

Angeli v Mass

2010 NY Slip Op 30408(U)

March 2, 2010

Supreme Court, New York County

Docket Number: 112049/08

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lobbis

PART 6

Index Number : 112049/2008

ANGELI, KIRSTEN

VS.

MASS, MICHAEL

SEQUENCE NUMBER : 002

RENEWAL

INDEX NO. _____

MOTION DATE 12/2/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-7
8-10 (x MOT)
11 ; 12

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

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

FILED

MAR 03 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/2/10

BT
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
NEW YORK COUNTY: IAS PART 6**

-----X
KRISTEN ANGELI,

Plaintiff,

-against-

DR. MICHAEL MASS,

Defendant.

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

Index No. 112049/08

Decision and Order

FILED
MAR 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Defendant, Dr. Michael Mass, moves for leave to renew his application to the court (Motion Sequence Number 001) to compel a non-party's compliance with a subpoena. The motion was denied without prejudice to renewal upon defendant's showing that the non-party, Robert Vogel, D.D.S., was personally served as directed in the order to show cause. Upon remaking his application, defendant presents an affidavit of service indicating that Dr. Vogel was indeed personally served. Plaintiff's attorney cross-moves to quash the subpoena.

This is a dental malpractice action for damages resulting from defendant's preparation and placement of prosthetic restorations and performance of root canal therapy on plaintiff. After being treated by Dr. Mass, plaintiff was treated by Dr. Vogel. Defendant sets forth that on or about March 27, 2009, his attorneys' office received copies of Dr. Vogel's treatment records for plaintiff. Defendant's review of the records indicated to defendant that certain information is missing from the records, including but not limited to treatment performed on July 16, 2008. On that date of treatment, the records indicate that anesthesia was administered but do not indicate what treatment was performed. Defendant also believes that x-rays might be missing from the records provided from Dr. Vogel; defendant maintains that the only x-ray obtained during discovery was from one of

plaintiff's former dentists, but that plaintiff testified that Dr. Vogel had taken x-rays. Dr. Mass' attorneys contacted Dr. Vogel and told him that the records appeared to be missing certain information. Dr. Vogel's office manager responded that she had sent all of the records in her possession.

On or about June 10, 2009, defendant served a non-party deposition subpoena on Dr. Vogel, notifying him to appear for a deposition on July 29 and that failure to comply is punishable as a contempt of court. Before the scheduled deposition date, counsel for plaintiff contacted counsel for defendant and informed defendant that Dr. Vogel is plaintiff's expert on the case and that Dr. Voegl did not have to appear for a deposition. Neither counsel for plaintiff nor Dr. Vogel appeared for the deposition on July 29. By a second subpoena dated July 29, defendant noticed a second date for the deposition, August 20, and added the following language to the body of the subpoena:

Please be advised that you are being subpoenaed due to the incompleteness of the records you have provided as they pertain to the plaintiff in the above referenced matter. Your office failed to provide x-rays, photographs, or models. Additionally, there are no treatment notes reflective of dates that your office billed the plaintiff for treatment. Thus, it is impossible to ascertain the treatment rendered. Therefore, special circumstances exist to clarify the treatment rendered in this matter.

Dr. Vogel again failed to appear for the deposition. Defendant then moved, by order to show cause, for an order holding Dr. Vogel in contempt of court for failing to comply with a subpoena, imposing a financial penalty against him in an amount up to \$150, and compelling him to comply with the subpoena and appear for a deposition.

Upon bringing this motion, defendant relies entirely on his first set of papers supporting the order to show cause. Initially, counsel for plaintiff did not move to quash the subpoena but simply opposed the motion. Plaintiff now cross-moves to quash the subpoena, and defendant opposes this cross motion on the grounds that plaintiff failed to bring this motion to quash the first time. Because the court allowed defendant to remake the motion upon a showing that Dr. Vogel was indeed personally served with the order to show cause, this is considered a *de novo* review of the motion on the merits, and the cross motion shall be considered.

Defendant argues that he has demonstrated that "special circumstances" exist, necessitating Dr. Vogel's testimony. He asserts that Dr. Vogel was the dentist who treated plaintiff immediately after he treated plaintiff. Dr. Mass alleges that Dr. Vogel redid much of his dental work. Further, Dr. Vogel does not provide x-rays, films, or models, and it appears to defendant that some of his records are incomplete, specifically as to treatment rendered on July 16, 2008. Defendant claims that he is not seeking to depose Dr. Vogel regarding his expert opinion, rather, he is seeking testimony related to Dr. Vogel's treatment of plaintiff because Dr. Vogel's records do not reflect the treatment described by plaintiff at her deposition.

