

Kelly v Sobel

2007 NY Slip Op 33405(U)

October 9, 2007

Supreme Court, Queens County

Docket Number: 0006792/2006

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

ANTONIA KELLY and BRIAN KELLY

Plaintiffs

-against-

ALAN SOBEL, ANTONIO C. FERNANDEZ,
MICHELE GIANAKOS and WILLIAM M. GIANAKOS

Defendant

Index No: 6792/06

Motion Date: 10/3/07

Motion Cal. No.:14

Motion Seq. No.: 3

The following papers numbered 1 to 11 read on this motion by defendant, Sobel, for an Order directing plaintiff to submit to a neuropsychological physical examination, to provide HIPAA compliant authorizations and to appear for a further deposition

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 5
Answering Affidavits-Exhibits.....	6 - 8
Replying Affidavits.....	9 - 11

Upon the foregoing papers and after a conference, it is ordered that this motion is determined as follows.

This is an action to recover for personal injuries plaintiff allegedly sustained on December 7, 2005, in an automobile accident. In her Verified Bill of Particulars, dated May 17, 2006, she alleged having sustained, insofar as relevant herein, head trauma, non-displaced skull fracture, scalp hematoma, bilateral orbital ecchymosis, post concussion syndrome, headaches and dizziness.

On January 18, 2007 plaintiff was deposed. On February 21 and 28, 2007 the plaintiff underwent an extensive neuropsychological examination by Steven H. Stein Ph.D. who prepared a report, dated March 1, 2007, regarding the results of his examination. On March 8, 2007 plaintiff appeared for IMEs and was examined by the defendant's expert orthopedist and

neurologist. On May 4, 2007 plaintiff served a Supplemental Exchange of Medical Report and a Supplemental CPLR 3101(d) Disclosure including in each a copy of Dr. Stein's report. On May 7, 2007 plaintiff served a Supplemental Verified Bill of Particulars, dated May 4, 2007, asserting, inter alia, severe closed head injury with post-concussion syndrome with resultant specifically identified cognitive deficits and cognitive difficulties.

By letter dated May 15, 2007 the defendant, Sobel, demanded that plaintiff appear for a neuropsychological IME, a further deposition and HIPAA compliant authorizations regarding the allegations asserted in the Supplemental Bill of Particulars, the Supplemental Exchange of Medical Report and plaintiff's expert's report. On June 5, 2007 plaintiff filed a Note of Issue. Defendant, Sobel, now moves to compel plaintiff to provide the demanded discovery.

Plaintiff opposes the defendant's demands, however, she asserts that if the demand for a neuropsychological examination is granted it must be held in Queens as going to Suffolk County is a hardship; and limited to a single day because any longer time is unreasonable.

The branch of defendant's motion for a neuropsychological examination is granted. Although defendant had a prior neurologic examination of the plaintiff, it was not until the service of the Supplemental Bill of Particulars, the plaintiff's deposition and service of plaintiff's CPLR 3101(d) expert disclosure, that the defendant learned that plaintiff claims additional injuries resulting from the head injury. Under the circumstances denial of defendant's demand would result in significant prejudice to the defendant (see Kavanagh v. Ogden Allied Maintenance Corp., 92 NY2d 952 [1998]), without causing a delay of the action or significant inconvenience to the plaintiff.

The plaintiff's expert required two days to administer the numerous tests which formed the basis of his opinion, thus, plaintiff's claim that it is unreasonable to afford defendant's expert at least the same amount of time is baseless. Unlike CPLR 3110 regarding depositions, CPLR 3120 does not require that an IME take place in any specific place. The plaintiff who is served with a demand for an IME pursuant to CPLR 3120 seeking to change the place of the IME has the burden to establish hardship if required to appear at the designated location (see Foley v. Haffmeister, 156 AD2d 541 [1989]; see also Platman v. Pham Thu Duc, 191 AD2d 620 [1993]). An attorney's affirmation asserting hardship is insufficient.

Accordingly, the plaintiff shall appear for a further deposition and neuropsychological examination by defendant's expert, Stephen Honor Ph.D., at a time to be determined by the parties, but in no event more than 45 days after the date of entry of this Order. In addition, the defendant's expert may take such reasonable amount of time as in his professional judgment he deems necessary to be able to properly carry out the examination, taking into consideration the plaintiff's health and work schedule.

The branch of the defendant's motion demanding HIPAA compliant authorizations with respect to "the allegations asserted" in the Supplemental Bill of Particulars and the Supplemental Exchange of Medical Report is denied.

First, the defendant's demand is patently improper as it does not identify the items sought with reasonable particularity so that the plaintiff may comply or formulate a proper objection. This deficiency is not cured by the moving papers. For the first time in his reply papers, defendant submits the affidavit of his expert, Dr. Honor, and relying upon Rodriguez v. Pontillo, 278 AD2d 400 (2nd Dept., 2000), clearly sets forth that he seeks Dr. Stein's entire file and in particular the "raw data" of plaintiff's tests. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (Hoffman v. Kessler, 28 AD3d 718 [2006]). Inasmuch as the plaintiff did not have the opportunity to oppose this new demand, the court may not grant this branch of the motion (see Harleysville Ins. Co. v. Rosario, 17 AD3d 677 [2005]).

However, this action is on the trial calendar and the parties must complete the additional discovery necessitated by the plaintiff's Supplemental Bill of Particulars and supplemental expert disclosure. Failing to address the issues raised by the defendant's demand would merely serve to create further motion practice, delay the discovery which must be completed and delay the trial. In addition, it is noted that this issue was raised and discussed at the conference of the motion.

Pursuant to CPLR 3101(d)(2) "materials ... prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative ... may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means". The defendant has

failed to establish entitlement to the relief.

As in Martinez v. KSM Holding Ltd., 294 AD2d 111 (1st Dept., 2002), Dr. Stein's files and the "raw data" are immune from disclosure pursuant to CPLR 3101(d)(2). Thus, to prevail on this application, the defendant must establish that he has a "substantial need" for the files and cannot obtain the substantial equivalent thereof by other means without "undue hardship," or that "special circumstances" exist within the meaning of CPLR 3101(d)(1)(iii) necessitating production of the files (see Daniels v. Armstrong, 42 AD3d 558 [2007]). This, the defendant failed to do.

It is undisputed that Dr. Stein was retained and designated as plaintiff's expert and that his examination, files and report were prepared solely for the purpose of testifying at trial. The plaintiff has complied with all her expert disclosure requirements by providing the CPLR 3101(d)(1)(i) disclosure and the expert's report. Moreover, unlike the circumstances in Martinez v. KSM Holding Ltd., the defendant here has the opportunity to conduct a neuropsychological examination of the plaintiff which will provide the substantial equivalent of the items defendant seeks. Under the circumstances, disclosure of plaintiff's expert's file is not warranted.

Dated: October 9, 2007
D# 32

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J.S.C.