

Sommer v Pierre

2008 NY Slip Op 31407(U)

May 15, 2008

Supreme Court, New York County

Docket Number: 0114156/2004

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

EVELYN SOMMER, ROBERT SOMMER,
ELIZABETH LEGER and CURTIS LEGER

INDEX NO. 114156/04

MOTION DATE _____

- v -

MOTION SEQ. NO. 004

JEAN JOSEPH PIERRE and KING NICK CAB CORP.

MOTION CAL. NO. _____

The following papers, numbered 1 to 3, were read on this motion by the defendant, inter alia, to quash a non-party deposition notice regarding Dr. Ethan Benardete, and for an order permitting the defendant to videotape an examination of defendant Pierre by plaintiff's physician.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

PAPERS NUMBERED
1 _____
2 _____
3 _____
FILED
MAY 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

I. Background

In this personal injury action arising from a motor vehicle accident, defendant Jean Joseph Pierre claims that a seizure from a previously undiagnosed pituitary tumor caused him to black out, lose control of his taxi and collide with a parked car and a loading dock. The plaintiffs, passengers in the defendants' taxi, seek to conduct an *ex parte* interview of or depose Dr. Ethan Benardete, the neurosurgeon who removed the tumor, and whom the defendants intend to call as an expert at trial to support their medical defense. To that end, the plaintiffs requested a HIPAA-compliant authorization permitting an *ex parte* interview of Dr. Benardete and, when the defendants refused to provide the authorization, served a notice of non-party deposition upon Dr. Benardete.

The defendants now move (1) to quash the notice of a non-party deposition of Dr. Benardete pursuant to CPLR 2304 and for a protective order pursuant to CPLR 3103 precluding plaintiff from deposing Dr. Benardete and (2) for permission to videotape the neurological examination of defendant Pierre by the plaintiff's physician.

II. Deposition of Defendant's Treating Physician/ Expert

Disposition of the first branch of the defendants' motion requires this Court to determine whether the recent holding of the Court of Appeals in Arons v Jutkowitz (9 NY3d 393 [2007]), which authorizes informal interviews of a nonparty treating physician, applies where, as here, the treating physician is also to testify as an expert in regard to the cause of the accident.

In Arons v Jutkowitz, *supra*, the Court held that a party may be required to furnish a HIPAA-compliant authorization permitting, but not compelling, his or her non-party treating physician to be interviewed by the opposing party. As previously explained by the Court, a party is "deemed to have waived the [physician-patient] privilege when, in bringing or defending a personal injury action, that person has affirmatively placed his or her mental or physical condition in issue." Dillenback v Hess, 73 NY2d 278, 287 (1989). Stated otherwise, "a party should not be permitted to affirmatively assert a medical condition in seeking damages or in defending against liability while simultaneously relying on the confidential physician-patient relationship as a sword to thwart the opposition in its efforts to uncover facts critical to disputing the party's claim." Dillenback v Hess, *supra*.

While Arons concerns the interviewing of plaintiffs' treating physicians, the Court of Appeals' holding in that case is also applicable to cases where, as here, the plaintiff seeks to interview the treating physician of the defendant who asserts his own medical condition as a defense to the action. Therefore, it is clear that the plaintiff may conduct an *ex parte* interview of Dr. Benardete regarding his treatment of the defendant, and that it was improper for the defendants to refuse to execute authorizations permitting such an interview. However, as noted above, the defendants intend to call this doctor to testify both as a treating physician and as an expert, a circumstance which "presents itself infrequently" (Diarrassouba v Urban, 24 Ad3d 602, 604 [1st Dept. 2005]) and which was

not presented in Arons. “[T]hat one physician may testify both as a treating physician and an expert “does not render such witness incompetent” but “compliance with court rules regarding exchange of expert reports and disclosure of all requested medical records of the plaintiffs treatment is essential (see 22 NYCRR 202.17).” Diarrassouba v Urban, supra. The plaintiffs do not dispute that the defendants have provided them with authorizations to obtain Dr. Benardete’s medical records. Their complaint is that the defendants refuse to authorize any *ex parte* interview.

While the plaintiffs may interview Dr. Benardete in regard to his treatment of defendant Pierre as established in Arons, supra, they may not question him in his capacity as an expert. See Piervinanzi v Bronx Cross County Medical Group, 244 AD2d 396 (2nd Dept. 1997); Waters v East Nassau Medical Group, 92 AD2d 893 (2nd Dept. 1983). CPLR 3101(d)(iii) precludes “disclosure concerning the expected testimony of any expert” except by court order upon a showing of “special circumstances.” The plaintiffs do not offer and this case presents no special circumstances to warrant a deposition of Dr. Benardete in regard to his expert testimony. Indeed, in their opposition papers, the plaintiffs recognize that they are prohibited from questioning Dr. Benardete regarding any basis he may have for any opinion testimony he may offer at trial in regard to the cause of the accident.

The defendants argue that since the plaintiffs sought to interview or depose Dr. Benardete only after he was designated as the defendant liability expert witness, they are improperly intending to question him in regard to his expert opinion. However, the Court will not speculate or assign improper motives to the plaintiffs based upon the timing of their discovery demands. In any event, the questioning will necessarily be limited as stated. Furthermore, in light of document discovery already provided to the plaintiffs, there may not be much more information to be obtained by interviewing Dr. Benardete. Nonetheless, for the reasons set forth herein, the plaintiffs are entitled to do so, if Dr. Benardete agrees to appear. “[I]t bears repeating that the treating physicians remain entirely free to decide whether or not to cooperate with [opposing] counsel.” Arons v Jutkowitz, supra at 416.

