

Henderson v Stryker Corp.

2009 NY Slip Op 30785(U)

April 3, 2009

Supreme Court, New York County

Docket Number: 110566/05

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 11

HENDERSON, KAREN
- v -
STRYKER CORPORATION,
ET AL

INDEX NO. 110566/05
MOTION DATE 3/10/09
MOTION SEQ. NO. 11
MOTION CAL. NO. _____

The following papers, numbered 1 to 24 were read on this motion to/for cancel

	PAPERS NUMBERED
Notice of Motion/ <u>Order to Show Cause</u> — Affidavits — Exhibits ...	<u>1-20</u>
Answering Affidavits — Exhibits _____	<u>21-23</u>
Replying Affidavits _____	<u>24</u>

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):

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER
FILED
APR 07 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/3/09 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: 1AS PART 6**

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KAREN HENDERSON, as Administratrix of the Estate of JAMES HENDERSON, and KAREN HENDERSON, individually,

Plaintiffs,

Index No. 110566/05

-against-

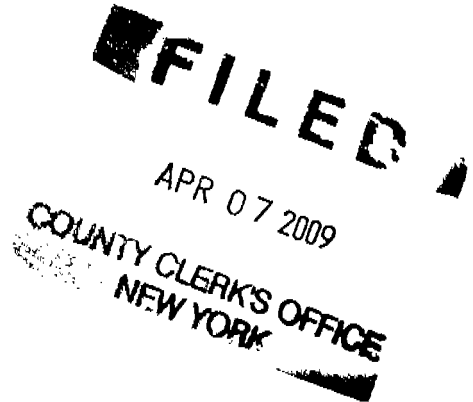
Decision and Order

STRYKER CORPORATION, EDWIN M. CHANG, SAMANTHA TUTTAMORE, SAINT VINCENT'S CATHOLIC MEDICAL CENTERS OF NEW YORK a/k/a SISTERS OF CHARITY MEDICAL CENTER, FRANK MICHAEL ROSELL, JEFFREY MICHAEL-NICASTRO, DANIEL ROESLER, DENNIS NG, HELEN HYOSUN KIM, ZHENQUING WU, STATEN ISLAND UNIVERSITY HOSPITAL, KENNETH J. WOON, M.D., P.C., and HEALTHCARE ASSOCIATES IN MEDICINE, P.C.

Defendants.

-----X

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



Motion Sequence Numbers 011 and 012 are consolidated for disposition. In Motion Sequence Number 011, defendants Frank Michael Rosell, Jeffrey Michael Nicastro, and Staten Island University Hospital move, by order to show cause, for an order, pursuant to C.P.L.R. § 3101 and Rule 3120, compelling plaintiff to produce for discovery the notes and case summary prepared by nonparty John Henderson; pursuant to C.P.L.R. § 3101 and Rule 3107, granting the moving defendants leave to conduct a further deposition of John Henderson with respect to his notes and case summary; pursuant to C.P.L.R. § 3101 and Rule 3120, directing plaintiff to disclose the terms, nature, and amounts of all settlements reached with settled defendants Edwin M. Chang ("Dr. Chang") and Healthcare Associates in Medicine, P.C. ("Healthcare"); and, pursuant to C.P.L.R. § 3101 and Rule 3120, compelling plaintiff to produce a HIPAA-compliant authorization, allowing the moving defendants' neuropathologist expert to examine pathology slides at the New York City

Medical Examiner's office, or, in the alternative, precluding plaintiff from offering any evidence or testimony as to any alleged departures or causation against the moving defendants. In Motion Sequence Number 012, defendants Helen Hyosun Kim ("Dr. Kim") and Kenneth J. Wooh, M.D., P.C. ("Wooh P.C."), move, by order to show cause, for similar relief as requested above regarding the settlement agreement and the notes by John Henderson, and also move for leave to amend their respective answers to include the affirmative defense of General Obligations Law § 15-108(a).

