

**Lolly v Brookdale Univ. Hosp. & Med.  
Ctr.**

2007 NY Slip Op 33041(U)

September 26, 2007

Supreme Court, Kings County

Docket Number: 0005241/2004

Judge: Gerard H. Rosenberg

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publication.

At an I.A.S. Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26<sup>th</sup> day of September, 2007.

P R E S E N T:

HON. GERARD H. ROSENBERG,

Justice.

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THERESA LOLLY,

*Plaintiff,*

*-against-*

THE BROOKDALE UNIVERSITY HOSPITAL AND MEDICAL CENTER, SAULIS MARIUS BANIONIS, M.D., SYED AHMED, M.D., SHARON BOVELL, RN, LESLIE CHAPLIN, RN, VANESSA WILLIAMS, RN, BISWAJIT GHOSH, M.D., MARINA PIERCE, M.D., WALAA HOUSNY, M.D. and ROBERT SPATZ, M.D.,

*Defendants.*

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**DECISION & ORDER**

Index No. 5241/04

Cal. No. 2005-007448T

Motion Seq. No. 017

The following papers numbered 1 to 4 read on this motion.

	Papers Numbered
Notice of Cross-Motion, Affirmation(s)/Affidavit(s) and Exhibits Annexed _____	1 - 2
Affirmation(s) in Opposition and Exhibits Annexed _____	3
Reply Affirmation(s)and Exhibits Annexed _____	4

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Upon the foregoing papers, and upon oral argument, defendants move pursuant to CPLR 3211 (5) and (8) for an order dismissing the Summons and Complaint against Syed Ahmed, M.D. as time barred pursuant to CPLR 214-a and improperly served pursuant to CPLR 308; pursuant to CPLR 3124 compelling plaintiff to provide an authorization to

conduct a post-Note of Issue interview with Stephen Carryl, M.D.<sup>1</sup>; pursuant to CPLR 2304 to quash twenty specified subpoenas and subpoenas duces tecum; pursuant to CPLR 3103 for a protective order against the subpoenas duces tecum, the Notice to Admit dated May 18, 2006 and the Notice of Intention to Read Examination before Trial as well as any and all other notices and subpoenas served since May 1, 2006 and in the future; and pursuant to 22 NYCRR 130-1.1 and 1.2 for the assessment of sanctions and costs against plaintiff's attorney.

**The motion pursuant to CPLR 3211 (5) and (8) for an order dismissing the Summons and Complaint against Syed Ahmed, M.D. as time barred pursuant to CPLR 214-a and improperly served pursuant to CPLR 308.**

The motion to dismiss the Summons and Complaint against Dr. Ahmed is denied.

All of the allegations which form the basis of the instant action deal with the plaintiff's treatment at Brookdale University Hospital and Medical Center (Brookdale) from June 11, 2003 through June 19, 2003. The 2½ year statute of limitations applicable to medical malpractice actions therefore expired on December 19, 2005.

Dr. Syed Ahmed was a resident physician involved in the care and treatment of the plaintiff. Defendants state that plaintiff initially served a summons and complaint (dated February 18, 2004) naming Brookdale and a number of John and Jane Does, and claim that Dr. Ahmed was one of those John Does. On December 23, 2004 Brookdale responded to plaintiff's demand for the identification of witnesses (in which plaintiff had circled or

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<sup>1</sup> This aspect of the motion has been resolved and will not be addressed.

highlighted with yellow marker names on pages of the hospital chart) by identifying the circled and highlighted names together with the person's status at Brookdale. Dr. Ahmed was not included in the identification demand, and defendants did not include his name in their response to the demand. Defendants claim that this is because Dr. Ahmed's name was clearly typed on the operative record as assisting Dr. Olivier, the plastic surgeon. In an Order dated March 10, 2005 Justice Steinhardt permitted plaintiff to substitute the names for the John and Jane Does as identified by Brookdale, and Brookdale agreed to accept service on their behalf. Dr. Ahmed's name appeared as one of those names.

In June 2005 plaintiff served the substituted defendants via Brookdale. Defendants contend that said service did not include Dr. Ahmed and Dr. Banionis. At that time Dr. Ahmed was completing a fellowship in Nebraska and was no longer a resident at Brookdale. Defendants claim that he was never served at Brookdale, and defendants state that Brookdale refused to accept service on his behalf as he was not a defendant, was no longer an employee, and was not on a service list authorized by Justice Steinhardt on April 11, 2005.

Plaintiff has produced two affidavits of service of the summons and complaint as to Dr. Ahmed. The first is dated June 14, 2005, and claims delivery on a person of suitable age and discretion, i.e., Victor Bacharev, at 4907 Davenport Street, #10, Omaha, Nebraska, as well as the mailing of a copy of the summons and complaint on 6/22/05 to Dr. Ahmed's residence at 4907 Davenport Street, #10, Omaha, Nebraska. The second affidavit of service is dated June 24, 2005, and claims delivery on a person of suitable age and discretion, i.e.,

M. Guzman, at 1 Brookdale Plaza, Brooklyn, NY, as well as the mailing of a copy of the summons and complaint to Dr. Ahmed at his place of business at 1 Brookdale Plaza, Brooklyn, NY.

