

**Pagano v Malpeso**

2009 NY Slip Op 31574(U)

July 9, 2009

Supreme Court, New York County

Docket Number: 108018/03

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobbis  
Justice

PART 6

Index Number : 108018/2003  
PAGANO, CARMINE N.  
VS.  
MALPESO, PASQUALE J.  
SEQUENCE NUMBER : 004  
ORDER OF PROTECTION

INDEX NO. \_\_\_\_\_  
MOTION DATE 4-21-09  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
1-28  
30-31, 32-33  
34-36

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

Answering Affidavits — Exhibits X MOT 29

Replying Affidavits \_\_\_\_\_

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**  
JUL 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/9/09

JBL  
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: IAS PART 6

-----X  
 CARMINE N. PAGANO, PATIENT

Plaintiff,

Index No. 108018/03

-against-

Decision and Order

PASQUALE J. MALPESO, D.M.D.  
 EILEEN, DENTAL HYGIENIST,

**FILED**  
 JUL 17 2009  
 COUNTY CLERK'S OFFICE  
 NEW YORK

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

Motion Sequence Numbers 004, 005, and 006 are consolidated for disposition. In Motion Sequence Number 004, defendants Pasquale J. Malpeso, D.M.D., and Eileen Olivo, s/h/a Eileen, Dental Hygienist, seek an order, pursuant to C.P.L.R. § 3103, striking and vacating certain discovery demanded by plaintiff; pursuant to C.P.L.R. § 3104, directing that all depositions be conducted under judicial supervision; pursuant to C.P.L.R. Rules 3024, and 3211(a)(5) and (7), striking the names of additional purported defendants from the caption; and, pursuant to C.P.L.R. §§ 8501 and 8502, requiring the out-of-state plaintiff to post a bond for security for costs, and staying all further proceedings in this case until such time as said bond is posted.<sup>1</sup> Plaintiff, proceeding pro se, cross-moves for an order declaring defendants in default and seeking sanctions. In Motion Sequence Number 005, plaintiff asks the court to “search the record” and “declare defendant’s legal process defective.”<sup>2</sup> In Motion Sequence Number 006, plaintiff moves for an order to obtain access

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<sup>1</sup> An interim decision granting this branch of defendants’ motion was signed on May 20, 2009 and filed with the county clerk on May 26, 2009; plaintiff posted the bond for security on June 11, 2009.

<sup>2</sup> Plaintiff sets forth that this motion is the first of three motions, all with the same return date; however, a review of the county clerk file indicates that only two motions were filed by plaintiff, Motion Sequence Numbers 005 and 006.

to defendants' original records in order for his expert, Michael Robertson, a forensic document examiner, to perform a forensic examination.

This is an action sounding in dental malpractice and lack of informed consent, by which plaintiff alleges that defendants improperly extracted a healthy tooth and placed implants, thereby causing plaintiff to suffer continuing nerve damage, pain, and pressure. This case is over six years old and has been the subject of several disputes regarding the scope of discovery. In 2006, the Hon. Eileen Bransten (to whom this case was originally assigned) dismissed this case for want of prosecution upon motion by defendants. Plaintiff appealed this decision and the First Department reversed the dismissal in 2007. Pagano v. Malpeso, 41 A.D.3d 145 (1st Dep't 2007). This case was restored to active status in early 2008. On February 26, 2008, Justice Bransten ordered the parties to engage in further discovery (the "February 2008 Order"). The February 2008 Order directed the depositions of both defendants, an updated deposition of plaintiff, updated authorizations, and an independent medical examination of plaintiff by defendants' designated specialist; deadlines for each item were set, with the final deadline being May 15, 2008, the date for plaintiff's updated deposition.

This case was transferred to the undersigned after inventory changes in March 2008. On April 15, 2008, the parties appeared for a conference; at that point, the parties were not in compliance with any of the directives from the February 2008 Order, except that defendants had designated a specialist to conduct an examination of plaintiff. The deadlines for discovery in the February 2008 Order were extended by this court in an order dated April 15, 2008 (the "April 2008 Order"), with the last date being June 27, 2008, the date for plaintiff's updated deposition. In the