At the outset, the request to amend Dr. Kim's and Wooh P.C.'s and answer to raise the affirmative defense of G.O.L. § 15-108(a) is granted. Plaintiff did not oppose this branch of the motion. Leave to amend pleadings should be freely granted, absent prejudice or surprise, and mere delay is insufficient to defeat the amendment. Sheppard v. Blitman/Atlas Bldg. Corp., 288 A.D.2d 33, 34 (1st Dep't 2001). There is no reason to deny this request to amend their answers.

This is an action for medical malpractice and wrongful death which arose from defendants' treatment of plaintiff's decedent, James Henderson. The underlying facts and procedural history are more fully set forth in this court's decision and order dated September 25, 2008 (the "September 2008 Order"), familiarity with which is presumed. Note of issue was filed on January 8, 2008. Summary judgment was granted to Stryker Corporation and St. Vincent's Medical Centers of New York a/k/a Sisters of Charity Medical Center in the September 2008 Order; plaintiff's counsel had previously executed a stipulation of discontinuance releasing Samantha Tuttamore from this action. According to the instant moving papers, defendants Daniel Roesler and Vhenquing Wu were never served.

Plaintiff recently settled with Dr. Chang and his professional corporation, Healthcare. Plaintiff asserts that the settlement is confidential. Defendants claim that they are entitled to the terms, nature, and amounts of all settlements reached with Dr. Chang and Healthcare, and cite to the recently decided case of Mahoney v. Turner Const., ___ A.D.3d ___, 872 N.Y.S.2d 433, 2009 WL 88604 (1st Dep’t Jan 15, 2009), as the basis for this claim. Mahoney involved a scaffold law action against the owner of the site, the general contractor, and a subcontractor. Id. at 434. Plaintiff settled with the general contractor and the owner (Id. at 435), and the subcontractor moved to compel the settling defendants to provide the subcontractor with a copy of the settlement agreement or a sworn statement setting out the terms of the agreement, on the ground that the contents of the agreement were “material and relevant” to the remaining action. Id. The settling defendants opposed the motion, on the basis that the settlement agreement contained a confidentiality provision, but stated that they were willing to submit a copy of the agreement to the supreme court for an *in camera* review. Id. The supreme court granted the motion, to the extent of directing the settling defendants to disclose the amount of the settlement, but never requested an *in camera* review of the agreement. Id.

On appeal, the First Department reversed. The court noted that “disclosure of the terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are ‘material and necessary’ to the nonsettling party’s case.” Mahoney, supra at 436 (citations omitted). “Conversely, where the terms of a settlement agreement have no bearing on the issues in the case, the terms are not discoverable by a nonsettling party.” Id. (citations omitted). Citing to Masterwear

Corp. v. Bernard, 298 A.D.2d 249 (1st Dep’t 2002), the Mahoney court noted that

‘[a]ny doubt as to the relevance [of the terms of the settlement] may be resolved by an in camera inspection’ of the settlement agreement and ‘the settling parties’ remaining interest in confidentiality may be protected by an order limiting the disclosure of the settlement agreement to [the nonsettling defendants] and [their] counsel or by such other manner as Supreme Court directs.’

Mahoney, supra at 436, citing Masterwear Corp., supra at 250-51. Because the lower court was not provided with the settlement agreement, the First Department noted that it was unable to determine whether it contained information “material and necessary” to the nonsettling subcontractor’s defense of the underlying action, together with the cross claims and third-party claims asserted against it by the settling parties. The nonsettling subcontractor maintained, and the settling parties did not dispute, that the settling defendants planned on participating in the trial of the action; the First Department noted that “[t]he uncertainty about whether [the settling defendants] plan on participating in that trial and, if they do plan to do so, the reason for their continued participation, are at least cause for concern.” Id. at 436-37. Accordingly, the First Department reversed the Supreme Court and remanded the matter for reconsideration of the motion after an *in camera* inspection of the settlement agreement.

