

Gartner v Munteanu

2007 NY Slip Op 34148(U)

December 13, 2007

Supreme Court, Nassau County

Docket Number: 0528-07/

Judge: Geoffrey J. O'Connell

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

MICHELLE LIPPA GARTNER, as the Administrator
of the Estate of MERSI WALDINA RODRIGUEZ
SANTOS,

Plaintiff(s),

INDEX No. 528/07

-against-

MOTION DATE: 10/5/07

FLORIN MUNTEANU, M.D. a/k/a FLORIN DUMITRU
MUNTEANU, M.D., SHELDA KALLOO, M.D.,
STEVEN LEV, M.D., ERIC SEITELMAN, M.D.,
DONALD KRIEFF, M.D., D.O., SATISH KADAKIA,
M.D., PETER CIMINERA, M.D., SAURABH BAHL,
M.D., IGOR GENOV, M.D., HUSAINY
KAPADIAMUNIRA, M.D., ROLINE ADOLPHINE,
M.D., LAMBROS ANGUS, M.D., TARIQ KELKER,
M.D., and NASSAU HEALTH CARE CORPORATION
d/b/a NASSAU UNIVERSITY MEDICAL CENTER,

MOTION SEQ. No. 1-MD
2-MOD
3-MD
4-MOD
5-MOD

Defendant(s).

- The following papers read on this motion:
- Order to Show Cause/Affirmation/Exhibits
 - Gartner Notice of Cross Motion/Affirmation/Exhibits
 - Krieff Notice of Cross Motion/Affirmation/Exhibits
 - Krieff Notice of Cross Motion/Affirmation/Exhibits
 - Defendants Notice of Motion/Affirmation/Exhibits
 - Plaintiff Affirmation in Opposition/Exhibits
 - Defendants Reply
 - Defendants Reply
 - Krieff Reply

Gartner v. Munteanu, M.D. et al.

This motion by defendants FLORIN MUNTEANU, M.D., a/k/a FLORIN DUMITRU MUNTEANU, M.D., SHELDA KALLOO, M.D., STEVEN LEV, M.D., ERIC SEITELMAN, M.D., SATISH KADAKIA, M.D., PETER CIMINERA, M.D., SAURABH BAHL, M.D., IGOR GENOV, M.D., HUSAINY KAPADIAMUNIRA, M.D., ROLINE ADOLPHINE, M.D., LAMBROS ANGUS, M.D., TARIQ KELKER, M.D. and NASSAU HEALTH CARE CORPORATION d/b/a NASSAU UNIVERSITY MEDICAL CENTER (Seq. No. 1) and cross motion by defendant DONALD KRIEFF, M.D., D.O. for an Order pursuant to CPLR § 3126 precluding non-party witness Wilmer Alexi Ochoa Castillo (“Castillo”) from giving any evidence at trial in support of the allegations set forth in the complaint based upon his failure to appear for a deposition on June 1, 2007 and June 11, 2007; an Order pursuant to CPLR § 2308 and Judiciary Law § 753 holding Castillo in contempt of court based upon his willful and contumacious failure to comply with a Judicial Subpoena; and, an order staying all discovery proceedings in this matter, including the depositions of the defendants until the within issues are resolved, is Denied as moot.

This cross-motion by plaintiff MICHELLE LIPPA GARTNER, as the Administrator of the Estate of Mersi Waldina Rodriguez Santos (Seq. No. 2), for an Order pursuant to CPLR § 3124 compelling defendant STEVEN LEV, M.D. to produce radiological computer printouts identified at his examination-before-trial and lifting the stay of discovery in this action is determined as provided herein.

The motions by defendants KRIEFF, D.O., MUNTEANU, KALLOO, LEV, SEITELMAN, KADAKIA, CIMINERA, BAHL, GENOV, KAPADIAMUNIRA, ADOLPHINE, ANGUS, KELKER, and the MEDICAL CENTER for an Order pursuant to CPLR § 3126 dismissing the plaintiff’s claims for damages as set forth in her pleadings based upon Castillo’s failure to respond to certain questions at his court-ordered examination-before-trial and/or precluding the non-party witness Castillo from giving evidence at trial or, in the alternative, an Order requiring Castillo to appear for a further examination-before-trial on the grounds that he refused to and/or was directed by his counsel not to answer proper questions at his deposition is granted as provided herein.

In this action commenced by the Public Administrator on September 12, 2006, the plaintiff seeks to recover for medical malpractice and wrongful death. The deceased Mersi Waldina Rodriguez Santos was

Gartner v. Munteanu, M.D. et al.

hospitalized at the MEDICAL CENTER on August 3, 2005 for treatment of injuries sustained in a motor vehicle accident that day. She died three days later on August 6, 2005. In the Bill of Particulars dated October 30, 2006, the plaintiff alleges, *inter alia*, that defendants failed to diagnose a parietal subdural hemorrhage, assess the need for neurosurgical intervention for head trauma and recommend neurosurgical intervention.

It is claimed that as a result of the defendants' negligence, the decedent sustained multiple brain bleeds, brain herniation and death. The plaintiff claims medical expenses were paid by Medicaid and No Fault. In the Bill of Particulars the plaintiff states that the decedent was earning \$250.00 per week, and will suffer the loss of income over her lifetime expectancy of \$25,000,000. The Public Administrator appointed seeks damages for loss of services as well as society, education and general welfare of the members of the family, including the services she rendered in superintending [sic] the household, training the children, assisting the decedent's alleged husband, William Alexi Ochoa Castillo in the management of his business and for expenses incurred in transporting and burying his wife, totaling \$25,000,000.00.