Accordingly, the branch of the defendants’ motion which seeks to quash the notice of a non-party deposition of Dr. Benardete and for a protective order pursuant to CPLR 3103 precluding plaintiffs from deposing him is granted to the extent that the

plaintiffs are precluded from deposing or otherwise questioning Dr. Benardete regarding the basis for his expert testimony. However, the plaintiffs may conduct an *ex parte* interview of Dr. Benardete limited to his treatment of defendant Pierre. Defendant Pierre shall execute a HIPAA-compliant authorization permitting the *ex parte* interview pursuant to Arons v Jutkowitz, *supra*. The defendants' motion is otherwise denied.

III. Videotaping of Defendants Physical Exam

The defendants' application for an order permitting the videotaping of any neurological examination of him by the plaintiffs' expert is denied. Videotaping of the examination may be ordered only in "special and unusual circumstances" such as where the party being examined is incompetent or comatose and "unable to review the examination with his attorney or testify at trial as to the manner in which the examination was conducted ([Mosel v Brookhaven Mem. Hosp.], 134 Misc2d 73." Lamendola v Slocum, *supra* at 781; see 7A Carmody-Wait 2d, NY Prac § 42:474.

For example, in Mosel, *supra*, the court permitted videotaping of the defendants' physical examination of the plaintiff because it was not disputed that the plaintiff was "unaware of his environment and unresponsive to the actions of individuals in his presence" and, thus, would be "unable to testify at trial concerning the particulars of that physical examination." Similarly, the Court in Matter of Campbell, 177 Misc 2d 59 (Sup Ct, Suffolk County 1998), relying on Mosel, permitted the videotaping of the psychiatric examination of an allegedly incompetent patient. In McNeil v State, 8 Misc 3d 1028(A) (Court of Claims 2005), the Court distinguished Mosel and Campbell on their facts and denied an application to videotape an examination, observing that "special circumstances" must be present "as the examination room is not to be turned into the hearing room."

As in McNeil, the defendants in the instant case have not shown that any such "special and unusual circumstances" exist to warrant preservation of the examination on videotape. The defendants allege, by way of an attorney's affirmation, that the brain surgery undergone by defendant Pierre has left him significantly compromised in his ability to communicate, ambulate and respond to his surroundings, making it "extremely unlikely that Mr. Pierre will be able to testify regarding the details of plaintiffs' neurological

examination.” However, the medical reports of Dr. Benardete appended to the plaintiffs’ application belie that assertion. One report, dated July 7, 2004, three months after the surgery, states that Pierre is doing “spectacularly well” and is “awake, alert and interactive.” That report notes that Pierre speaks both Creole and English, “which is better than his baseline exam prior to surgery.” In a report dated October 8, 2004, Dr. Benardete states that Pierre came to his office for a follow-up examination, that he was “doing well” and “neurologically much improved from pre-operative,” and that he reports no new problems with headaches, personality changes, visual problems or ambulation.” A report dated January 18, 2005, states that Pierre was again seen by Dr. Benardete for a follow-up examination and was still “doing very well”, and that his speech was “fluent” and a motor exam showed “full strength in both upper and lower extremities.” If there has been any subsequent deterioration in defendant Pierre’s condition, it is not apparent from a reading of the moving papers. Having failed to demonstrate a medical basis or any other “special and unusual circumstances” to warrant the videotaping of the physical examination of defendant Pierre, that branch of the defendants’ motion must be denied.

Finally, the Court notes that, unless the opposing party demonstrates a necessity for exclusion, a party’s attorney may be present as an observer during any physical examination of the party, so long as the attorney does not interfere with the conduct of the examination. See A.W. v County of Oneida, 34 AD3d 1236 [4th Dept. 2006]; Parsons v Hytech Tool & Die, Inc., 241 AD2d 936 [4th Dept. 1997]; Lamendola v Slocum, 148 AD2d 781 [3rd Dept. 1989]. Since the plaintiffs have not demonstrated any basis to exclude defendant Pierre’s attorney from the neurological examination, he or she may be present.

IV. Conclusion

Accordingly, it is

ORDERED that the branch of the defendants’ motion which seeks to quash the notice of a non-party deposition of Dr. Ethan Benardete and for a protective order pursuant to CPLR 3103 precluding plaintiffs from deposing him is granted to the extent that the plaintiffs are precluded from deposing or otherwise questioning Dr. Benardete regarding the basis for his expert testimony, and it is further,

ORDERED that the plaintiffs may conduct an *ex parte* interview of Dr. Benardete limited to his treatment of defendant Pierre in accordance with Arons v Jutkowitz (9 NY3d 393 [2007]) and as set forth herein and it is further,

ORDERED that, within 30 days of entry of this order, defendant Jean Joseph Pierre shall execute a HIPAA-compliant authorization permitting the *ex parte* interview of Dr. Benardete, and that branch of the motion is otherwise denied, and it is further,

ORDERED that the branch of the defendants' motion which seeks permission to videotape the neurological examination of defendant Pierre by the plaintiff's physician is denied.

This constitutes the Decision and Order of the Court.

Dated: ~~April 30, 2008~~
May 15, 2008

MAY 15 2008



Deborah A. Kaplan J.S.C.
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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