Dr. Ahmed returned to Brookdale as an attending surgeon at the end of July, 2005. He was produced for a deposition on August 22, 2005 as directed by Justice Steinhardt. Defendants assert that Dr. Ahmed was not a party to the action at that time, despite the fact that his name incorrectly appeared in the caption. The deposition was commenced but not completed, and defendants allege that plaintiff made no effort to serve Dr. Ahmed between the end of July 2005 and December 19, 2005 when the statute of limitations expired.

Defendants contend that plaintiff did nothing with respect to obtaining jurisdiction over Dr. Ahmed until recently, and that plaintiff's only attempt to obtain jurisdiction over Dr. Ahmed was the recent mailing of the summons and complaint. That summons and complaint is dated May, 2005, and Dr. Ahmed received it on or about May 3, 2006 at Brookdale.

The court finds that plaintiff effectively served Dr. Ahmed in June of 2005 when service was effectuated upon a person of suitable age and discretion on June 14, 2005 at 4907 Davenport Street, #10, Omaha, Nebraska. The significance of the Nebraska address is that it was provided by counsel for the defendants to plaintiff's counsel in a letter dated May 10, 2005 as Dr. Ahmed's last known address. When mailing of a copy of the summons and complaint to Dr. Ahmed's residence at 4907 Davenport Street, #10, Omaha, Nebraska was done within 20 days on June 22, 2005, service was effectuated.

If defendants wish to challenge that service they have not done enough. Production of a affidavit of service is prima facie evidence of proper service (*Chemical Bank v Darnley*, 300 AD2d 613 [2002]), and defendants have not proffered sufficient evidence to warrant a traverse hearing. Since service in June of 2005 was within the statute of limitations it was timely.

**The motion to quash subpoenas and subpoenas duces tecum, and for a protective order against the subpoenas duces tecum, the Notice to Admit dated May 18, 2006 and the Notice of Intention to Read Examination before Trial as well as any and all other notices and subpoenas served since May 1, 2006 and in the future.**

The motion for a protective order against the Notice to Admit dated May 18, 2006 is granted. This Notice to Admit seeks information, in part, with respect to an entity known as TransCare New York, Inc. In an Order dated July 6, 2006 Justice Steinhardt held:

In addition, any argument advanced about the correct name for Brookdale and the claims that TC Ambulance Corp. and Transcare New York, Inc. are somehow involved as the correct entities are totally without merit. The plaintiff was treated at The Brookdale University Hospital and Medical Center. The attorneys for the defendant answered for that entity. All of the relevant actors were employed by the hospital at the time in question. At no time has the hospital ever denied that it treated the plaintiff at the time frame in question nor has it denied that it had insurance coverage for the acts complained of at the time in question.

This is the law of the case and plaintiff is bound by it. Further, insofar as the Notice to Admit is at least in part improper, this court is not required to prune any proper items from the Notice to Admit (see, *Mijatovic v. Noonan*, 172 AD2d 806 [1991]). Accordingly,

defendants' motion for a protective order is granted and the Notice to admit is stricken.

Plaintiff continues to attempt to revisit areas which have been litigated, and in some instances, re-litigated. Therefore, similarly, and for the same reason, any and all subpoenas which relate, in whole or in part, to the issue of Transcare New York, Inc. are quashed. Also quashed are any and all subpoenas which seek:

- Depositions or further depositions of witnesses who have previously been deposed or who could have been deposed prior to the filing of a Note of Issue on April 19, 2005 (i.e., Dr. Fogler; Nurse Leslie Chaplin; Nurse Vanessa Williams; Nurse Bovell; Margaret M. Johnson; David P. Rosen; the (unnamed) Director of Nursing at Brookdale; Bruce Flanz; Mounir Doss; Dr. Housny; Dr. Spatz; Dr. Marina Pierce; and Dr. A.R. Abadir) to the extent that these subpoenas seek matters beyond the issues of medical malpractice which will be addressed at trial.
- The Subpoena Duces Tecum as to Dr. Syed Ahmed is quashed as to anything beyond trial testimony. Plaintiff had an opportunity to fully depose Dr. Ahmed, that deposition was commenced but not completed. deposition. Thus it is improper to seek to have Dr. Ahmed bring those requested materials and testify as to the issues mentioned in the subpoena such as diplomas, applications for employment, employment contracts, etc.
- Materials and/or testimony which could have been obtained prior to the filing of the first Note of Issue on April 19, 2005. This includes the Subpoena Duces Tecum dated May 12, 2006 to the Medical Records Director at Brookdale seeking Policy Manuals, Rules & Regulations, etc. The Subpoena Duces Tecum to the Medical Records Director at Brookdale also dated May 12, 2006 with HIPAA authorization attached is not quashed.

The motion for a protective order as to the Notice of Intention to Read Examination before Trial of Saulis Marius Banionis is granted. This is not an unaltered transcript as provided by the Reporting Service. Rather, plaintiff has prepared a 79-page version of the EBT which she has rearranged by cutting and pasting questions and answers in an order of

her own preference and which is totally unrelated to the original version. The issue of the ability to employ the deposition transcript and the order in which plaintiff intends to read questions and answers is otherwise referred to the Trial Justice.

**The motion pursuant to 22 NYCRR 130-1.1 and 1.2 for the assessment of sanctions and costs against plaintiff's attorney.**

The court finds that plaintiff's counsel conduct in relation to the issues raised in this motion has not risen to the level where costs and /or sanctions are appropriate. This branch of defendants' motion is denied.

ENTER,

  
~~HON. GERARD H. ROSENBERG~~

J. S. C.