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

PRESENT: Joan B. Lobis PART 6

Index Number : 113306/2007
BARRETT, TANYA
VS.
AZAR, DAVID E., D.D.S.
SEQUENCE NUMBER : 004
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE 10/30/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-7
Answering Affidavits — Exhibits	8; x mot 9-24
Replying Affidavits	25-30

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
JAN 29 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/27/10

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

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TANYA BARRETT,

Plaintiff,

-against-

DAVID E. AZAR, DDS and
DALE D. GOLDSCHLAG, DDS,

Defendants.

Index No. 113306/07

Decision and Order

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

Motion Sequence Numbers 004 and 005 are consolidated for disposition. In Sequence 004, defendant Dale D. Goldschlag, D.D.S., moves, pursuant to C.P.L.R. § 3103, for a protective order with respect to the transcripts of the prior deposition testimony of Dr. Goldschlag in another case, Albert v. Azar, Index No. 117959/05 (the "Albert Action"). In Sequence 005, defendant David E. Azar, D.D.S., moves for a protective order with respect to the transcripts of his deposition testimony in the Albert Action. Plaintiff Tanya Barrett opposes both motions and cross-moves on each sequence for an order compelling defendants to produce aforementioned transcripts.

These motions resulted from plaintiff's Notices for Discovery and Inspection, dated August 13, 2009, served on Drs. Goldschlag and Azar, respectively, requesting that the defendants provide copies of their testimony in the Albert Action, and "all other actions" in which these dentists testified at an examination before trial. At oral argument on October 27, 2009, plaintiff withdrew her request for the transcripts of defendants' deposition testimony from "all other actions," and these motions are hereby limited to defendants' deposition testimony in the Albert Action only. At oral argument, defendants agreed to produce the transcripts for an in camera review.

The facts are taken from this court's decision and order dated March 19, 2009 (the "March 2009 Decison"):

> In the summer of 2004, plaintiff was Dr. Azar's patient. Dr. Azar determined that plaintiff needed dental work at the site of teeth numbers 4 and 5. His treatment plan recommended implants. According to plaintiff, Dr. Azar represented to her that Dr. Goldschlag, "his partner" or "associate," would insert the implants at "their office." On September 9, 2004, Dr. Goldschlag placed the implants at the office where plaintiff saw Dr. Azar. On October 28, 2004, Dr. Goldschlag saw plaintiff at the aforementioned offices for a follow-up visit. Dr. Azar saw plaintiff for all other follow-up appointments and treatment. Plaintiff commenced this action on September 12, 2007.

There is an ongoing issue as to the nature of the business relationship between Drs. Azar and Goldschlag and, as set forth in the March 2009 Decision, the relationship between the two dentists is an element in establishing the continuous treatment doctrine in this case.

Dr. Goldschlag argues that plaintiff's request of his prior deposition testimony is abusive under C.P.L.R. § 3103(a) and that plaintiff has failed to provide any reason why the prior testimony is material or necessary to the prosecution of her case. He maintains that the prior testimony relates to another patient, a different set of facts, different injuries, and a different procedure. Additionally, Dr. Goldschlag argues that releasing the prior testimony would violate the Health Insurance Portability and Accountability Act ("HIPAA"). Dr. Goldschlag argues that the release of prior deposition testimony would be "highly prejudicial" as it would deny him the "right of confidentiality of prior actions and prior treatment rendered to other persons." In support of the motion, counsel for Dr. Goldschlag annexes an affidavit from Dr. Goldschlag wherein he states that the claims in Albert Action involved different issues, procedures, and alleged injuries from those in

the instant case. He sets forth that the alleged injuries claimed by the plaintiff in the Albert Action did not involve the sinus or sinus infections, and that this action involves claims of implant placement into the sinus, causing alleged sinus infections and removal of the implant. Dr. Azar's motion, accompanied by Dr. Azar's affidavit, recites essentially the same arguments as Dr. Goldschlag's motion and affidavit.

Plaintiff argues that the testimony is relevant and material to the issue of the business relationship between Drs. Goldschlag and Azar. Counsel for plaintiff sets forth that he discovered that the two defendants had been defendants together in the Albert Action. He maintains that both cases involve implants in the same area of the mouth (albeit, not the same tooth), so the testimony in the Albert Action is material and relevant to the instant case. Counsel further maintains that since both defendants were defendants in the Albert Action, they were likely asked questions about their relationship in that action.

Pursuant to C.P.L.R. § 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." What is considered "material and necessary" is left to the discretion of the court. Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740, 745 (2000). The phrase "material and necessary" is "interpreted liberally" as meaning "relevant" or as permitting "disclosure, upon request, of 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." Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 406 (1968). However, the court may, on application of a party, issue an order

"denying, limiting, conditioning or regulating" the material sought. C.P.L.R. § 3103. Protective orders are intended to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." Id.

The court has reviewed the transcripts. Uniquely, both cases involve the same two dentists providing dental services under very similar circumstances: a patient of Dr. Azar's receiving an implant placed by Dr. Goldschlag working out of an office of Dr. Azar's. Although both cases involved implants, the alleged departures, injury, and site of the injury are different. But, the relationship between Drs. Azar and Goldschlag and the manner in which they provided dental services is a contested issue, and the transcripts—limited to the testimony about the business practices and the relationship between the two defendants—are relevant to this issue. The court notes that a finding that the transcripts are relevant for discovery purposes, however, has no bearing on whether the transcripts would be relevant or admissible at trial.

With respect to defendants' arguments for the protective order, the court does not find them wholly persuasive. There is no right of confidentiality of prior actions. While "sweeping demands" for all transcripts of deposition testimony of the defendant doctors in prior actions are inappropriate (Sonsini v. Memorial Hosp. for Cancer and Diseases, 262 A.D.2d 185, 186 [1st Dep't 1999]), targeted, relevant requests for materials from prior actions have been granted. See Davis v. Solondz, 122 A.D.2d 401 (3d Dep't 1986); Zarate v. Mount Sinai Hosp., 142 Misc. 2d 426 (Sup. Ct. N.Y. Co. 1989). Those portions of the transcripts from the Albert Action containing Drs. Azar's and Goldschlag's testimony related to their business practices and the relationship between the two

dentists shall be produced and redacted to remove any identifying health information about the plaintiff in that action and the specifics of that plaintiff's treatment in order to protect the plaintiff's rights under HIPAA and C.P.L.R. § 4504(a).

The motions are denied to the extent set forth above. The cross-motions are granted to the extent that defendants are directed to submit copies of the redacted portions of the transcripts to chambers, Room 690, by February 25, 2010, for an in camera comparison to the original transcripts. The parties shall appear for a conference on March 2, 2010, at 10:00 a.m., whereupon the redacted transcripts shall be exchanged.

This constitutes the decision and order of the court.

January 27 2010

JOAN B. LOBIS, J.S.C.