In the Bill of Particulars, plaintiff alleges that her mother, her two children, and Castillo were dependent upon the decedent at the time of her death. Mr. Castillo is the alleged husband of the decedent and father of her children.

Castillo's deposition was held on September 21, 2007, pursuant to this Court's Order dated August 21, 2007. At the direction of his attorney, Castillo refused to answer any questions regarding his or the decedent's immigration status, as well as the status of their children and other family members. As a result, the defendants have moved pursuant to CPLR § 3126 or § 3101, § 3124 to either strike the plaintiff's complaint; preclude Castillo from testifying or offering evidence at trial; or, to compel him to appear for a further deposition and answer any and all questions regarding the decedent's, his, their children's and other relatives' immigration status.

The motions to strike the complaint and to hold non-party Castillo in contempt based upon his failure to appear for his deposition are denied. Not only are they moot by virtue of his appearance, but also it appears that Castillo was not served with the subpoena duces tecum and accordingly, his failure to appear cannot be found to be willful.

Gartner v. Munteanu, M.D. et al.

As for his refusal to answer questions regarding the decedent's immigration status, at this juncture, that conduct does not warrant relief pursuant to CPLR § 3126, i.e., the striking of plaintiff's complaint or precluding evidence at trial.

Nevertheless, that information is certainly subject to discovery. The Court of Appeals held that an undocumented alien can recover lost wages including future lost wages, however, in determining the amount of wages to which such a plaintiff is entitled, a jury may consider a myriad of factors including the plaintiff's immigration status. *Balbuena v IDR Realty, LLC* (6 NY3d 338 (2006)); *Barahona v Trustees of Columbia University in the City of New York*, 11 Misc3d 1035 (Supreme Court Kings Co. 2006); *Orov v 23 East 79th Street Corp.*, 10 Misc.3d 82 (App. Term 2005); *Vasquez v Sokolowski*, 277 AD2d 370 (2nd Dept. 2000); *Collins v New York City Health and Hospitals Corp.*, 201 AD2d 447 (2nd Dept. 1994). In *Balbuena v IDR Realty LLC*, (*supra*, at p. 362), the Court held that: “[a] jury’s analysis of a future wage claim proffered by an undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case.” *Balbuena v IDR Realty, LLC*, *supra*, at p. 362. It explained that:

“[A]n undocumented alien plaintiff could, for example, introduce proof that he had subsequently received or was in the process of obtaining the authorization documents required by IRCA [Immigration Reform and Control Act] and, consequently, would likely be authorized to obtain future employment in the United States. Conversely, a defendant . . . could, for example, allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied.” *Balbuena v IDR Realty, LLC*, *supra*, at p. 362.

The decedent's immigration status is relevant.

In light of the fact that this is a medical malpractice action, the employer/employee relationship is not implicated. “The public policies involved in federal immigration law and the state law of tort recovery do not trench upon each other.” *Orov v 23 East 79th Street Corp.*, *supra*, at p. 85, citing *Majlinger v Cassino Contr. Corp.*, 25 AD3d 14 (2nd Dept. 2005), *aff'd. sub. nom. Balbuena v IDR Realty Corp.*, *supra*. Thus, contrary to Castillo's attorney's argument, IRCA does not prevent the discovery sought here. *Compare, Gomez v F & T Int'l, LLC (Flushing, NY)*, 16 Misc3d 867 (Supreme Court NY Co. 2007).

Gartner v. Munteanu, M.D. et al.

In light of the plaintiff's claims for loss of guidance and parental support by the decedent's children; loss of support by Castillo and the decedent's mother; and, loss of consortium by Castillo, all of their immigration status are relevant in calculating damages, too, and accordingly are also subject to discovery. *See, Plotkin v New York City Health & Hospitals Corp.*, 221 AD2d 425 (2nd Dept. 1995); *Zygmunt v Berkowitz*, 301 AD2d 593 (2nd Dept. 2003). However, the decedent's other relatives, specifically Castillo's brother, sister-in-law and father's immigration status, i.e., their green card or visa status, has not been shown to be relevant to the calculation of damages at this juncture.

Castillo is directed to appear for a further deposition and to answer all questions regarding the decedent's, his, the decedent's children's and the decedent's mother's immigration status. Castillo need not answer questions regarding the immigration status of the decedent's other relatives at this juncture.

As for plaintiff's motion, "[t]hrough disclosure a party may be required to produce only those items which are in the possession, custody or control of the party served[.] . . . Such items must be pre-existing and tangible to be subject to discovery and production.'" *Orzech ex rel. Orzech v Smith*, 12 AD3d 1150, 1151 (4th Dept. 2004), *quoting Durham Med. Search v Physicians Intl. Search*, 122 AD2d 529, 529-530 (4th Dept. 1986). Per defense counsel's suggestion, defendants are directed to provide a disc of films containing the images Dr. Lev testified about at his deposition. Since a party cannot be compelled to create new evidence and/or to produce evidence not presently extant, neither enlargements or measurements need be produced. *Orzech ex rel. Orzech v Smith, supra*, at p. 1151, citing *Hawley v Hasgo Power Equip. Sales*, 269 AD2d 804 (4th Dept. 2000).

It is, SO ORDERED.

Dated:

Dec 13, 2007

HON. GEOFFREY J. O'CONNOR



ENTERED

DEC 19 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**