

Matter of AXA Equit. Life Ins. Co. (Melone)

2009 NY Slip Op 32098(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 103720/09

Judge: Emily Jane Goodman

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

P Index Number : 103720/2009
 AXA EQUITABLE LIFE INS. CO.
 VS.
 MELONE, M.D., CHARLES P.
 SEQUENCE NUMBER : 001
 COMPEL DISCLOSURE

PART 17

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided per attached*

FILED
 SEP 15 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: 9/8/09

[Signature]

 EMILY JANE GOODMAN ^{J.S.C.}

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
In the Matter of the Application of

AXA Equitable Life Insurance Company
f/k/a The Equitable Life Assurance Society
of the United States and Disability
Management Services, Inc

Petitioners

INDEX NO.: 103720/09

For an Order taking the deposition of

Charles P. Melone, M.D.

Respondent

And for the production of documents by
Charles P. Melone, M.D.

For use in an action pending in the Superior Court
of Fulton County, Georgia entitled:

Frederick M. Laun, M.D. v. AXA Equitable Life
Insurance Company, et al.

FILED
SEP 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
EMILY JANE GOODMAN, J.S.C.

Petitioner AXA Equitable Life Insurance Company f/k/a The Equitable Life Assurance Society of the United States and Disability Management Services, Inc. ("AXA Equitable") seeks an order compelling Respondent Charles P. Melone, M.D. ("Dr. Melone") to appear for deposition pursuant to CPLR 3124. Dr. Melone is a hand surgeon. The deposition is sought in connection with a lawsuit pending in the Superior Court of Fulton County, Georgia entitled Frederick M. Laun, M.D. v. AXA Equitable Life Insurance Company f/k/a The Equitable Life Assurance Society of the United States and Disability Management Services, Inc., (the "out-of-state action"). Dr. Laun was a patient of Dr. Melone. At issue here, is not whether Dr. Melone can be deposed but how much he should be compensated for his time. That issue turns upon whether Dr.

Melone is a fact witness or an expert witness.

BACKGROUND

The facts and determinative question in the out-of-state action are pertinent to the discussion of this motion as they relate to the nature of the deposition sought here. Dr. Laun, an orthopaedic and hand surgeon, was diagnosed with osteoarthritis at the base of both thumbs on October 7, 2003. As a result, he could no longer perform as a surgeon. He began receiving payments under the Sickness Total Disability provision of his insurance policy in February 2004. Dr. Laun had surgery on both of his hands and planned to return to practice medicine after therapy. However, on November 5, 2004, Dr. Laun fell and injured his wrist. On March 15, 2005 Dr. Laun made a claim for Accident Total Disability due to the injury incurred to his wrist from the fall. Dr. Laun underwent more surgery on his right wrist due to the injury.

Dr. Laun's request for reclassification from the Sickness Total Disability provision to the Accident Total Disability provision (due to injury) was denied on April 13, 2007. Under Dr. Laun's policy, the definition of sickness is "sickness or disease of the insured which manifests itself while this policy is in force." Injury is defined as "accidental bodily injury of the insured occurring while this policy is in force." The effect of the denial is that Dr. Laun will stop receiving disability payments at age 65, whereas under the injury provision he would receive disability payments for life. Consequently, in the out-of-state action, Dr. Laun seeks a declaration that his disability be reclassified from one arising out of sickness to one falling under the accident provision.

The fact that Dr. Laun has a disability is not in dispute. The determinative question, according to Petitioner, is "whether Plaintiff's disability resulted from accident, or whether his disability was caused or contributed to by sickness. Resolution of this issue hinges solely on the terms of the policy, and medical evidence concerning the cause(s) of Plaintiff's disability" (Memorandum of Law in Support of Petitioners' Motion to Compel Charles P. Melone, M.D. to Appear at Deposition Pursuant to N.Y. C.P.L.R. § 3124, at 2).

DISCUSSION

Petitioner maintains that they are calling Dr. Melone, a treating physician of Dr. Laun, as a non-party fact witness. As a result, Petitioner argues that Dr. Melone is entitled to compensation under CPLR 8001(a) and has agreed to pay the statutory fee of “fifteen dollars for attendance fees and twenty three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return.” Thus, Petitioner insists that it seeks “fact testimony, not expert opinions.... and here they seek the deposition of a lay witness” (Reply Memorandum of Law in Support of Petitioners’ Motion to Compel Charles P. Melone, M.D. to Appear at Deposition Pursuant to N.Y. C.P.L.R. § 3124, at 3). Petitioner acknowledges that opinions may not be elicited from Dr. Melone but insist that in the event that that elusive line is crossed “counsel for Dr. Melone may direct him not to answer any question they believe in good faith to solicit expert testimony.” (Id.).

Respondent maintains that AXA Equitable is “seeking opinion testimony from Dr. Melone concerning the cause and extent of Dr. Laun’s disability” (Affirmation In Opposition, at 2). Respondent makes it abundantly clear that Dr. Melone is in fact an expert in his field as reflected by his Curriculum Vitae. Thus, Respondent asserts that AXA Equitable is designating Dr. Melone as a fact witness to elicit his expert opinion without paying Dr. Melone his customary fee of \$10,000 for such a deposition.

The Court agrees that Dr. Melone, having “rendered treatment and care” to Dr. Laun, may be compelled to present fact testimony.¹ However, “the line between a physician’s opinion testimony and fact testimony becomes very hard to draw. And it is not clear either that the witness’ purely fact testimony is required or useful” (Plummer v. R. H. Macy & Co. 69 A.D.2d 765 [1st Dept. 1979]). The causation question hinges on whether Dr. Laun’s disability was caused by the fracture or was

¹The New York Rule is that a witness may not be compelled to give expert testimony (People v. Thorpe, 296 N.Y. 223 [1946]).

caused by the underlying condition of osteoarthritis. Thus, the causation question by its very nature calls for professional or technical knowledge and is therefore more opinion than fact (see De Long v. Erie, 60 NY2d 296, 307 [1983] [in determining the admissibility of expert testimony, the guiding principle is that expert testimony should be received “when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.”]). Further, given that such determination is one of medical causation, it is difficult to see why those facts could not be ascertained from Dr. Melone’s records alone, as suggested by his counsel.²

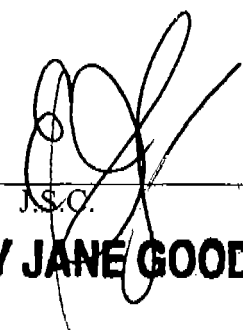
It is hereby

ORDERED that the motion is held in abeyance and that parties are directed to contact the Court for a telephone conference regarding settlement of the matter or further briefing of the issues.

This constitutes the Decision and Order of the Court.

Dated: September 8, 2009

ENTER:



J.S.C.

EMILY JANE GOODMAN

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²Petitioner argues that in the event that opinions are sought during deposition, Respondent may refuse to answer such questions if there is a good faith belief that the testimony is expert in nature. Such an approach would no doubt lead to further litigation expense and the drain of judicial resources and should be avoided, if possible.