interim, plaintiff moved for certain relief, seeking a “change of venue” to Federal Court and leave to amend his complaint to assert claims for obstruction of justice, fraud, perjury, and conspiracy (Motion Sequence Number 003). On August 19, 2008, the parties appeared for oral argument. Again, the parties had not complied with the discovery deadlines ordered in the April 2008 Order. During oral argument, plaintiff expressed, *inter alia*, that he was dissatisfied with the discovery process and that he required further discovery to prove his claims. By a compliance conference order dated August 19, 2008 (the “Compliance Conference Order”), defendants were directed to provide certain records responsive to plaintiff’s requests for further discovery; plaintiff was directed to provide updated authorizations; defendants were to be deposed on or before December 31, 2008; plaintiff was to be deposed on or before January 30, 2009; and, plaintiff was to submit to an examination by defendants’ designated specialist by February 27, 2008. The Compliance Conference Order set forth that the depositions of defendants would be deemed waived if plaintiff did not conduct these depositions before December 31, 2008, absent a proper showing of just cause. The relief sought in Motion Sequence Number 003 was denied in this court’s decision and order dated August 22, 2008 (the “August 2008 Order”), which incorporated the Compliance Conference Order by reference therein.

The parties appeared for a status conference on March 17, 2009. Again, they had not complied with the deadlines for discovery, except that defendants provided plaintiff with defendant Ms. Olivo’s attendance records from June 1999 to November 2000, and returned certain CAT scan films. None of the deadlines for the exchange of authorizations, depositions, or medical examinations had been complied with. Because defendants had provided the attendance records after

the court-ordered deadline in the Compliance Conference Order, the court deemed the remainder of the deadlines unenforceable, and set new deadlines: updated authorizations to be exchanged by May 31, 2009; defendants to be deposed by June 30, 2009; and, plaintiff to be deposed by July 30, 2009.<sup>3</sup>

Between May 6, 2008 and March 13, 2009, plaintiff served defendants with numerous discovery demands by letter. These collective letter demands are the subject of defendants' instant motion for a protective order. The court has reviewed the letters and the discovery requests therein. It is apparent that plaintiff believes that defendants, defendants' attorneys, and certain third-parties (including the stenographer from his deposition on September 19, 2003, Kim Grasso), have colluded in some fashion to tamper with his dental records, tamper with the deposition transcript, and commit what he terms obstruction of justice, fraud, perjury, and conspiracy. The letter demands are primarily focused on obtaining discovery to support plaintiff's continuing efforts to raise these additional claims which are not the subject of this case. This court has already determined that the only cognizable cause of action that plaintiff may assert in this case is his claim for dental malpractice, together with a claim for lack of informed consent. See August 2008 Order. Plaintiff's requests to obtain discovery to support claims other than dental malpractice and lack of informed consent are beyond the appropriate scope of discovery.

There is also a continuing demand by plaintiff for defendants to provide certain responses and materials in order for the court to "search the record" to see if fraud exists. These

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<sup>3</sup> Although the court did not set a new deadline for an examination of plaintiff by defendants' physician, this appears to be inadvertent; defendants' request for an updated independent medical examination is not deemed waived and is addressed, infra.

demands appear to stem from a statement made by the court during oral argument on Motion Sequence Number 003. As was set forth in the August 2008 Order, “[d]uring oral argument of this application and the conference that was held on August 19, plaintiff pro se requested that this court consider other claims that are raised in his papers.” (Emphasis added.) In deference to plaintiff’s lay understanding of properly pleading a cause of action, during oral argument, the court agreed to “search the record”—and not to proceed on the wording of plaintiff’s motion alone—to determine whether plaintiff had alleged the facts necessary to plead a cause of action for fraud. It appears from reading the various letter demands that are the subject of the instant motion that plaintiff interpreted that statement—to “search the record”—to mean that the court intended to review the underlying dental records and items obtained via plaintiff’s numerous notices for discovery and conduct its own inquiry to determine the issue of whether fraud took place. That is not the function of the court. When plaintiff brought Motion Sequence Number 003 to amend the complaint, the court needed to determine whether plaintiff had pled the elements of fraud. Indeed, the court reviewed all of the facts alleged in plaintiff’s papers to determine whether plaintiff had asserted the “elements necessary to make out any cognizable civil wrongs separate from his claims for dental malpractice.” In searching through the facts asserted by plaintiff in the papers underlying Motion Sequence Number 003, the court determined that the facts alleged by plaintiff did not fit within the elements required in order to assert a cause of action for fraud. Having determined that plaintiff did not make out a cause of action for fraud, and that his action sounds in dental malpractice and lack of informed consent, the court concluded the “search of the record” required in Motion Sequence Number 003.

A pro se plaintiff is not held to the same stringent standards of drafting as a party represented by counsel. Haines v. Kerner, 404 U.S. 519, 520 (1972); Pezhman v. City of New York,

29 A.D.3d 164, 168 (1st Dep't 2006). But, the court cannot confer on a pro se litigant any greater rights than those afforded to represented litigants. Duffen v. State, 245 A.D.2d 653, 653-54 (3d Dep't 1997), app. denied, 91 N.Y.2d 810 (1998); Sloninski v. Weston, 232 A.D.2d 913, 914 (3d Dep't 1996), app. denied, 89 N.Y.2d 809 (1997).