Counsel for plaintiff argues that Dr. Vogel should not have to appear for a deposition because defendant has not demonstrated special circumstances warranting his testimony. He maintains that Dr. Vogel's failure to document treatment rendered on July 16, 2008 was due to a computer error, and that Dr. Vogel cannot recall the treatment on that date, though Dr. Vogel does not believe that the treatment on that date is "relevant to the total treatment of this patient." Plaintiff provides a sworn statement from Dr. Vogel attesting to the statement above.

An expert is not expected to testify at a deposition regarding his expert opinion. However, pursuant to C.P.L.R. § 3103(d)(1)(iii), “disclosure concerning the expected testimony of any expert may be obtained . . . by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate.” Merely demonstrating relevancy does not suffice as “special circumstances.” Ruthman, Mercadante & Hadjis, P.C. v. Nardiello, 288 A.D.2d 593, 594-95 (3d Dep’t 2001). See also Brooklyn Floor Maint. Co. v. Providence Washington Ins. Co., 296 A.D.2d 520, 521-22 (2d Dep’t 2002) (the “special circumstances” requirement is “more than a nominal barrier to discovery”). Special circumstances exist where there is a “‘unique factual situation’ . . . such as proof ‘that the information sought to be discovered cannot be obtained from other sources.’” Id. (citations omitted).

Dr. Vogel treated plaintiff right after she discontinued seeing Dr. Mass, and plaintiff testified that Dr. Vogel redid some of the work done by Dr. Mass. But, Dr. Vogel’s records are incomplete due to an alleged computer glitch. The condition of plaintiff’s mouth changed due to treatment rendered by Dr. Vogel and Dr. Vogel likely has knowledge of facts relevant to plaintiff’s claims. See generally, Dixon v. City of Yonkers, 16 A.D.3d 542 (2d Dep’t 2005); Kaufman v. Lund Fire Prod. Co. Inc., 8 A.D.3d 242, 243-44 (2d Dep’t 2004); Taft Partners Dev. Group v. Drizin, 277 A.D.2d 163 (1st Dep’t 2000). Further, there are inconsistencies between plaintiff’s deposition testimony and Dr. Vogel’s records. And, defendant has represented to the court that he seeks to depose Dr. Vogel only as to Dr. Vogel’s treatment of plaintiff. See id. The above conditions present special circumstances warranting a limited deposition of Dr. Vogel in his capacity as plaintiff’s treating dentist. Clearly, since Dr. Vogel is both an expert and a treating physician, he may only be questioned as a treating physician with regard to his “factual observations, rather than

in his potential capacity as an expert.” Waters v. East Nassau Med. Group, 92 A.D.2d 893 (2d Dep’t 1983). Plaintiff’s argument that Dr. Vogel has already said he does not remember the information that is missing from his records is unavailing since it is unknown what information Dr. Vogel might recall upon more probative questioning.

This court declines to hold Dr. Vogel in contempt at this time. Rather, the request to compel Dr. Vogel to comply with the subpoena and appear for a deposition is granted, and the cross motion to quash the subpoena is denied. Unless the parties consent to adjourn the deposition to another mutually agreeable date, Dr. Vogel is ordered to appear for a deposition at the office of defendant’s counsel, Kolenovsky Spiegel LLP, 135 West 29th Street, Suite 801, New York, New York, at 10:00 a.m. on March 12, 2010, and to produce the documents that are set forth in the deposition subpoena, dated July 29, 2009.

The request for fees and costs not exceeding \$150 is denied, without prejudice to defendant seeking such fees at the time of trial, upon submission of appropriate bills or invoices.

Defendant’s counsel is directed to serve a copy of this order, together with a copy of the deposition subpoena, by mail on both Dr. Vogel, individually, and on plaintiff’s counsel.

The parties shall appear for a status conference on March 9, 2010, at 10:00 a

This constitutes the decision and order of the court.

Dated: March 2 , 2010



JOAN B. LOBIS, J.S.C.

FILED
MAR 03 2010
NEW YORK
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