In the instant case, defendants do not assert that the settling parties, Dr. Chang and Healthcare, plan to participate at trial. Plaintiff asserts that the parties settled for a sum certain, that there is no high-low agreement, and that they do not intend to call Dr. Chang as a witness at trial. Defendants assert that the terms of the settlement are “material and necessary” to their defense of this action because defense counsel must decide whether they should “put in a case” against the

settling defendants; they cite to the set-off provisions of General Obligations Law § 15-108, under which a settlement “reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor’s equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.” However, under Hulse v. A.B. Dick Co., 222 A.D.2d 381 (1st Dep’t 1995), other than the amount of the settlement, which must be disclosed in the event of a verdict in plaintiff’s favor, materials relating to a settlement agreement between plaintiffs and settling defendants “have no conceivable relevance to a possible postverdict apportionment under General Obligations Law § 15-108. While the materials would be useful to defendants in assessing their maximum exposure, and thus whether they too should settle, . . . such strategizing has no bearing on the underlying issues of fault and damages.” Hulse, supra at 382. Defendants have not articulated a cogent reason, other than trial strategy, as to why they are entitled to the materials relating to plaintiff’s settlement with Dr. Chang and Healthcare; therefore, the branches of both motions seeking this relief are denied.

Defendants also assert that plaintiff should be compelled to produce the notes and case summary prepared by nonparty John Henderson, who is plaintiff’s decedent’s son and is also an attorney employed by the United States Securities and Exchange Commission. On November 25, 2008, Mr. Henderson was deposed; he was voluntarily produced by counsel representing plaintiff and he was not represented by plaintiff’s counsel until halfway through the deposition. During the deposition and while he was unrepresented, Mr. Henderson testified that before the deposition that day, he had reviewed notes that he had taken during the course of his father’s treatment, and he had

reviewed a case summary that he had provided to counsel representing plaintiff. Mr. Henderson testified that he took the notes for two reasons: to assist his father in getting medical therapy for therapeutic purposes, and also because he wanted a record in anticipation of a potential lawsuit. When defendants demanded that Mr. Henderson produce the notes, counsel for plaintiff indicated on the record that Mr. Henderson “represents the family and individual family members and Karen Henderson regarding this, and all the notes he took were in anticipation of litigation and are work product.” Mr. Henderson described the case summary as a three-page “explanation of the facts and circumstances associated with [his] father’s quadriplegia and death, written for the purposes of engaging counsel.” Mr. Henderson refused to provide the sum and substance of or produce the case summary, asserting that the case summary is attorney work product and a privileged communication.

Defendants argue that there is no privilege protecting the notes or case summary, and that, even if there were such a privilege before, Mr. Henderson waived any privilege by reviewing the materials prior to his deposition. Defendants maintain that Mr. Henderson does not represent plaintiff in this action, and argue that a document that was recorded for multiple purposes is not protected from disclosure merely because one purpose was to prepare for anticipated litigation. Defendants further contend that if, indeed, Mr. Henderson is plaintiff’s attorney, then he cannot be produced as a witness at the time of trial; he must be precluded from testifying at trial; and, plaintiff’s counsel must be precluded from reading from or referring to his deposition testimony or his notes at the time of trial. They argue that plaintiff cannot “have it both ways,” *i.e.*, that Mr. Henderson cannot be both plaintiff’s attorney and witness at trial.

In opposition, plaintiff contends that Mr. Henderson's notes are privileged pursuant to the attorney work product privilege, attorney-client privilege, and the privilege covering documents prepared in anticipation of litigation and trial preparation. Plaintiff asserts that the documents contain privileged communications between Mr. Henderson and his client, plaintiff Karen Henderson (Mr. Henderson's mother), and as such, are absolutely immune from discovery. Plaintiff further notes that the attorney-client privilege can only be waived by the client, Karen Henderson, who does not waive the privilege and who sets forth that she does not in an affidavit annexed to plaintiff's papers. It is also argued that while Mr. Henderson reviewed the notes prior to his deposition, he did not do so to refresh his recollection of any events; rather, he did so to ensure that counsel for plaintiff had copies of all of his notes.

