

**Jin Ja Shin v Wong**

2007 NY Slip Op 32386(U)

July 25, 2007

Supreme Court, New York County

Docket Number: 0100100/2005

Judge: Sheila Abdus-Salaam

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

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

Jin Ja Shin and Peter Arnos

INDEX NO. 100100/05

MOTION DATE 6/14/07

MOTION SEQ. NO. 002

- v -

Soman Mary Wong, M.D.

MOTION CAL. NO. \_\_\_\_\_

**FILED**  
AUG 02 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendant to strike the note of issue and for various forms of other relief, and the cross-motion by plaintiffs for a protective order are decided as follows:

That branch of defendant's motion for an order directing plaintiffs, who currently reside in New Hampshire, to post security for costs is granted without opposition. Plaintiffs are directed to post a bond or other form of security in the amount of \$500 (CPLR 8503) within 20 days of service of a copy of this order with notice of entry if they have not already done so. This action is stayed until the security has been posted (CPLR 8502).

Similarly, that branch of defendant's motion to modify or vacate my prior ruling embodied in the September 21, 2006 status conference order denying defendant's request for disclosure of records of an ob/gyn in Connecticut seen by plaintiff Jin Ja Shin is granted without opposition.

This ruling is modified to the extent that it conflicts with (1) the directive in

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

the preliminary conference order dated May 19, 2005 that plaintiff provide defendant with a written report of any non-treating physician who examines plaintiff within 45 days of the examination, (2) CPLR 3121 (b), and (3) 22 NYCRR § 202.17.<sup>1</sup> Plaintiffs are directed to provide this physician's report within 30 days of service of a copy of this order with notice of entry.

Also granted is that branch of defendant's motion which seeks disclosure of logs and diaries concerning medical and psychological conditions and treatment in issue, as well as plaintiffs' efforts to conceive. Any such writings, whether "contemporaneous" or not are material and relevant and must be produced unless privileged. Plaintiffs have alleged that no such contemporaneous writings exist and that any non-contemporaneous writings are protected by the attorney-client privilege. However, plaintiffs fall to support their assertion that any non-contemporaneous writings are privileged. Consequently, plaintiffs' cross-motion for a protective order regarding disclosure of these materials is denied. Plaintiffs are directed to produce as demanded any logs, diaries or other such writings either in plaintiffs' possession or in the possession of anyone under their control within the same 30-day time period indicated above.

That branch of defendant's motion which seeks to vacate or modify my oral ruling of March 15, 2007 that plaintiff Peter Arnos did not have to

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<sup>1</sup>Defendant is demanding an authorization for this examining physician's records and for production of any materials concerning Ms. Shin's visits with this doctor in plaintiffs' possession or control. However, the preliminary conference order refers only to reports, as does CPLR 3121 (b) and 22 NYCRR §202.17(b)(1) and (c). Moreover, the reference to authorizations for records in 22 NYCRR §202.17 (b)(2) is limited to "...records...as may be referred to and identified in the reports of those medical providers who have treated or examined" the plaintiff. Even the case law cited by defendant in support of this motion deals with an examining physician's report, not her/his records. Thus, even if my prior ruling was based on the erroneous ground of attorney-client privilege (no basis for the ruling is contained in the status conference order itself and I do not recall its basis), to the extent that the ruling denied defendant's request for the production of records, as opposed to reports, it is correct.

undergo a psychological examination is denied. Even though this branch of the motion was not specifically addressed in plaintiffs' opposition and cross-motion, plaintiffs maintain in their papers (as they represented on March 15, 2007 and on June 14, 2007, the return date of these motions) that the only claim Mr. Arnos is making is a derivative one based on loss of consortium. This is born out by the complaint and bills of particulars. Since Mr. Arnos has not placed his physical or mental condition in issue in this lawsuit, a physical or mental examination of him is unwarranted. However, consistent with plaintiffs' representations and my rulings, as regards Mr. Arnos's derivative action, plaintiffs will be limited at trial to presenting evidence in support of his loss of consortium claim only.

In view of the preceding paragraph, that branch of defendant's motion which seeks authorizations for Mr. Arnos's medical records is denied.

That branch of the motion to preclude plaintiffs from introducing at trial proof of special damages beyond the \$1,428.83 claimed in plaintiffs' original bill of particulars and to strike that portion of the amended bill of particulars making claims in excess of that amount is granted only to the extent that plaintiffs are directed to produce all documents in their possession or in the possession of anyone under their control to support these claimed additional hospital and medical expenses within 30 days of service of a copy of this order with notice of entry. Plaintiffs properly amended their bill of particulars as of right prior to filing the note of issue (CPLR 3042 (b)) and have stated that they have provided authorizations for all collateral sources connected with the additional expenses stated in the amended bill of particulars.<sup>2</sup> Further, defendant states but has not shown

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<sup>2</sup>In her reply papers at footnote 9, defendant claims that one of plaintiffs' insurers, Celtic Individual Health, responded to an authorization that it has no records. It would be advisable for plaintiffs to followup with this and other collateral sources to make sure that defendant is provided with this information, which plaintiffs themselves will need to prove their claims.

how she is prejudiced by this amendment.

