

Morgana v Guttman

2010 NY Slip Op 30302(U)

January 25, 2010

Supreme Court, Nassau County

Docket Number: 17909/08

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY
Justice

PAUL MORGANA,

Plaintiff,

-against-

JEFFREY GUTTMAN, M.C., ORTHOPAEDIC
& SPORTS ASSOCIATES OF LONG ISLAND,
IRWIN INGWER, M.D., NORTH SHORE
UNIVERSITY HOSPITAL AT PLAINVIEW and
JEFFREY CARUSO, M.D.,

Defendants.

Motion Sequence #1, #2
Submitted December 10, 2009

INDEX NO: 17909/08

The following papers were read on this motion for protective order:

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This motion by defendants Jeffrey Guttman, M.D., Orthopedic & Sports Associates of Long Island, P.C., s/h/a Orthopaedic & sports Associates of Long Island and Jeffrey Caruso, D.O., s/h/a Jeffrey Caruso, M.D., for an order pursuant to CPLR 3101, 3113, 3115, 3124, 3126, Article 222 of the Uniform Rules for the Conduct of Depositions and CPLR § 3025(b) directing the Court to rule on the propriety of objections at the deposition of the

plaintiff Paul Morgana, directing plaintiff to respond to various questions at the deposition of plaintiff, a continuation of the plaintiff's deposition, sanctions, and permission to serve an amended verified answer and Cross-Motion by the plaintiff, for a protective order and sanctions pursuant to CPLR § 3103, is determined as follows:

This is an action sounding in medical malpractice and negligence.

Plaintiff alleges he sustained injuries as a result of a dog bite that occurred on June 15, 2006, in the second-floor apartment he rented in a private house owned by John and Lisa Newsom. (The name of the dog was Milo). In a prior action plaintiff settled a claim against John and Lisa Newsom in the sum of \$155,000.00 arising out of the dog bite incident.

After the dog bite plaintiff was treated by defendant Jeffrey Caruso, D.O. Plaintiff visited the defendant hospital's emergency room. Subsequent thereto he treated with co-defendant Irwin Ingwer, M.D. It is alleged that the malpractice of the defendants was a substantial cause of the development of osteomyelitis by the plaintiff causing pain and restriction of motion of his right hand. Lost wages in the sum of \$30,000.00 are also being claimed.

An examination before trial of the plaintiff was held on October 23, 2009 at 10:15 a.m. at the law offices of plaintiff's attorney in lower Manhattan. During the deposition plaintiff's attorney objected to numerous questions. As the deposition continued acrimony developed between the plaintiff's and moving defendants' attorneys. The deposition broke at 2:15 p.m. A court conference was previously scheduled for October 30, 2009. An expedited copy of the examination before trial transcript was ordered. The attorney for moving defendants agreed to overnight a copy of the transcript to plaintiff's attorney so that

plaintiff's attorney would be able to review it and have the transcription in his possession for the court conference. Plaintiff's attorney states that upon receipt of the transcript his adversary chose to carefully and painstakingly index each and every portion of the plaintiff's deposition so that he would be fully prepared to discuss these issues with the Court, without ever having overnighted a copy of the transcript to plaintiff's attorney's office for review prior to the conference. In his reply affirmation the defendants' attorney apologized to the court for not overnighting the examination before trial transcript of the plaintiff prior to the conference. The Court is not impressed by his belated apology and observation that even if the transcript had been overnighted in a timely manner "it is highly unlikely that . . . anything meaningful with regarding to rulings [sic] would have been accomplished." (Brenner reply affidavit pg. 2, ¶ 6).

The counsel for the respective parties stipulated that:

"[A]ll rights provided by the C.P.L.R. and Part 221 of the Uniform Rules for the Conduct of Depositions, including the right to object to any question, except as to form, or to move to strike any testimony at this examination is reserved; and in addition, the failure to object to any question or to move to strike any testimony at this examination shall not be a bar or waiver to make such motion at, and is reserved to, the trial of this action.

Since all the counsel agreed to the aforesaid stipulations, in the first instance, plaintiff's attorney should have noted his objection to a question on the record. Rules of the Court (§§ 221.1 and 221.2) provide for the conduct of a deposition. Section § 221.1 Objections at depositions provides:

(a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would

be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2 Refusal to answer when objection is made provides:

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§ 221.3 Communication with the deponent provides:

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

CPLR § 3101(1) provides for “full disclosure of all matters material and necessary in the prosecution or defense of an action. . . .” This provision has been liberally construed to require disclosure of any information or material reasonably related to the issues “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 Pub. Co.*, 21 NY2d 403, 406; see also *Titleserve, Inc. v Zenobio*, 210 AD2d 314, 315) “if there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense.” (*Allen v Crowell-Collier Pub. Co.*, *supra*, at 407 [citations omitted]). In an examination before trial, questions should be freely permitted and answered, unless the question is clearly violative of the witness’ constitutional right or of some recognized privilege, or is palpably irrelevant. (*Tardibuono v County of Nassau*, 181 AD2d 879, 881; *Watson v State of New York*, 53 AD2d 798, 799).

Many of the objections made by plaintiff’s attorney were valid in light of the questions poised. For example, the attorney for the moving defendants asked the plaintiff where he put the money he earned. The plaintiff replied that he didn’t have a bank account but “stuffed” his money in his mattress, “literally.” (Morgana p. 62).

Q. How much in savings do you have stuffed in this mattress?

Mr. Kauffman: Over objection. That’s completely and palpably irrelevant. don’t answer the question. Counsel, how is that relevant?

