Giampa v Shelton

2008 NY Slip Op 30042(U)

January 3, 2008

Supreme Court, New York County

Docket Number: 0104070/2004

Judge: Judith J. Gische

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SCANNED ON 1/11/2008

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

PRESENT: JUDITH J. GISCHE, Justice

PART 10

Sloan Granpa

- v -

Marvin Shelton MD

INDEX NO. 104070/04

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for disqualify

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: Jan 3, 2008

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

Sloan Giampa,

Plaintiff(s),

-against-

Marvin L. Shelton, M.D., P.C.,
Marvin L. Shelton, M.D., sued herein as
Arden B. Shelton, Executrix of Estate of
Marvin Shelton, and
Columbia Presbyterian Medical Center,

Defendant(s).

DECISION/ORDER
Index No.: 104070/04
Seq. No.: 005

Present:
Hon. Judith J. Gische
J.S.C.

FILED
JAN 11 2008
COUNTY CLERK'S OFFICE NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Notice of Motion (Shelton) disqualify w/HM affirm, exhs	1
X/Motion (CP) disqualify w/JO'S affirm, exhs	2
RLG affirm in opp to Shelton's motion	3
RLG affirm in opp to CP's x/motion	4
Shelton reply w/HM affirm	5
Transcript of oral argument	6

Gische, J.:

This is an action by plaintiff Sloan Giampa ("Sloan") for medical malpractice and negligence against Marvin L. Shelton, a medical doctor ("Dr. Shelton") and Columbia Presbyterian Medical Center, a hospital ("Columbia Prebyterian"). Dr. Shelton is now deceased and this case is being defended by the Executrix of his estate. The doctor has moved and the hospital has cross moved for the disqualification of Richard L. Giampa, Esq. ("Mr. Giampa") as plaintiff's attorney. Mr. Giampa is Sloan's father. The

claims asserted, which involve the manner in which Sloan's fractured ankle was treated, arose when Sloan was 12 years old. She is now an adult.

In connection with prior motions by the doctor and the hospital for Mr. Giampa's disqualification or, in the alternative, an order that he appear for his deposition, the court ordered that Mr. Giampa be deposed, but denied the motions to disqualify him. In the court's order of April 17, 2007 (at times "prior order"), the court decided that until Mr. Giampa was deposed, it would be impossible to know whether Mr. Giampa was possessed with factual information that was detrimental to Sloan's claims, and therefore "necessary" to the defendants' defense of this action. At that time neither side was willing to commit to or divulge whether it would be calling Mr. Giampa as a witness. The motions were denied without prejudice. Now that Mr. Giampa has been deposed, defendants have brought the instant motions to once again put the disqualification issue before the court.

Though separately moving for disqualification, the doctor and hospital raise closely aligned, if not identical, arguments as to why Mr. Giampa must be disqualified. Unless one defendant makes a distinctive argument not raised by the other, the arguments will be addressed collectively as being those of the "defendants."

Background

When Sloan was 12 years old she suffered a fracture to her right ankle while at school. She was taken to a local hospital in her community, but her parents had her transferred to Columbia Presbyterian where they were referred to Dr. Shelton, an orthopedic surgeon. Dr. Shelton performed surgery on Sloan's ankle and later provided follow up care. Sloan contends that Dr. Shelton improperly casted her ankle and she

suffered an infection because he departed from good and accepted standards of medical and surgical care and practice. She contends Columbia Presbyterian was negligent in referring her to this particular doctor.

There are a several contacts between Sloan and Dr. Shelton which provide the bases of plaintiff's malpractice/ medical negligence claims against Dr. Shelton, and her separate claim against the hospital for lack of informed consent. Certain contacts are the focal points of these motions. They are as follows:

The first visit with Dr. Shelton on October 30, 1997 was at the hospital when he operated on and casted Sloan's ankle ("the surgery"), directly after her accident at school. Plaintiff asserts that had she been informed of and known of alternative methods of treatment, she would have chosen them instead so as to have avoided the serious injury she claims to have suffered. Sloan has testified that she has no recollection of whether the doctor discussed the surgery with her, but remembers that her parents were present. Each parent has testified s/he was present at the hospital and consulted with Dr. Shelton. It is undisputed that Mr. Giampa signed the informed consent form for the surgery to be performed on Sloan. Mrs. Giampa signed the informed consent form for anesthesia to be administered to Sloan during the surgery. Mr. Giampa also signed the patient information notice. Sloan was discharged on October 31st. Between October 31st and November 5th, Sloan's first post-operative visit to Dr. Shelton at his office, both parents were in touch with the hospital.

Mr. Giampa took Sloan to her November 5th office visit with Dr. Shelton. Mrs. Giampa was not present at that visit. Sloan has testified that the doctor "ripped" the cast open with his hands and that it "was all bloody" inside. She also testified that the

leg was swollen and that when he recasted her, the cast felt very tight and her ankle hurt. Mr. Giampa testified that the area around the pins looked "whitish."

