Roemer v Miller

2008 NY Slip Op 33312(U)

December 8, 2008

Supreme Court, New York County

Docket Number: 114351/01

Judge: Joan B. Lobis

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SCANNED ON 12/11/2008

[* 1]

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

PRESENT: Joan B. Lobis, Justice PART 6

Index Number : 114351/2001
ROEMER, JAMES
vs.
MILLER, M.D., CHARLES
SEQUENCE NUMBER : 003
ORDER OF PROTECTION

INDEX NO.
MOTION DATE 10/22/08
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-11
Answering Affidavits — Exhibits	12-13
Replying Affidavits	14

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

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

FILED
DEC 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

Dated: 12/8/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

--X

JAMES ROEMER,

Plaintiff,

Index No. 114351/01

-against-

Decision and Order

CHARLES MILLER, M.D., SUKRU EMRE, M.D., DR. A. GILL, MOUNT SINAI HOSPITAL, and MOUNT SINAI MEDICAL

Defendants.

--X

FILED
DEC 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

JOAN B. LOBIS, J.S.C.:

Defendants Charles Miller, M.D., Sukru Emre, M.D., Avtar Gill, M.D. (s/h/a Dr. Gill), The Mount Sinai Hospital (s/h/a Mount Sinai Hospital) and Mount Sinai Surgical Associates (s/h/a Mount Sinai Medical) (collectively, "Defendants") move for a protective order pursuant to C.P.L.R. § 3103(a), striking paragraphs 3 through 10 from plaintiff's notice to admit, dated September 23, 2008.[1]

Plaintiff brings this action sounding in medical malpractice for personal injuries that he allegedly suffered during a left hepatectomy and cholecystectomy (surgical donation of his left liver lobe for transplantation to a friend) in January 1999. Plaintiff alleges, *inter alia*, that Defendants negligently and improperly positioned his arms during the course of the surgery, causing him to suffer a nerve injury to his left shoulder and arm. Plaintiff's bill of particulars as to Mount Sinai Hospital and Mount Sinai Surgical Associates, dated December 27, 2005, alleges departures including a "[f]ailure to properly and adequately address and treat plaintiff's post-operative

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[1] Defendants do not seek a protective order as to paragraphs 1 and 2.

complaints of numbness, shoulder pain, limited range of motion of the left arm, pains, numbness of the arm, hands and fingers with decreased function" and the negligent "causing, enabling and allowing plaintiff's post-operative neurological status and damage to the left shoulder arm and hand to continuously diminish and deteriorate".

Plaintiff filed his summons and complaint on July 27, 2001, served his bills of particulars in or about December 2005, and was deposed on March 5, 2007. When plaintiff commenced this lawsuit, he was represented by a prior attorney. By decision and order of the Hon. Eileen Bransten, dated June 27, 2007, plaintiff's prior counsel was permitted to withdraw. Plaintiff elected to proceed pro se for approximately one year. The following depositions took place during the period that plaintiff was pro se: defendant Dr. Gill, on November 15, 2007; defendant Dr. Emre, on January 4, 2008; and, defendant, Dr. Miller, on February 7, 2008. On or about July 1, 2008, a consent to change attorney form substituting plaintiff's current counsel as plaintiff's attorney of record was filed with the County Clerk. Non-party witness, Edwin Velazquez, R.N., was deposed on August 19, 2008.

Plaintiff's notice to admit seeks admissions to the following:

1. On January 30, 1999 Wilma Amaba R.N. was employed by defendant, Mount Sinai Hospital as an R.N.
2. On January 30, 1999 Wilma Amaba R.N worked in the post-operative care unit of Mount Sinai Hospital.
3. On January 30, 1999 at 8:00 a.m. Wilma Amaba R.N. during course [sic] of her employment in the post-operative care unit treated/cared for patient, James Roemer.
4. On January 30, 1999 in Mount Sinai patient records, Wilma Amaba R.N. recorded in Nurses Notes James Roemer's complaint of "numbness of left elbow down to hand and fingers"

5. On January 30, 1999 in Mount Sinai patient records, Wilma Amaba, R.N. recorded in Nurses Notes that James Roemer had a positive pulse in his left radial artery.
6. On January 30, 1999 in Mount Siani patient records, Wilma Amaba, R.N. recorded James Roemer's left arm was "warm to touch".
7. On January 30, 1999 Wilma Amaba, R.N. 'elevated' James Roemer's left arm.
8. On January 30, 1999 in Mount Sinai Wilma Amaba, R.N. notified a physician of observations of "P. Lateral on left shoulder".
9. On January 30, 1999 at 9:30 Wilma Amaba, R.N. recorded that Dr. Haliwa anesthesia [sic] spoke with Dr. Derzie with regard to James Roemer and a neurological consult was requested.
10. Attached is a true copy of Mount Sinai Hospital patient record for plaintiff dated 1/29/99, "Progress Notes" of PACU Critical Care indicating
    (1) "Of Note, Patient with complaints of post-surgery shoulder pain."
    (2) "P.E. as noted by resident. Also area of red at left shoulder".

The notice to admit is accompanied by three pages of notes excerpted from plaintiff's hospital chart, with dates of January 29 and January 30, 1999.

