observe the events that are the basis of this action. Nor did he take any role in making decisions about Plaintiff's care on November 11, 2003--the date of the alleged malpractice. He never had any conversations with Defendants. He did not sign consent forms for treatment that "is the subject of this action" and was not Plaintiff's health care proxy at the time he underwent treatment by Defendants.

Though it is true that Mr. Chidekel signed consent forms for Plaintiff's subsequent treatment at another unrelated institution and discussed his care with subsequent treaters, Defendants have not demonstrated that consent to that subsequent treatment will be a "significant" or contested issue in the case. Nor have they shown why Mr. Chidekel's testimony is "necessary" to them and the defense of the action. Likewise, they have not explained how his testimony would actually be prejudicial to Plaintiff. They simply maintain, without providing any particulars (and initially operating under the wrong assumption that Mr. Chidekel spoke with Defendants themselves), that "it is very likely that at least some of his testimony will be prejudicial to his client." *See, Supp.*, at ¶ 11. Such

* Defendants' statement that they "absolutely intend" to call Mr. Chidekel as a witness also appears to be based on the mistaken belief that he witnessed the malpractice and had conversations with Defendants themselves. Although Defendants submitted a corrected Affirmation, *see, Reply, Ex. 1*, they do not substantively address the significance of Mr. Chidekel's information related to subsequent treatment or explain how Plaintiff would be prejudiced.

speculation is clearly insufficient. *See, Goldberger v. Eisner*, 21 A.D.3d 401, 401 (2d Dept. 2005).

Defendants' showing is woefully insufficient and does not warrant depriving Plaintiff of counsel of his choice. *See, Ansonia Assocs. Limited Partnership v. Public Service Mutual Ins. Co.*, 277 A.D.2d 98, 99 (1st Dept. 2000) (disqualification properly denied "since plaintiff had no intention of calling counsel to testify and [defendant] failed to demonstrate that the attorney's testimony was necessary [and] * * * that counsel's testimony, when called by [defendant] to testify, was prejudicial to plaintiff"), *lv. denied* 96 N.Y.2d 715 (2001); *Iannazzo v. Stanson*, 8 A.D.3d 113, 114 (1st Dept. 2004) (motion to disqualify properly denied "for failure to show that counsel's testimony at trial was necessary * * * or that it would have been prejudicial to [the client]"); *see also, Matter of Porter*, 35 A.D.3d 477 (2d Dept. 2006); *Goldberger v. Eisner*, 21 A.D.3d, at 401 (reversing disqualification of attorney because movant failed to establish "that [1] the testimony of the opposing counsel is necessary to their case, and [2] that such testimony is or may be prejudicial to the client"); *Daniel Gale Assocs., Inc. v. George*, 8 A.D.3d 608, 608 (2d Dept. 2004); *Matter of Levinson*, 11 A.D.3d 826, 828 (3d Dept. 2004), *lv. denied* 4 N.Y.3d 704 (2005); *Ocean-Clear, Inc. v. Continental Casualty Co.*, 94 A.D.2d 717, 719 (2d Dept. 1983) (record did not establish that projected testimony was "sufficiently adverse to the factual assertions or account of events offered" on behalf of client; thus, disqualification should have been denied).

Cases cited by Defendants are readily distinguishable. In *Hempstead Bank v. Reliance Mortgage Corp.*, 81 A.D.2d 906 (2d Dept. 1981), for example, the attorney had "specific and personal knowledge" of the promissory note that was the subject of the action, was himself "the subject of some * * * accusations," and was so involved in the facts that were the subject of the suit that it was difficult "to see how [the client] could avoid calling him in circumstances where an unfavorable inference might be drawn from his failure to appear." That is not remotely the case here as Mr. Chidekel was never involved with Defendants or the medical care that they provided.

Likewise, *Courtney v. Edelschick*, 157 A.D.2d 818 (2d Dept. 1990), *appeal denied* 76 N.Y.2d 936, *rearg. denied* 76 N.Y.2d 1018 (1990), is inapposite. There, the attorney was decedent's subsequent treating physician and diagnosed decedent with cancer--the very disease defendant was accused of failing to appreciate. The Appellate, Division concluded that under those "peculiar circumstances," where counsel's participation as a physician made it such that he "ought to be called as a witness" and "at the very least, his office records for which he must vouch would be introduced into evidence," disqualification was appropriate. Here, however, Defendants have not offered any explanation as to the necessity of Mr. Chidekel's testimony or established the relevance of his signing consents to subsequent treatment at another facility.

Defendants have also failed to show that no other evidence is available to them. For example, perhaps Plaintiff has friends who could testify to his condition before the alleged malpractice (particularly since it appears that he and Mr. Chidekel were estranged).

Thus, the motion to disqualify Plaintiff's counsel is denied without prejudice to renewal at the time of trial upon a proper showing. *See, Saunders v. Bryant's Towing*, 27 A.D.3d 992, 995 (3d Dept. 2005).

Finally, this Court is concerned that the motion may have been an effort to delay the proceedings. *See, H.H.B.K. 45th Street Corp. v. Stern*, 158 A.D.2d 395, 396 (1st Dept. 1990) ("The possibility that this motion was made merely to secure a tactical advantage * * * is strongly suggested by the fact that it is made * * * months after the start of litigation and after * * * two previous attorneys, who knew of [counsel's] involvement with the transaction, did not seek" disqualification). Nonetheless, it does not appear that sanctions are appropriate. Defense counsel was undoubtedly mistaken and should have paid more attention to the obvious fact that Mr. Chidekel never had any involvement whatsoever with Defendants. If he had, the outcome of this motion may well have been different. This Court, however, will not sanction Defendants for what appears to have been a careless (and not an intentional or malicious) error. *See, Reply*, at ¶ 3.

In light of the delay occasioned by Defendants' motion, the parties will proceed on an expedited basis to get back on course. Depositions of Defendants must be completed no later than August 15, 2007 and the Note of Issue is to be filed no later than August 31, 2007.

Accordingly, it is

ORDERED that Defendants' motion to disqualify Plaintiff's counsel is denied without prejudice to renewal after the completion of discovery and before trial but only upon a proper showing; it is further

ORDERED that Plaintiff's cross-motion is denied; it is further

ORDERED that Defendants must make all of their witnesses available for depositions by August 15, 2007 and all depositions are to be completed by that date; it is further


ORDERED that the Note of Issue is to be filed no later than August 31, 2007; and it is further

ORDERED that the parties are to appear for a status conference on August 7, 2007, at 10:00 a.m.

This constitutes the Decision and Order of the Court.

Dated: New York, NY
July 24, 2007

ENTER


Hon. Eileen Bransten

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