Sloan again visited Dr. Shelton at his office on November 18th. Her father was present, but her mother was not. Sloan testified that her old cast was removed and a new one put on. She observed puss, blood, and the area around her the pins were raw. She observed that the doctor cleaned the area and it hurt a great deal. Mr. Giampa testified that there was "clearly an infection" and the doctor expressed concerns about an osteomyelitis .

On November 20th, Dr. Shelton paid Sloan a house call. Both parents were present. Sloan testified she could not remember anything about that home visit or what her parents talked to the doctor about. On November 21st, Dr. Shelton returned to plaintiff's home to tend to her ankle. Only Mr. Giampa was present. Sloan testified she could not remember what happened then either. Mr. Giampa testified that what had been two pin holes the previous day, had morphed into one large wound. He testified doctor treated the wound with antibiotics and debrided it with something sharp, removing dead skin, discolored areas, and pus. Mr. Giampa also testified that the doctor came to the visit without antibiotics and he offered to go buy them at the drugstore. They were prescribed antibiotics that the doctor wrote a prescription for.

On November 22nd, both Mr. and Mrs. Giampa took Sloan to her pediatrician who recommended they take Sloan to a wound specialist, which they did. Sloan and her parents have testified they were told, or learned from this doctor, that although Dr. Shelton had taken a culture of plaintiff's leg, it was mishandled (never made it to the lab). The wound specialist prescribed Sloan a new antibiotic and she improved.

Defendants argue that the Code of Professional Responsibility should be applied to the facts of this case, and upon doing so, Mr. Giampa must be disqualified from testifying. DR 5-102 (a) and (d) provide in relevant part as follows:

> "(a) A lawyer shall not act, or accept employment that contemplates the lawyer acting as an advocate on issues of fact . . . if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client . . ."
>
> * * *
>
> (d) If after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer . . . may be called as a witness on a significant issue other than on behalf of a client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer must . . . must withdraw as an advocate. . ."

Defendants argue that because only Mr. Giampa witnessed or remembers certain key events, and he made several critical phone calls to Dr. Shelton, Mr. Giampa is an important witness. Defendants contend further that because plaintiff claims her infection was improperly treated, and Mr. Giampa was present on one occasion when allegedly Dr. Shelton came to the Giampa residence to treat the wound without any antibiotics, Mr. Giampa has set up a scenario by which he will be using his own testimony to prove defendants' negligence. Defendants contend this will confuse the jury and be highly prejudicial to them because an attorney will be vouching for his client thereby bolstering her case. Separately, the hospital contends that since it was Mr. Giampa who signed the informed consent document, his testimony is necessary to establish plaintiff's case.

According to the defendants, Mr. Giampa played a pivotal role in monitoring

Sloan's care, interacting with non-parties at the hospital, such as nurses, and regularly calling Dr. Shelton with questions in the two week period between her surgery and when she went to the wound specialist. The executrix asserts on behalf of the deceased doctor that because Dr. Shelton is deceased, and Sloan was a minor when the allegedly negligent treatment occurred, Mr. Giampa's testimony about what happened at that second home visit is particularly material and relevant to the claims in the case.

Mr. Giampa opposes both motions and contends that even now, after his deposition, defendants have failed to prove that "ought" to be called as a witness because his testimony "is necessary." Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143 (1st Dept 1994). Mr. Giampa still maintains that the defendants can establish their defenses through the other available witnesses - his wife and plaintiff herself - and that his testimony is simply cumulative. He argues that he knows of no exculpative facts that another witness cannot also testify to. Mr. Giampa, at oral argument, refused to state one way or another whether he intends to take the stand on the plaintiff's behalf. Likewise, defendants have also refused to commit themselves to not calling him as a witness.

Finally, Mr. Giampa contends that disqualifying him from the case at this stage will prejudice the plaintiff who will have to hire new counsel, bring that attorney up to speed very quickly, and also deprive her of the lawyer she has chosen.

Discussion

Disqualification of an attorney or a law firm "may be required only when it is likely that the testimony to be given by the witness is necessary. . ." S & S Hotel Ventures

Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 445-446 (1987). "Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" S&S Hotel Ventures v. 777 S.H. Corp., *supra* at 446.

Even if there is the possibility an attorney may be called to testify by the other side on a significant issue, disqualification of that attorney is required only if it is apparent that his testimony will be so adverse to the factual assertions or account of events offered on behalf of the client so as to warrant his disqualification. Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 299 A.D.2d 64, 75 [1st Dept 2002] (*citing* Broadwhite Assocs. v. Truong, 237 A.D.2d 162, 162-163 [1st Dept 1997]; S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 446 [1987]). Therefore, the testimony that the attorney is expected to offer must be adverse to his own client.