Defendants argue that paragraphs 3-10 are outside the scope of C.P.L.R. § 3123 and seek admissions as "to matters of fact that apply directly to the material and ultimate issues of liability and damages in this action." Defendants aver that the material and ultimate issues in this action include plaintiff's post-operative treatment. Defendants also maintain that plaintiff is improperly attempting to use a notice to admit as a substitute for a deposition of Wilma Amaba, R.N. ("Nurse Amaba"). Plaintiff, while proceeding pro se, was directed in various court orders to identify and designate on or before January 11, 2008 any Mount Sinai Hospital witnesses to be deposed.

Defendants argue that the time for plaintiff to seek the deposition of Nurse Amaba has expired, and that "plaintiff should not be permitted to circumvent his failure to timely designate and request the production of Nurse Amaba and other Mount Sinai witnesses, by improperly using a notice to admit to seek the determination of disputed issues of liability or damages that should have been explored at deposition."

In opposition, plaintiff's counsel agrees that while plaintiff would have been entitled to depose Nurse Amaba, the opportunity to depose Nurse Amaba passed prior to the time plaintiff's current counsel was substituted; he asserts that Defendants' counsel refused to produce Nurse Amaba for a deposition after he was substituted as counsel for plaintiff. Plaintiff's counsel asserts that he is using the notice to admit "simply to eliminate the necessity of taking the deposition of [Nurse Amaba]." Plaintiff sets forth that one purpose of his notice to admit is to verify that Nurse Amaba was the correct name of the person who entered certain records. He argues that the paragraphs in dispute seek admission of facts that do not go to the issue of what occurred or did not occur during plaintiff's surgery.

C.P.L.R. § 3123(a) provides, in pertinent part, that

> a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs . . . or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such party or can be ascertained by him upon reasonable inquiry.

"A notice to admit pursuant to CPLR 3123 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial." Meadowbrook-Richman Inc. v. Cicchiello, 273 A.D.2d 6 (1st Dep't 2000) (citation omitted). The First Department has "consistently held that the purpose of a notice to admit is 'to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices.'" Taylor v. Blair, 116 A.D.2d 204, 205-06 (1st Dep't 1986), citing Berg v. Flower Fifth Ave. Hosp., 102 A.D.2d 760 (1st Dep't 1984) (internal citations omitted). Additionally, while the First Department has ruled that it is "unnecessary for the court to prune the requests to construct for counsel and the parties a proper notice to admit" (Berg v. Flower Fifth Ave. Hosp., 102 A.D.2d at 761), where the notice is "not so lengthy or prolix" (Villa v. New York City Housing Auth., 107 A.D.2d 619, 621 [1st Dep't 1985]), it is appropriate for the court to strike certain improper requests for admissions in a notice to admit while not striking the notice to admit in its entirety. See Taylor v. Blair, supra, 116 A.D.2d at 208; cf., Villa v. New York City Housing Auth., supra, 107 A.D.2d at 621. Here, since there are ten items in the notice to admit, of which eight are objected to, this court deems it appropriate to review each item, rather than to strike the notice in its entirety.

Paragraphs 4, 5, 6, and 9 of the notice to admit seek admissions of the authorship of certain notes in plaintiff's hospital record. By the parties' papers on this motion, it appears that Nurse Amaba is currently employed by Mount Sinai Hospital. Mount Sinai Hospital and its employees are responsible for the chart, and Defendants have not demonstrated that the issue of whether Nurse Amaba did or did not record certain entries in plaintiff's chart is at all contested.

[* 7]

Plaintiff is merely requesting admissions of incontrovertible facts, i.e., the authorship of four notes in plaintiff's chart. Defendants have not demonstrated any reason why these statements cannot be addressed; as long as Nurse Amaba is currently employed by Mount Sinai Hospital, the fact of whether or not Nurse Amaba authored certain notes is easily provable, is within Mount Sinai's knowledge, and can be ascertained by Mount Sinai upon reasonable inquiry. See C.P.L.R. § 3123(a). Similarly, paragraph 10 seeks an admission as to whether attached to the notice to admit is a true copy of plaintiff's chart, dated January 29, 1999. Plaintiff does not seek an admission as to the truth of the contents of the chart, only that attached pages constitute a true copy of part of the chart. Defendants have not demonstrated that the authenticity of the copy of the chart is at all contested, nor have they shown that this matter is at the heart of the litigation. The request for a protective order is denied as to paragraphs 4, 5, 6, 9, and 10.

In contrast, the issuance of a protective order as to paragraphs 3, 7, and 8 is warranted. Plaintiff alleges that his shoulder, arm, and hand were injured by Defendants' malpositioning of him during surgery and also alleges departures post-operatively. Paragraphs 3, 7, and 8 improperly demand that Defendants admit to matters that are in dispute, and the paragraphs contain language that could conceivably be interpreted in different ways. Moreover, the information plaintiff seeks to obtain through these paragraphs must necessarily have been explored through other disclosure devices, such as a deposition; however, it is undisputed that plaintiff waived his right to depose Nurse Amaba. As stated above, a notice to admit is not a substitute for other appropriate disclosure devices, such as a deposition. See Taylor v. Blair, surpra, 116 A.D.2d at 205-06. A protective order is granted as to paragraphs 3, 7, and 8.

Accordingly, it is

ORDERED that Defendants' motion for a protective order pursuant to C.P.L.R. § 3103(a) is granted only to the extent that paragraphs 3, 7, and 8 in the notice to admit are stricken. Defendants are directed to respond to the remaining statements within twenty (20) days of the date of notice of entry of this decision and order.

The parties are to appear for a status conference on December 9, 2008, at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: December 8, 2008

JOAN B. LOBIS, J.S.C.

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