Mr. Brenner: Well, you have claim for lost earnings. I have a right to know what is his source of income and all the details with respect to the various sources of income that he has already testified that he has. It’s absolutely relevant.

Mr. Kauffman: And you have all of that pursuant to authorizations which have either been exchanged or will be exchanged with regard to employment, IRS, tax filings, tax records, et cetera. (Morgan pg. 62).

Mr. Brenner: Yes, Counsel, but you seem to disregard the fact that you can’t give me an authorization to look into his mattress. I have a right to know. If

this money were in a bank I would be entitled to know the name of the bank, the account number and verify.

Q. Well, how much to you have in a mattress?

Mr. Kauffman: Objection. Don't answer. Palpably irrelevant. (Morgana p. 63).

Q. Did you ever sell any Oxycontin tablets and use that money to put under your mattress?

Mr. Kauffman: objection. Over objection you can answer that.

A. No.

Mr. Kauffman: Counsel, just out of curiosity, do you have a good faith basis for that question?

Mr. Brenner: Yes.

Mr. Kauffman: You do.

Mr. Brenner: Yes.

Mr. Kauffman: Do you care to share that on the record?

Mr. Brenner: No. That's attorney work product and privilege. (Morgana pgs. 79-80).

In another series of questions, Mr. Brenner probed about any alleged sexual relations that the plaintiff might have had with his landlord's wife. Plaintiff's counsel asked the relevancy of whether plaintiff had sexual relations with the landlord's wife.

Mr. Brenner: The relevance is that if he had a sexual encounter with Ms. Newsom and Milo was present, that would be an aggravating factor in Milo attacking him and biting him on the hand, so there is a relevance whether you laugh about this or not and smirk about it, and I want that on the record, that is plenty or relevance.

Mr. Kauffman: Very well. Objection. It is palpably irrelevant. Counsel, let's ask some relevant questions, please.

Q. Did Mr. Newsom on at least one occasion enter your apartment—your second floor area and encounter you sitting on a chair or a sofa or a bed with your genitals showing and Lisa Newsom sitting opposite you in direct vision? Do you recall any incident like that?

Mr. Kauffman: Counsel, what is the relevance of that?

Mr. Brenner: Same relevance.

Mr. Kauffman: As relates to the claims and allegations of asserting malpractice to your client and the other co-defendants?

Mr. Brenner: Same relevance. (Morgana pgs. 105-106).

There is no indication that plaintiff was ever arrested or convicted of a crime. A plaintiff may be questioned as to whether he has ever been convicted of a crime for purposes of impeachment. (See *Tardibuono v County of Nassau, supra*; *Watson v State of New York, supra*). Any objections made by plaintiff's attorney regarding plaintiff's alleged sexual encounters with his former landlord are sustained. As are the questions regarding the alleged sale of Oxycontin.

Attorney for moving defendants raised questions about the date of the dog bite. The questions regarding the date of the dog bite should have been answered after the objection was made and without further comment by plaintiff's attorney. The landlord, Mr. Newsom, at his deposition testified that the plaintiff told him Milo bit him on May 21, 2006, not June 16, 2006. The landlady, Ms. Newsom, testified that the plaintiff told her the dog bite took place two weeks before she picked him up on June 23, 2006. The defendant movant attorney argues that if the bite occurred on June 9, 2006, and he first saw Dr. Caruso on June 16, 2006, then the plaintiff may have self-treated himself for approximately a week before seeking medical attention.

Plaintiff has denied having a blog, Twitter account, Facebook or My Space problem. The request to have a computer expert review plaintiff's e-mail correspondence is denied. No foundation has been laid for such a request; nor has any legal authority been cited to warrant any such an intrusion in a dog bite case that has ripened into an action for alleged medical malpractice.

Based upon the settlement in the case of *Paul Morgana v John and Lisa Newsom*, which dog bite case was settled for the sum of \$155,000.00, defendants may be entitled to a set-off of the said sum of \$155,000.00 as against any verdict for the plaintiff in the within action. The unopposed application to permit an amendment of defendants' answers to interpose an additional affirmative defense of set-off pursuant to the General Obligations Law §15-108 is granted. (See *Hill v St. Clare's Hospital*, 67 NY2d 72, compare *Milks v McIver*, 264 NY 267, cited by attorney for moving defendants).

The attorney for the defendant Irwin Ingwer, M.D. has not taken a position on, or submitted any responsive pleadings to the within motion. The attorney for the defendant Plainview Hospital s/h/a North Shore University Hospital at Plainview has submitted an affirmation in support of the motion by the attorneys for the Guttman defendants and requests the same relief.

Following plaintiff's October 23, 2009 deposition, attorney for moving defendants served a Demand for Authorization dated October 29, 2009, a copy of which is annexed as Exhibit A (motion seq. no. 1). Plaintiff is directed to comply with demands styled 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 18, 19, 20, 21, and items no. 23 and 24 for the past three (3) years. The demand for the balance of the items requested is overly broad and denied.

The applications for sanctions and the appointment of a referee are denied.

Counsel familiar with all aspects of the within action shall appear for the certification conference previously scheduled for February 8, 2010 at 9:30 a.m. At the certification conference the court shall fix a date for the continuation of the plaintiff's deposition to be held at the Supreme Court Nassau County, 100 Supreme Court Drive, Mineola, N.Y. One of the suggestions the Court will make is that the attorneys representing Dr. Ingwer continue the questioning of the plaintiff only as to the remaining issues that may be generic to all defendants.

Dated: January 25, 2010


UTE WOLFF LALLY, J/S.C.

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