

Provenzano v 181 S. Franklin Assoc., Inc.

2009 NY Slip Op 31136(U)

March 31, 2009

Supreme Court, New York County

Docket Number: 14966/07

Judge: F. Dana Winslow

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**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

**Present: HON. F. DANA WINSLOW,
Justice**

**VINCENT PROVENZANO and GERALDINE
PROVENZANO,**

**TRIAL/IAS, PART 6
NASSAU COUNTY**

Plaintiff(s),

**MOTION DATE: 11/7/09
MOTION SEQ. NO.: 001**

-against-

INDEX NO.: 14966/07

181 SOUTH FRANKLIN ASSOCIATES, INC.,

Defendant(s).

The following papers read on this motion (numbered 1-3):

- Order to Show Cause 1**
- Affirmation in Opposition 2**
- Reply Affirmation 3**

Defendant's motion pursuant to the **Uniform Rules for the New York State Trial Courts ("Uniform Court Rule") sections 202.17(h) and 202.17(b)**, to compel the exchange of a narrative medical report prior to the videotaped deposition of plaintiff's treating physician, is determined as follows.

This personal injury action arises out of a slip and fall accident which occurred on October 13, 2005 on defendant's premises located at 181 South Franklin Avenue, Valley Stream, New York. Plaintiff testified at his examination before trial that he was treated by Stephen J. O'Brien, M.D. ("Dr. O'Brien") for accident-related injuries to both his left and right knee, and that Dr. O'Brien performed arthroscopic surgery on both knees on June 5, 2007 at the Hospital for Special Surgery, 535 East 70th Street, New York, New York.

On or about September 24, 2008, plaintiffs served notice to conduct a videotaped deposition of Dr. O'Brien. In response, defendant filed the instant motion by Order to Show Cause, which temporarily stayed the deposition of Dr. O'Brien pending the hearing of the motion. Defendant now seeks an Order compelling the plaintiffs to exchange a

narrative medical report from Dr. O'Brien prior to conducting the videotaped deposition. The substance of defendant's argument is that insofar as plaintiff intends to offer the videotaped testimony at trial in lieu of calling Dr. O'Brien as a witness, the rules regarding pre-trial exchange of medical reports apply. See **Uniform Court Rule §202.17 ("Section 202.17")**. That is, defendant is entitled to receive Dr. O'Brien's medical report in advance of the deposition, and in the absence of such report, the deposition should be precluded. Defense counsel argues that without such report, he would be hampered in his questioning and cross-examination of Dr. O'Brien, and his client would be prejudiced in its defense of the action.

In opposition, plaintiff argues that he has no obligation under the **New York Civil Practice Law and Rules ("CPLR")** or the **Uniform Court Rules** to provide a medical narrative report prior to conducting a deposition. Plaintiff states that Dr. O'Brien has not prepared a narrative medical report and further argues that, in light of the extensive discovery already provided, the absence of such report is of no consequence. Plaintiff has delivered authorizations for all treating physicians, hospitals, MRIs and workers compensation file to the defendant, and has presented the full examination and treatment records of Dr. O'Brien to defendant's counsel and carrier. In addition, plaintiff has submitted to a physical examination by an orthopedic doctor on behalf of defendant. Plaintiff argues that this would be sufficient under **Section 202.17(h)** to avoid preclusion of Dr. O'Brien's testimony at trial, citing **Cutsogeorge v. Hertz Corp.**, 264 A.D.2d 752 and **Connors v. Sowa**, 251 A.D.2d 989. Therefore, plaintiff reasons, even if **Section 202.17(h)** applies in the present context (which plaintiff does not concede), the deposition should be allowed to proceed.

The question presented here is: does **Section 202.17** require the production of a narrative medical report from a physician before that physician may be deposed for purposes of **CPLR §3117(a)(4)**? The question has no clear answer in the **Uniform Court Rules**, and appears to be a matter of first impression for the courts.

Section 202.17(b)(1) provides that copies of the medical reports of those medical providers who have previously treated or examined the plaintiff must be delivered to all other parties at least twenty days prior to the date on which the plaintiff's physical examination is to be conducted pursuant to **CPLR §3121**. The medical report must include "a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those x-ray and technicians' reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis." **Uniform Court Rule §202.17(b)(1)**. **Section 202.17(h)** provides that the Court will not hear the testimony of any treating or examining medical providers whose medical reports have not been served as provided by this rule.

