

Diresta v Brackman

2008 NY Slip Op 31287(U)

April 24, 2008

Supreme Court, Nassau County

Docket Number: 3846-06/

Judge: Antonio I. Brandveen

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: ANTONIO I. BRANDVEEN
J. S. C.

TOBY A. DIRESTA, as Administratrix of the
Goods, Chattels and Credits which were of the
Estate of RONALD PATSY DIRESTA,
deceased and on behalf of his distributees and
Individually,
Plaintiffs,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 3846/06

Motion Sequence No. 009

- against -

MATTHEW R. BRACKMAN, M.D., WILLIAM
M.. LIPSKY, M.D. and LONG BEACH
MEDICAL CENTER,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2,3,4</u>
Replying Affidavits	<u>5</u>
Briefs: Plaintiff's / Petitioner's	<u>6</u>
Defendant's / Respondent's	<u> </u>

The plaintiffs moves this court for an order pursuant to CPLR §§ 3124 and 3126 directing defendants MATTHEW BRACKMAN, M.D. and WILLIAM LIPSKY, M.D. to appear for further depositions to answer questions that were improperly objected to and blocked by their attorneys at their examination before trial and answer any further questions that may flow naturally flow from their answers to the blocked questions and schedule specific dates and times for their further depositions.

This is a medical malpractice and wrongful death action. It is alleged that the

defendants were professionally careless and negligent in causing plaintiff's decedent to suffer c-difficile infection, abscess and pseudomembranous colitis (PMC). It is alleged the defendants failed to timely and properly diagnose and treat these conditions and perform appropriate surgery causing plaintiff personal injury and wrongful death.

The examination before trial of the defendant MATTHEW BRACKMAN, M.D., a general surgeon was held on October 12, 2007. The attorney for the plaintiff attempted to question the defendant about whether he had made a complaint to the risk management department of the hospital about the care and treatment of the deceased RONALD PATSY DIRESTA by Dr. Neysa Valentin or any other doctors and about the nature of such complaints. Dr. Valentin, not a party to this action, prepared a Consolation Report dated February 25, 2005 after family members requested a second opinion surgical consult. The plaintiff's attorney also attempted to ask the defendant his opinion as to the cause of the patient's fever following his first surgery on February 7, 2005 until the surgery of March 2, 2005. The attorney for the defendant objected to these questions and the defendant did not answer them.

The plaintiff argues that the nature of the complaint made by the defendant Brackman is material and relevant and is reasonably calculated to lead to admissible evidence as to whether Dr. Valentin's second opinion consultation in any way interfered with, delayed or in any way affected defendant Brackman's treatment of plaintiff decedent. Plaintiff further argues that the opinion questions posed to the defendant are appropriate to the defendant's diagnosis and treatment of the deceased plaintiff.

The examination before trial of the defendant WILLIAM LIPSKY, M.D. was held on October 23, 2007. The attorney for the plaintiff attempted to question the defendant about the use of Flagyl, an antibiotic, for treatment of pseudomembranous colitis (PMC) and also sought to question the defendant about why the patient was receiving the antibiotic Zosyn. The attorney for the defendant objected to these questions and the defendant did not answer them.

The plaintiff argues that Dr. LIPSKY's understanding as to the reason why Zosyn was given to the patient prior to Dr. Lipsky's consultation on February 25, 2005 is relevant and material because Dr. Lipsky made the decision to discontinue all antibiotics including Zosyn. The defendant argues that the use of Zosyn and Flagyn were prescribed by the co-defendant MATTHEW BRACKMAN, M.D. He further argues that these questions were an attempt to elicit an opinion from DR. LIPSKY on the plaintiff's care and treatment by his co-defendant DR. BRACKMAN.

A plaintiff is permitted to examine a defendant doctor with regard to the standard of skill and care ordinary exercised by physicians in the community under like circumstances and with regard to whether his conduct conformed thereto, even though such questions call for the expression of an expert opinion (*see, McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 200).

In the case of *Carvalho v. New Rochelle Hospital* 53 A.D.2d 635, referred to by both plaintiff and defendants, the court held:

In an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness (citation ommitted). Where, however, the opinion sought refers to the treatment rendered by the witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from deposing as an expert (citation ommitted).

The motion to compel a further examination before trial of the defendant MATTHEW BRACKMAN, M.D. is denied. The plaintiff has failed to demonstrate that the alleged complaint to the risk management department of the hospital by the defendant about the care and treatment of the deceased by Dr. Neysa Valentin or any other doctors was relevant to the issues in this case. Further, a review of the complete examination before trial of the defendant revealed that the plaintiff questioned the defendant extensively as to the patient's condition including fevers during the hospital stay.

The motion to compel a further examination before trial of the defendant WILLIAM LIPSKY, M.D. is granted. Under the holding set forth in *Carvalho*, it cannot validly be said in the instant case, as a matter of law, that the questions in dispute do not refer to the treatment rendered by the defendant, since the questions attempted to explore his knowledge of the effects on the patient of the of the antibiotics medicines prescribed by the codefendant MATTHEW BRACKMAN, M.D. The defendant knew when he examined the patient which medicines had been given to the patient. Whether he was aware of the effects of those medicines on the patient may be relevant in the determination of whether he reasonably diagnosed the patient's condition and properly treated him. Certainly, it does not appear that the questions bear solely on the alleged negligence of the codefendant MATTHEW BRACKMAN, M.D. The defendant therefore, is required to answer those questions.

Accordingly, the defendant is ordered to appear for further examination before trial on or before May 30, 2008 to answer the questions addressed herein and reasonable follow-up questions.

So ordered

Dated: ~~May~~ 24, 2008

April

ENTER:

J. S. C.

HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

APR 28 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**