In deciding whether testimony is "necessary" the court has to take into account such factors as the significance of the matters the lawyer is expected to testify about, the weight of such testimony, and the availability of other evidence. S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 446. Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make that attorney's testimony "necessary," thereby requiring his or disqualification. Talvy v. American Red Cross in Greater New York, 205 A.D.2d 143, 152 (1st Dept 1994) *affirmed*[1] 87 N.Y.2d 826 (1995) (*citing* S & S Hotel Ventures Ltd. Partnership v. 777

[1]There is no written decision by the Court of Appeals, other than that the decision of the appellate court is affirmed "for the reasons stated in the opinion by Justice Joseph P. Sullivan at the Appellate Division." All references are, therefore, to

S.H. Corp., *supra* at 445). This is consistent with the general legal principle that a party has the right to be represented by an attorney of his or choosing. Therefore, the moving party seeking disqualification not only has the heavy burden of establishing that the attorney is a necessary witness, or that the moving party intends to call the attorney as a witness, but also that the testimony he is expected to give will be adverse to his client's interests. Transcontinental Const. Services, Ltd. v. McDonough, Marcus, Cohn & Tretter, P.C., 216 A.D.2d 19 (1st Dept. 1995); Also: Hakimian Management Corp v. Fiore, 16 Misc3d 1108 (A) (Sup Ct N.Y. Co 7/9/07). This approach is also consistent with the so-called "advocate witness rule" (DR 5-102 et seq) because a lawyer's professional judgment should be exercised for his client's benefit, free from "compromising influences and loyalties . . ." S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp., *supra* at 444.

In evaluating defendants' motions, the court considers on the one hand that Dr. Shelton is deceased, plaintiff was only 12 years old when he treated her, and there are certain events she does not recall. The court further considers that her parents both were in charge of Sloan's care because she was a child. The court also considers that there were times that one parent was present with Dr. Shelton, or talking to him on the phone, but the other parent was not present, or his or her testimony could be inadmissible hearsay. Although the defendants have refused to divulge whether they intend to call Mr. Giampa as a witness at trial, the court assumes that is what they intend to do. Were the court to assume otherwise, these motions would have to be summarily denied because the defendant would have no claim that Mr. Giampa is

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the appellate court's decision.

expected to give testimony that will be adverse to his client's interests, and therefore useful to their defense. Transcontinental Const. Services, Ltd. v. McDonough, Marcus, Cohn & Tretter, P.C., *supra*.

Even though each parent has different information, or recollections, and plaintiff herself may have no recollection at all of certain events, the defendants have failed to establish either that Mr. Giampa's testimony is "necessary" to plaintiff's case, or that he can provide testimony that is exculpatory. None of his deposition testimony would appear to be adverse to his client, or aid the defendants. To the contrary, some of his testimony is damaging.

In deciding whether Mr. Giampa's testimony is necessary to plaintiff's case, the court first considers whether Mr. Giampa could testify on plaintiff's behalf in the first place. To date, Mr. Giampa has also refused to commit himself on whether he intends to take the stand on his daughter's behalf. He studiously avoid that issue by stating that no one exchange between Dr. Shelton and the plaintiff is evidence of negligence, or "significant" within the meaning of the disciplinary rules. By the same token, however, each interaction between plaintiff and her doctor is in dispute and therefore significant for the jury to consider in deciding whether the defendants were negligent. Since Mr. Giampa could not testify on his daughter's behalf without triggering the rule against an attorney advocating for his client on a signigicant issue in the case, the court decides that Mr. Giampa cannot continue as plaintiff's counsel, if he intends to testify at trial.

Defendants contend that it is not possible for plaintiff to present her case without the testimony of her father. This is inaccurate. While plaintiff might be able to more

easily present her case and even strengthen it with the testimony of her father, under the particular facts of this case, because for example, he was present for one home visit by Dr. Shelton, but his wife was not, it would not be absolutely "necessary" for plaintiff to have Mr. Giampa's testimony for her to present her case to the jury. It is possible for plaintiff to competently present her case through circumstantial evidence.

Having failed to meet their burden on these motions, the motion and cross motion for disqualification must be denied. Allowing Mr. Giampa to continue as plaintiff's counsel does not violate the witness-advocate rule, under the facts of this case, and therefore he does not have to be disqualified. Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, *supra*; Transcontinental Const. Services, Ltd. v. McDonough, Marcus, Cohn & Tretter, P.C., *supra*.

The court previously marked defendants' motions for summary judgment off-calendar, pending its decision on these disqualification motions. **Defendants shall serve a copy of this decision/order on the Clerk in the Motion Support Office so that they can be restored to the calendar in Part 10 for February 21, 2008 at 9:30 a.m. for oral argument.**

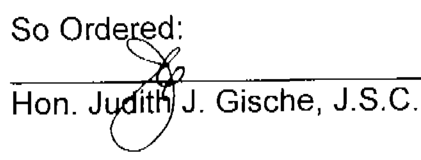
Conclusion

The motion and cross motion are denied in their entirety. The motions by defendant for summary judgment that were previously marked off-calendar are hereby restored to the active calendar. **Defendants shall serve a copy of this decision/order on the Clerk in the Motion Support Office so that they can be restored to the calendar in Part 10 for February 21, 2008 at 9:30 a.m. for oral argument.**

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied. not expressly addressed herein has been nonetheless considered and is hereby denied. This shall constitute the decision and order of the court

Dated: New York, New York
January 3, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

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