As shown above, there is no explicit requirement in **Section 202.17(b)(1)** that a plaintiff produce a treating physician's medical narrative report prior to taking the physician's deposition. The only requirement is that it be served prior to the physical examination of the plaintiff by the defendant's designee. This section, however, must be read in conjunction with **Section 202.17(h)**, which precludes the testimony of a physician whose report has not been produced in accordance with the rule. By its express terms, the section is not limited to trial testimony. There is no reason why **Section 202.17(h)** should apply only to trial testimony, and not also to deposition testimony. There is no rational basis to distinguish these contexts, particularly insofar as **CPLR §3117(a)(4)** effectively renders a physician's deposition the functional equivalent of trial testimony. (See *Jessmer v. Martin*, 46 AD3d 1059, wherein the Third Department assumed, without explicitly holding, that a physician's videotaped deposition could be precluded under **Section 202.17(h)** on grounds of untimely disclosure of the medical report.)

The purpose of **Section 202.17(h)** "is to avoid surprise, narrow and crystallize the issues, lessen the burdens of pretrial discovery and reduce the number of medical witnesses . . . The rule permits a party to review and evaluate often complex medical evidence of the adversary in advance so as to afford the party an opportunity to adequately present a proper defense to such evidence before the trier of the facts." *Bradford v. City of New York*, 141 Misc.2d 209, citing *Padilla v. Damascus*, 16 AD2d 71. The need for a medical report to adequately assist in the preparation of a defense is no less urgent when the physician's testimony is to be elicited in an out-of-court deposition, rather than at trial. Further, it would be incongruous to allow a plaintiff to circumvent the application of **Section 202.17(h)** by choosing to depose his treating physician rather than to produce him or her at the trial.

The Court finds, as a general matter, that **Section 202.17(h)** applies in the context of a physician's deposition. Such deposition may be precluded if a plaintiff has failed to timely produce the physician's medical report in accordance with **Section 202.17(b)(1)**. In the Court's view, the power to preclude a physician's deposition for failure to produce a medical narrative report necessarily implies the power to compel such production prior to the deposition. The Court ventures one step further, and, consistent with the intent of **Section 202.17** as a whole, holds that the production of a medical narrative report prior to a physician's testifying, either at deposition or at trial, is an affirmative, albeit implicit, requirement of **Section 202.17(b)(1)**. To hold otherwise would arguably allow plaintiffs to forego production of the report, without preclusion, in the event the physical examination is never conducted, such as when the examination is waived or the injured plaintiff is deceased. (If **Section 202.17(b)(1)** is construed to require the report in connection with the physical examination only, then arguably, the failure to produce such

report when there is no such physical examination would not constitute a failure to serve the medical report "as provided by this rule" under **Section 202.17(h).**)

In this case, plaintiff did not comply with the express terms of **Section 202.17(b)(1)**. He did not produce the medical narrative report of Dr. O'Brien, a prior treating physician, within 20 days prior to his physical examination by defendant's designee. Neither did defendant, however, timely move to compel pursuant to **Section 202.17(j)**.

Insofar as the case is in the pre-trial phase of litigation, and time is available for further discovery, the Court finds that the most appropriate remedy, in the interest of justice, is to compel the production of a medical narrative report containing the information specified in **Section 202.17(b)(1)**. The fact that Dr. O'Brien has not prepared a narrative report to date does not relieve plaintiff of his obligation to ensure that the report is prepared and delivered to defendant. **Davidson v. Steer/Peanut Gallery**, 277 AD2d 965. In this context, it is unnecessary to consider plaintiff's argument that the discovery previously provided is sufficient. The cases cited by plaintiff concern what discovery is sufficient to avoid preclusion, retrospectively. They do not stand for the proposition that a party can dispense with the requirements of **Section 202.17(b)(1)** by producing abundant discovery of his choice.

Based upon the foregoing it is

ORDERED, that plaintiff shall deliver to defendant the medical report of Dr. Stephen J. O'Brien containing the information set forth in **Uniform Court Rule §202.17(b)(1)** no later than twenty (20) days prior to the date upon which the deposition of Dr. O'Brien is scheduled pursuant to a duly served Notice (or thirty (30) days prior to trial, if no such deposition is conducted), upon penalty of preclusion of Dr. O'Brien's testimony.

This constitutes the decision and Order of the Court. Defendant shall serve a copy of this Order with Notice of Entry upon plaintiff, within 20 days of entry.

ENTER:

Dated: 3/31/09

[Handwritten signature: Dana V. Winslow]
ENTERED
MAY 13 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE