

White v Nassau Health Care Corp.

2007 NY Slip Op 33966(U)

November 27, 2007

Supreme Court, Nassau County

Docket Number: 8258-05/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

**Honorable James P. McCormack
Acting Justice of the Supreme Court**

ANTHONY WHITE,

Plaintiff,

Index No. 008258/05

-against-

**NASSAU HEALTH CARE CORPORATION,
individually and doing business under the name
and style of Nassau University Medical Center, R.
ZOHABIAN, M. D. and A. RAJAN, R. N.,,**

**Motion Submitted: 8/2/07
Motion Sequence: 008, 009**

Defendants.

x

The following papers read on this motion:

- Notice of Motion/Notice of Cross-Motion.....XX
- Answering Papers.....XX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's Respondent's.....

The plaintiff moves this court for an order striking defendant hospital's answer for failing to produce for examination before trial certain staff, agents, servants and/or employees; compelling the production of each of the aforementioned witnesses; compelling defendants' timely response to the two outstanding Notice(s) to Produce; adjourning the re-certification of this matter for trial until the completion of discovery; and quashing the Notice to take Deposition Upon Oral Examination of Non-Party Witness Diane White. The

defendant cross-moves this court for an order pursuant to CPLR § 3124 compelling the non-party witness deposition of Diane White.

This action for medical malpractice was commenced by the filing of a summons and verified complaint on May 25, 2005. The issue was joined on behalf of the defendants, Nassau Health Care Corporation, individually and doing business under the name Nassau University Medical Center, Raffi Zohrabian, M.D., and Aleyamma Rajan, R.N., by service of answers and demands for verified bill of particulars on July 15, 2005. On September 30, 2005 the parties entered into a preliminary conference stipulation and order directing a time frame in which to complete discovery. On June 14, 2005 plaintiff sought the permission of the court to withdraw as counsel and that application was granted, by order of this court (Alpert, J.), on July 19, 2006. Plaintiff's counsel was ordered to serve Diane White with a copy of the order, but failed to do so. Subsequently, by an order dated October 13, 2006, this court (Alpert, J) ordered the plaintiff to serve a copy of the order relieving counsel upon Diane White and to furnish opposing counsel with proof of service.

Initially, plaintiff asks this court to strike the defendant hospital's answer for failing to produce for an examination before trial (hereinafter "EBT") staff, agents, servants and/or employees, including: Saju Biju, R.N.; Technician Dean Dushane; "The medical director of the emergency room and/or department"; "The nursing director of the emergency room and/or department"; "An authorized person with knowledge of the materials published on defendant hospital's website"; "An authorized person with knowledge of the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"); Joan McInerney,

M.D.; and the individual whose initials are "AHR" pre-printed on the emergency room registration sheet. This court will not reach a determination on these issues however because plaintiff, in his Reply and Affirmation in Opposition to Cross Motion, has withdrawn the request for this court to strike the defendant hospital's answer for failing to produce the above indicated individuals for examinations before trial. The plaintiff's application to strike the defendant's answer is denied as moot, the plaintiff having withdrawn the request without prejudice.

Alternatively, the plaintiff asks this court for an order compelling the defendant's timely response to two outstanding Notice(s) to Produce; adjourning the certification conference in this matter until discovery is complete; extending the time to file the Note of Issue until discovery is complete; quashing the Notice to Take Deposition addresses to Diane White; and issuing protective order in favor of Diane White and Anthony White.

As for the order compelling the defendant to respond to the two outstanding Notice(s) to Produce, the court must first note that the defendant through counsel states the responses to the notices are forthcoming and that an order is unnecessary. However, it is now November 2007 and the Notice(s) to Produce are both from May 2007. Therefore, this court finds the defendant has had ample time to comply with the Notice(s) to Produce and as such the defendant must provide their response to the plaintiff's Notice(s) to Produce dated May 27, 2007 and May 28, 2007, if they have not done so already, by December 19, 2007 or risk further sanctions by this court.