That branch of defendant's motion to strike plaintiffs' claims for lost earnings included in the amended bill of particulars also is granted only to the extent of directing plaintiffs to provide (if they have not done so already), within 30 days of service of a copy of this order with notice of entry, an unlimited authorization for Ms. Shin's employer at the time of the claimed loss, the Social Security Administration, and directing Ms. Shin to submit to a further deposition limited to the claimed loss of approximately five weeks of sick time Ms. Shin used in September and October 2002, if necessary, to be scheduled after receipt of a response to the authorization. The cases cited by defendant regarding plaintiffs taking inconsistent positions after a new trial is ordered or in separate actions are inapposite. As noted, plaintiffs had a right to serve an amended bill of particulars prior to filing a note of issue in this action. The relief granted here will offset any prejudice defendant has suffered by Ms. Shin's reversal of her pre-note position not to claim any lost earnings. Further, the newly claimed loss of earnings is limited to a five week period of sick leave while Ms. Shin was employed with the Social Security Administration, where she purportedly worked from April 2001 until October or November 2004. Her prior (or subsequent) education and employment records have little if any bearing on this alleged loss.

That branch of defendant's motion to compel plaintiffs to provide authorizations for Drs. Varlotta, Fung, Sadick, Dye, Klass and Hirsch, as well as for an acupuncturist and certain MRIs of Ms. Shin's spine is denied. Plaintiffs' cross-motion for a protective order regarding these authorizations is granted. Plaintiffs' amended bill of particulars as to Ms. Shin states claims for obstetrical/gynecological and psychiatric/psychological injuries arising from the loss of her fetus and infertility after undergoing a myomectomy while pregnant. According to plaintiffs, the above physicians and the acupuncturist have either provided treatment unrelated to the obstetrical and mental conditions Ms. Shin has placed in issue (Dr. Varlotta treated Ms. Shin

for a neck injury she sustained at work; Dr. Fung performed lasik surgery on Ms. Shin's eyes; and Dr. Sadick, a dermatologist, saw plaintiff when her face became itchy) and are remote in time (Ms. Shin received acupuncture for back pain in 1990 and has received no further treatment since) or are unknown to plaintiff (Drs. Dye, Klass and Hirsch). Plaintiff has waived her physician-patient privilege only as to the physical and mental conditions she has "affirmatively put in issue" (Koump v. Smith, 25 NY2d 287, 294 [1969]) and must disclose "relevant hospital and medical records" (Dillenbeck v. Hess, 73 NY2d 278, 287 [1989]; CPLR 3121(a)). None of the above records of the doctors known to plaintiff are relevant to the conditions Ms. Shin has placed in issue, and defendant has failed to inform plaintiff or the court what treatment all but one of the doctors unknown to plaintiff<sup>3</sup> provided or what their areas of practice are. Further, while defendant argues generally that disclosure of all prior and subsequent medical records would permit defendants to fully evaluate the truthfulness of plaintiffs' claims, defendant has not shown that the records she seeks here are "material and necessary" to her defense of this action (CPLR 3101(a)).

Finally, that branch of defendant's motion to direct plaintiffs' counsel to preserve and produce for in camera inspection at trial any notes and audiotapes taken during an interview of non-party witness Marvala Allen, R.N., and upon inspection, to advise defendant of any statements by the witness that would affect the defense is denied. These materials, if they exist, are attorney work product (see Fraylich v. Maimonides Hospital, 251 AD2d 251 [1998]; Siemens Solar Industries v. Atlantic Richfield Co., 246 AD2d 476 [1998]; Corcoran v. Peat, Marwick, Mitchell & Co., 151 AD2d 443 [1989]) and need not be produced either to defendant or to the court

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<sup>3</sup>According to defendant, Ms. Shin's Duane Reade pharmacy records indicate that Dr. Hirsch prescribed Prilosec for her. Prilosec is a heartburn/acid reflux medication, which also is irrelevant to the physical and mental conditions Ms. Shin has put in issue in this case.

for an in camera inspection. Defendant's attempt to distinguish Corcoran, supra, and Siemens, supra, cases cited by plaintiffs, because they involve requests by defendants for disclosure of opposing counsel's notes to them, rather than for an in camera inspection and disclosure by the court of facts revealed in the notes, is rejected. As is defendant's argument that those cases conflict with Court of Appeals precedent articulated in Spectrum Systems International Corp. v. Chemical Bank (78 NY2d 371, 377, 381 [1991]) that the protection afforded to attorney work product must be narrowly construed. The Spectrum Systems decision deals with *attorney-client* privileged material, not *attorney work* product. In fact, the Court of Appeals expressly stated that it did not need to address whether the report at issue there was attorney work product because the report was protected by the attorney-client privilege (id., p.381). For these same reasons too, defendant's alternative request for relief that plaintiffs' counsel be limited at trial to Nurse Allen's deposition testimony to impeach her is denied.

Accordingly, defendant's motion is granted only to the extent indicated above and is otherwise denied. Plaintiffs' cross-motion also is granted or denied only as indicated above.

Dated: July 25, 2007 \_\_\_\_\_ SA-S \_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
 AUG 02 2007  
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