For the attorney-client privilege to attach, "the information sought to be protected from disclosure must be shown by the party asserting the privilege to have been a 'confidential communication' made to the attorney for the purpose of obtaining legal advice or services." Poteralski v. Colombe, 84 A.D.2d 887, 888 (3d Dep't 1981), citing Matter of Priest v. Hennessy, 51 N.Y.2d 62, 68-69 (1980); see C.P.L.R. § 4503. Similarly, "the mere assertion that items constitute attorney's work product or material prepared for litigation will not suffice." Salzer v. Farm Family Life Ins., 280 A.D.2d 844, 845-46 (3d Dep't 2001), quoting Graf v. Aldrich, 94 A.D.2d 823, 824 (3d Dep't 1983). The attorney work product privilege is "a very narrowly construed concept . . . including only materials prepared by an attorney, acting as an attorney, which contain his analysis and trial strategy." Graf v. Aldrich, supra, at 824 (internal citation omitted). "Materials or documents that could have been prepared by a layperson do not fall within the attorney work product

exception.” Salzer v. Farm Family Life Ins. Co., *supra* at 846; *see* C.P.L.R. § 3101(c). With respect to the qualified privilege of “materials prepared in anticipation of litigation,” the party asserting the privilege must demonstrate that the materials were prepared “exclusively for litigation.” Commerce & Indus. Ins. Co. v. S.H. Laufer Vision World, 225 A.D.2d 313, 314 (1st Dep’t 1996); *see* C.P.L.R. § 3101(d)(2). Materials prepared for more than one reason, and not exclusively for litigation, may subject the materials to disclosure. Commerce & Indus. Ins. Co. V. S.H. Laufer Vision World, *supra* at 314.

“When lawyers have become intertwined with the merits [of a case] . . . they begin to look more like a traditional fact witness. In these circumstances, any factual statements that a lawyer makes should be subject to the same vetting that all witnesses receive, including the requirement that the witnesses be sworn and subject to cross-examination.” People v. Berroa, 99 N.Y.2d 134, 143 n4 (2002) (ellipsis in original), *quoting* McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 *Fordham L. Rev.* 945, 946 (2001). Although he asserts that he is plaintiff’s attorney in the instant matter, Mr. Henderson was deposed and appeared voluntarily as a fact witness to his father’s injuries and treatment; he is therefore, necessarily, subject to the discovery rules applicable to fact witnesses. Plaintiff’s counsel of record shall produce Mr. Henderson’s notes and case summary for an *in camera* review; should these materials not qualify as privileged under the narrow standards set forth above, the materials will be subject to production. Defendants’ request for a further deposition of Mr. Henderson with respect to his notes and case summary is held in abeyance, pending the *in camera* review.

Defendants also seek to compel plaintiff to produce a HIPAA-compliant authorization permitting defendants' neuropathologist expert to examine pathology slides at the New York City Medical Examiner's office, or, in the alternative, preclude plaintiff from offering any evidence or testimony as to any alleged departures or causation against the moving defendants. 22 N.Y.C.R.R. § 202.21(d) sets forth that, "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice, the court, upon motion supported by affidavit, may grant permission to conduct such necessary proceedings." Defendants argue that defendants' expert should have access to the same evidence as plaintiff's expert, but this reason does not qualify as an "unusual or unanticipated circumstance" that has developed that would require post-note of issue discovery in order to "prevent substantial prejudice," especially since defendants have had a copy of decedent's autopsy report since plaintiff commenced this action in 2005. This branch of defendants' motion is denied.

Accordingly, it is hereby

ORDERED that plaintiff shall submit Mr. Henderson's notes and case summary by April 24, 2009, to my chambers, room 690 at 60 Centre Street, New York, New York, for an *in camera* review; and it is further

ORDERED that defendants' requests to compel plaintiff to produce the notes and case summary and, upon production, order nonparty John Henderson to submit to a further

* 11]
deposition regarding the notes and case summary, are held in abeyance pending the court's *in camera* review of the materials; and it is further

ORDERED that defendants Helen Hyosun Kim and Kenneth J. Wooh, M.D., P.C. are granted leave to amend their respective answers to include the affirmative defense of General Obligations Law § 15-108(a), and shall serve such amended answers upon all parties within twenty (20) days of the date of service of notice of entry of this decision and order.

All other requested relief is denied. This constitutes the decision and order of the court.

Date: April 3, 2009



JOAN B. LOBIS, J.S.C.

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