CPLR 3101 (a) entitles parties to 'full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' What is 'material and necessary' is left to the sound discretion of the lower courts and includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.'

Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740, 746 (2000) (citation omitted); C.P.L.R. § 3101(a). Bearing in mind the standard that must be utilized in considering a pro se litigant's papers, and having reviewed plaintiff's numerous requests for discovery, together with defendants' responses, I have determined that one of plaintiff's outstanding requests is appropriate: plaintiff's request for information regarding the name of the agency that supplied the substitute dental hygienist and the name of the substitute dental hygienist during the period of time defendant Eileen Olivo was out of work for maternity leave during 1999-2000. Within thirty (30) days, defendants are directed to provide plaintiff with any documentation they may have responsive to this request. If defendants have no such documentation, they shall state so in an affidavit, together with the reason why.

In all other respects, I find that defendants have complied with all of plaintiff's demands that require responses. Defendants are not required to produce items that do not exist or are not in their possession and control, nor are they required to create documents that do not exist. Plaintiff's requests that defendants and third parties explain certain events and/or alleged acts or

omissions are appropriate questions to ask during a deposition of said party, as long as those questions bear on the controversy at hand, which is plaintiff's claim for dental malpractice and lack of informed consent. The remainder of plaintiff's discovery requests are denied and vacated as immaterial to the prosecution of this action for dental malpractice and lack of informed consent. C.P.L.R. § 3103(a).

Defendants request that all further depositions be conducted under judicial supervision.

CPLR 3104 provides for the appointment of a referee to supervise all or part of disclosure proceedings upon motion or on the court's initiative. The decision to appoint a referee is a matter within the discretion of the trial court and is especially appropriate where, as here, a party appearing pro se is hostile or otherwise frustrates discovery.

Kogan v. Royal Indem. Co., 179 A.D.2d 399 (1st Dep't 1992) (citations omitted); C.P.L.R. § 3104.

Given the circumstances of the prolonged discovery in this case, plaintiff's ongoing attempts to enlarge the scope of his dental malpractice case, and both sides' failure to comply with court-ordered discovery deadlines, it is appropriate for the court to appoint a special referee to oversee further depositions; such depositions shall be held at the courthouse. This branch of defendant's motion is granted. Within fifteen (15) days of the date of notice of entry of this order, defendant's counsel shall serve a copy of this order with notice of entry, together with the Special Referee Information Sheet, on the Special Referee Clerk (Room 119).

Defendants further request that the names Marybel Pagan, Luz Angela King, and Kim Grasso be struck from the caption of this action. These parties have not been named as defendants

in this action and plaintiff has never served these parties nor asked for leave to add these parties to the action. Plaintiff is directed to stop adding the names of parties to the caption who are not proper parties to this action. Inasmuch as plaintiff asserts that these parties are necessary parties to his causes of action for obstruction of justice, fraud, perjury, and/or conspiracy, these causes of action have already been dismissed as not properly pled or not actionable.

Plaintiff's cross-motion to declare defendants in default on his cause of action for fraud is denied. Similarly, Motion Sequence Number 005 is denied in its entirety. By that motion, plaintiff asks this court to declare defendants' legal process defective, on the basis that defendants and their attorneys refuse to recognize fraud as a cause of action in this complaint. There are no grounds to hold defendants in default or otherwise, and this court has already made a determination that the only cognizable causes of action that plaintiff may assert in this case are his claims for dental malpractice and lack of informed consent. As the court set forth in its prior August 2008 Order.

[1]o the extent that plaintiff attempts to raise claims of "dental fraud," his claims really sound in dental malpractice and lack of informed consent. The only other "fraud" alleged is plaintiff's claim that medical records were falsified. This is akin to a claim of spoliation of evidence, which is not a separate cause of action. Pharr v. Cortese, 147 Misc. 2d 1078, 1079 (Sup. Ct. N.Y. Co. 1990) (Sklar, J.); Hartford Ins. Co. v. Rosa, 2002 WL 31686861 at \* 1 (Sup. Ct. Nassau Co. 2002); Sterbenz v. Attina, 205 F. Supp. 65 (E.D.N.Y.2002); but see, Fada Industries, Inc. v. Falchi Bldg. Co., L.P. 189 Misc. 2d 1, 12-13 (Sup. Ct. Queens Co. 2001). As Justice Sklar noted in Pharr, supra, "if the jury is satisfied from the evidence presented that [defendant] intentionally altered these relevant records, the jury can infer that his purpose in falsifying the documents was fraudulent and that accurate medical records would have been unfavorable to his interests." Pharr v. Cortese, 147 Misc. 2d at 1081.