The plaintiff's request to adjourn the new certification conference regarding this

matter until discovery is complete is granted to the extent indicated herein. Counsel for both the plaintiff and defendant are in agreement that they do not want this case to be certified for trial until discovery is complete. That being said, counsel are strongly encouraged to continue discovery at a rapid pace once they are receipt of the court's order on these motions. This case is now two years old and the plaintiff has yet to be deposed. Although it seems the case was certified prematurely in the past, and as a result it became necessary for this court (Martin, J.) to vacate the Note of Issue on March 27, 2007, it is nonetheless time for this case to move expeditiously toward trial. By virtue of the motions presently before this court, this case was removed from the certification calendar. Although this case is not certified presently, the court fully expects that this case will be ready for certification within 75 days. Accordingly this court will fix a new compliance date for January 23, 2008, at that time any outstanding discovery issues will be addressed with the court and the case will then be given a final date for certification. On that date it will be within the discretion of the judge to certify the case as ready for trial with or without the consent of counsel and regardless of what discovery remains incomplete. Therefore plaintiff's request to adjourn the certification conference is granted for now, however the court will not issue an order adjourning the certification until discovery is "complete", given the age of the case and the various interpretations of what constitutes "complete discovery".

Plaintiff's request to extend time to file the Note of Issue until the completion of discovery is denied as moot. As discussed earlier, this case had been previously certified as ready for trial and the Note of Issue had been filed, however it is no longer certified and the

Note of Issue has been vacated. Accordingly, the time to file the Note of Issue has not yet commenced. Once the case is certified the time for plaintiff to file a Note of Issue will be set by the judge at that time. Currently the Note of Issue cannot be filed because the case is not certified and any request to extend the time to file the Note of Issue is premature.

Plaintiff further requests this court quash the Notice to Take Deposition Upon Oral Examination of Non-Party Witness. The court finds counsel's "amicus" arguments on behalf of Diane White to be wholly without merit. The court granted counsel's application to be relieved as counsel to Diane White on July 19, 2006 (Alpert, J.). Accordingly, counsel lacks standing to bring an application on behalf of a non-party witness whose testimony is arguably relevant. Defendant's efforts to obtain information that is material and necessary appear reasonable to this court, see CPLR § 3101; *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403 .

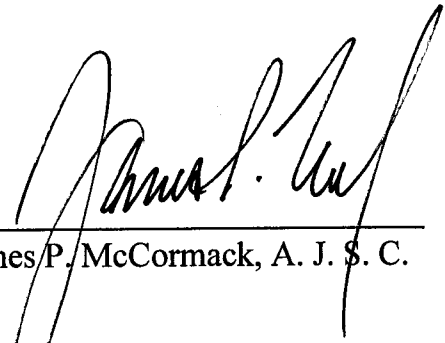
Plaintiff also asks this court to issue protective orders in favor of former plaintiff Diane White and plaintiff, Anthony White. That application is denied in its entirety. The burden of showing discovery is improper is on the party seeking the protective order. *See Roman Catholic Church v. Tempso*, 202 AD2d 257; *Sage Realty v. Proskauer Rose LLP*, 251 AD2d 35. Both Diane White and Anthony White have previously offered 50-h hearing testimony. For reasons that remain unclear to this court the plaintiff appears to believe the defendant is not entitled to depose a witness who offered 50-h hearing testimony. Plaintiff suggests that the defendants are supposed to explain what "they hope to obtain that was not obtained during the exhaustive 50-h hearing" of each witness. This assertion is contrary to

law. The defendant is under no obligation to answer the questions that have been posed by counsel regarding the 50-h hearing and what “they hope to uncover that was not uncovered at the 50-h hearing”. It is black letter law that the defendants are entitled to a deposition of the plaintiff in a medical malpractice action. The fact that a defendant is part of a municipality and that the Anthony White was obligated to submit to the 50-h hearing has no bearing on the entitlement of the defendants to properly depose the plaintiff in this action. Similarly, as to former plaintiff Diane White, the suggestion that the 50-h hearing is a substitute for a deposition is preposterous. The court denied the plaintiff’s motion to quash the Notice to Take Oral Examination of Non-Party Witness Diane White for *inter alia* lack of standing. For the reasons previously stated the plaintiff’s motion for a protective order regarding Diane White is denied in its entirety.

Finally, defendant cross-moves this court for an order compelling the former plaintiff, Diane White to appear for a deposition as a non-party witness. This court indicated previously that the defendant is entitled to depose the non-party witness and that the plaintiff does not have the standing to object to the deposition. However, the court is not inclined to compel the deposition at this juncture. The defendants appear to be in touch with former plaintiff Diane White and the witness appears to be cooperating with the subpoena that was served upon her. That subpoena remains in effect and seems sufficient to bring Diane White before the court to give testimony. The court does not feel an order pursuant to CPLR § 3124 is necessary. The application is denied without prejudice; if the witness becomes uncooperative defendant may renew if necessary in the future.

The foregoing constitutes the decision and order of this court.

Dated: November 27, 2007
Mineola, N. Y.



James P. McCormack, A. J. S. C.

ENTERED
DEC 05 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE