

McCarthy v Kwannang Lau

2008 NY Slip Op 30189(U)

January 17, 2008

Supreme Court, Suffolk County

Docket Number: 0034806/2006

Judge: Joseph Farneti

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

INDEX NO. 34806/2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

OWEN McCARTHY, as Administrator of the
Estate of EILEEN McCARTHY, Deceased,
and OWEN McCARTHY, Individually,

Plaintiff,

-against-

KWANNANG LAU, M.D., DOUGLAS
GLADSTONE, M.D., COLETTE PAMEIJER,
M.D., and STONY BROOK SURGICAL
ASSOCIATES, P.C.,

Defendants.

ORIG. RETURN DATE: OCTOBER 26, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: OCTOBER 26, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 002
CROSS-MOTION: XMD

PLTF'S/PET'S ATTORNEY:
SULLIVAN, PAPAIN, BLOCK,
McGRATH & CANNAVO, P.C.
55 MINEOLA BOULEVARD
MINEOLA, NEW YORK 11501
516-742-0707

ATTORNEYS FOR DEFENDANT LAU:
ANDREW M. CUOMO
ATTORNEY GENERAL OF THE
STATE OF NEW YORK
120 BROADWAY, 23RD FLOOR
NEW YORK, NEW YORK 10271
212-416-8500

ATTORNEYS FOR DEFENDANT GLADSTONE:
FUREY, KERLEY, WALSH, MATERA &
CINQUEMANI, P.C.
2174 JACKSON AVENUE
SEAFORD, NEW YORK 11783
516-409-6200

**ATTORNEYS FOR DEFENDANTS PAMEIJER
AND STONY BROOK SURGICAL ASSOCS.:**
FUREY, FUREY, LEVERAGE, MANZIONE,
WILLIAMS & DARLINGTON, P.C.
600 FRONT STREET
HEMPSTEAD, NEW YORK 11550
516-538-2500

Upon the following papers numbered 1 to 11 read on this motion _____
TO STRIKE ANSWER AND CROSS-MOTION TO STAY DEPOSITION.
Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Answering Affirmation and supporting papers 7; Affirmation 8; Answering
Affirmation and supporting papers 9, 10; Replying Affidavits and supporting papers 11; it is,

ORDERED that this motion by plaintiff for an Order striking the answer of defendants for failing to appear for depositions in violation of the within preliminary conference stipulation and order dated May 23, 2007, is hereby **DENIED**; and it is further

ORDERED that this cross-motion by defendant KWANNANG LAU, M.D. ("LAU") for an Order, pursuant to CPLR 3104(a) and 3106(a), staying LAU's deposition until the completion of the non-party deposition of the decedent's daughter, BARBARA McNAMARA, is hereby **DENIED**.

This is an action seeking monetary damages for the conscious pain and suffering and wrongful death of the decedent as a result of defendants' alleged negligence and medical malpractice by ordering and performing an "unnecessary and extremely risky surgery to obtain a biopsy sample."

Plaintiff has filed the instant motion to strike defendants' answer based upon defendants' failure to appear for depositions in violation of the within preliminary conference stipulation and order dated May 23, 2007. Plaintiff alerts the Court that pursuant to the aforementioned stipulation and order, the depositions of all defendants were to be completed by September 13, 2007, but that to date, none of the defendants have appeared for deposition.

Defendants DOUGLAS GLADSTONE, M.D., COLETTE PAMEIJER, M.D., and STONY BROOK SURGICAL ASSOCIATES, P.C. have all submitted opposition to plaintiff's application. Defendant GLADSTONE alleges that at no time has plaintiff attempted to schedule his deposition, whether by telephone or in writing, and alerts the Court that plaintiff has failed to respond to multiple discovery demands served upon him. Defendants LAU, COLETTE PAMEIJER, M.D. and STONY BROOK SURGICAL ASSOCIATES, P.C. have made a similar allegations that at no time has plaintiff attempted to schedule their depositions.

LAU has filed a cross-motion seeking to stay his deposition until the completion of the non-party deposition of the decedent's daughter, BARBARA McNAMARA. LAU alleges that plaintiff's deposition revealed that he had little knowledge of the medical care given to his deceased wife or the events that led up to her death on April 18, 2006. As such, LAU's counsel indicates that immediately following plaintiff's deposition, she requested that Ms. McNamara be produced for a non-party deposition, but that plaintiff's counsel refused. LAU argues that Ms. McNamara should be deposed prior to the depositions of the defendants as: (1) plaintiff had little information to offer at his deposition; (2) Ms. McNamara is a potential beneficiary of the decedent's estate; and (3) pertinent records reveal that Ms. McNamara was "intimately involved" in the decedent's medical care (she was the decedent's health care agent pursuant to a health care proxy and executed consents to procedures on behalf of the decedent), and "may" possess a great deal of information that was not forthcoming during plaintiff's deposition.

Initially, as plaintiff's motion relates to disclosure, plaintiff was required to submit an affirmation indicating that plaintiff's counsel has conferred with defendants' counsel in a good faith effort to resolve the issues raised in the motion (22 NYCRR § 202.7[a]; *Amherst Synagogue v Schuele Paint Co., Inc.*, 30 AD3d 1055 [2006]; *Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180 [2006]; *Cestaro v Mun Yuen Roger Chin*, 20 AD3d 500 [2005]; *Diel v Rosenfeld*, 12 AD3d 558 [2004]). Such affirmation must indicate the time, place and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with defendants' counsel was held (22 NYCRR § 202.7[c]). Although plaintiff has submitted an "affirmation of good faith," said affirmation merely indicates that the deposition clerk of counsel's office attempted "on numerous occasions" to schedule the depositions of the defendants, but was unsuccessful. The Court finds that this affirmation lacks the specificity required by 22 NYCRR § 202.7(a), and as discussed, defendants dispute that plaintiff's counsel made any good faith efforts to schedule their depositions.

CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the

proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a defendant's answer where there is a clear showing that his or her failure to comply with discovery demands was wilful, contumacious, or in bad faith (see *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for the defaults (see *Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

Here, the Court finds that the sanction of striking defendants' answer is not warranted. On this record, plaintiff failed to establish that defendants' failure to appear for depositions was wilful, contumacious, or in bad faith. Defendants have asserted that plaintiff failed to even make an attempt in good faith to schedule their depositions prior to filing the instant motion. Accordingly, plaintiff's motion to strike defendants' answer is **DENIED**.

With respect to LAU's cross-motion, the Court finds that LAU has not provided a compelling basis to alter the rules concerning depositions. Although LAU argues that plaintiff's deposition revealed that he had little knowledge of the medical care given to the decedent, and that Ms. McNamara may possess additional information, plaintiff has agreed to voluntarily produce Ms. McNamara for deposition after the completion of party depositions. Further, LAU's argument that Ms. McNamara is a potential beneficiary of the decedent's estate is unpersuasive, as she nevertheless remains a non-party. Moreover, the parties agreed to the priority of depositions in the preliminary conference stipulation and order, albeit before the deposition of plaintiff was conducted. In view of the foregoing, this application to stay the deposition of LAU until the completion of the non-party deposition of Ms. McNamara is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: January 17, 2008


HON. JOSEPH FARNETI
Acting Justice Supreme Court