In Motion Sequence Number 006, plaintiff asks this court to allow him access to certain original records of defendants so that plaintiff's forensic document examiner, Michael Robertson, may examine the records. At the outset, defendants object to this motion as improperly brought during the stay of proceedings granted by this court's May 20, 2009 interim decision and order (the "Interim Order"). In that branch of Motion Sequence Number 004 which has already been decided by the Interim Order, defendants requested a stay of proceedings until a \$500 bond was posted by plaintiff. Plaintiff did not oppose and, at the direction of the Interim Order, posted the bond on June 11, 2009. Since the stay was lifted when the bond was posted, and Motion Sequence Number 006 was brought after the bond was posted, this motion will be considered.

From plaintiff's affidavits of service, it appears that plaintiff served defendants with a demand for discovery, "Notice No. 7 for Discovery" (hereinafter "Discovery Notice 7"), on June 15, 2009, the same day that he served defendants with Motion Sequence Number 006, his motion to enforce Discovery Notice 7. To this end, Motion Sequence Number 006—by which plaintiff seeks to compel defendants to comply with Discovery Notice 7—is not ripe; plaintiff did not give defendants time to respond to the notice. But, considering the protracted course of discovery of this case, the court will examine the merits of plaintiff's application.

Plaintiff seeks an eight (8) hour window of time for his forensic document examiner to examine the following records: Dr. Malpeso's appointment calendar, 1999 to 2000; chart records for 1970 to 2000; Ms. Olivo's attendance and payroll records from 1998 to 2000; personnel records showing the name of the substitute dental hygienist who replaced Ms. Olivo while she was on

maternity leave and dates of service; the substitute dental hygienist's attendance and payroll records from 1998 through 2000; and, the attendance records of Marybel Pagan and Luz Angela King for 2000. Plaintiff wants this examination because he asserts that Ms. Olivo "made false entries" on his dental records while she was on maternity leave, and that defendants have "submitted a false attendance record [for Ms. Olivo] with the intent of defrauding a jury." In order to "neutralize" these falsehoods, plaintiff retained a forensic document examiner to examine defendants' documents and check for alterations. This request is mirrored in Discovery Notice 7. Defendants ask that the court to deny plaintiff's request on the grounds that plaintiff has not established any good faith basis for his claims that records were falsified, and that plaintiff's demand for a forensic examination of "diverse and wide-ranging categories of the defendant's business records is . . . 'putting the cart before the horse.'"

Given that plaintiff has yet to depose either defendant, this court agrees that the majority of plaintiff's request is premature. Plaintiff is entitled to access to his original dental record in order to allow his own expert to examine it; additionally, because this court has already ordered defendants to produce a copy of Ms. Olivo's attendance records, and defendants have done so, there is no reason to preclude plaintiff from examining this document in person at a time mutually convenient to both parties. A date for this inspection to occur shall be set at the parties' next court conference. As to plaintiff's remaining requests to examine original documents, plaintiff has not demonstrated that an inspection of these original documents is material and necessary to the prosecution of his dental malpractice case. C.P.L.R. § 3101(a). Again, it appears that plaintiff requests this in-person discovery in an attempt to expand the scope of disclosure beyond the

parameters of his claims for dental malpractice and lack of informed consent. The remaining requests to give plaintiff's expert access to certain original business records of defendants may be renewed if and after plaintiff has deposed defendants,<sup>4</sup> together with a showing that this discovery is warranted and that there is a good faith basis for making these discovery demands.

Due to the brief stay that was in place pending plaintiff's posting of a bond, the parties shall be given one final extension of the dates by which all discovery must be completed. On or before July 31, 2009, plaintiff shall provide updated HIPAA-compliant authorizations, as designated in this court's previous orders. On or before September 15, 2009, defendants shall be deposed. On or before October 15, 2009, plaintiff shall appear for an examination by a specialist of defendants' choosing. On or before October 30, 2009, plaintiff shall be deposed regarding any updated treatment since his last deposition.

The parties are scheduled for an appearance on August 18, 2009, at 11:00 a.m., at which time a date will be set for inspection of plaintiff's original chart and the original attendance records for Ms. Olivo.

This constitutes the decision and order of the court.

Dated: July 9, 2009

**FILED**  
JUL 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK  
*JBL*  
JOAN B. LOBIS, J.S.C.

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<sup>4</sup> Since April 2008, this court has given plaintiff three separate extensions of time to depose defendants.