

Konopka-Sauer v Colgate-Palmolive Co.

2010 NY Slip Op 31889(U)

July 6, 2010

Supreme Court, New York County

Docket Number: 190078/08

Judge: Sherry Klein Heitler

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

PRESENT: **HON. SHERRY KLEIN HEITLER**
Justice

PART 30

Karen Teduch
- v -
Colgate - Palmolive

INDEX NO. 190078/08
MOTION DATE _____
MOTION SEQ. NO. 04
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided

as per the memo discussion
of 7.6.10.

FILED
JUL 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7.6.10 _____ SKH J.S.C.

HON. SHERRY KLEIN HEITLER

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: IAS PART 30**

-----X

LORI KONOPKA-SAUER and
RICHARD KONOPKA, as Executors of the
Estate of KAREN TEDRICK,

Plaintiffs,

-against-

COLGATE-PALMOLIVE COMPANY,

Defendant.

-----X

SHERRY KLEIN HEITLER, J.:

Index No. 190078/08
M.S. 004

DECISION & ORDER
FILED
JUL 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

In this asbestos wrongful death case, defendant, Colgate-Palmolive Company (hereinafter referred to as "Colgate") seeks an order pursuant to CPLR 3108 for a commission to take the deposition of Rachel Sanborn, M.D. and to obtain a complete copy of her records pertaining to the treatment and diagnosis of decedent, Karen Tedrick. Plaintiffs oppose this application.

Dr. Sanborn's "THORACIC ONCOLOGY CONSULTATION NOTE" consists of four pages with various headings, such as "History of Present Illness, Allergies, Medications, Past Medical History, Past Surgical History, Social History, Family History, Physical Examination, Pertinent Imaging, and Assessment Plan." Below the heading "Social History" there is a note which reads, in part:

...Previously, she has exercised 5 days a week on a treadmill and going to yoga. She previously worked as a flight attendant in the 1960's and 1970's. Her father was an ophthalmologist, who did smoke. Her mother also smoked. Her father had some sort of hobby activity or other project in the family basement as the patient was growing up, which the patient's brother reports did involve having asbestos in the basement. She has no other known asbestos exposure, although she worked for county agencies in older buildings through most of her career. She has had second-hand tobacco exposure as above from both of her parents.

(Kramer Affirmation, Exhibit A.)

The defendant reads this statement to mean that there is an alternative asbestos source in the family home and that Richard Konopka, Karen Tedrick's only brother, had a conversation with Dr. Sanborn. Colgate argues that as Ms. Tedrick's treating physician, Dr. Sanborn, has unique knowledge regarding the decedent's diagnosis, treatment and possible exposure to asbestos. Colgate contends that this testimony is essential to its defense because Dr. Sanborn's records indicate that Mr. Konopka, now the plaintiff (as co-executor) in this matter, told Dr. Sanborn that a hobby, activity or project of their father's contained asbestos and was located in the basement of the family home. Colgate claims this residential asbestos exposure was not mentioned during Ms. Tedrick's deposition.

Since the submission of this application, Colgate has deposed Richard Konopka. Mr. Konopka denied speaking to Dr. Sanborn and claimed that the only asbestos-related hobby at the family household involved a chemistry set which he owned during a time period when Karen Tedrick was living away from home. Colgate argues that it is essential that it be permitted to explore an asbestos source unrelated to Colgate products.

The court notes that Colgate deposed Mr. Konopka, the alleged source of the statement contained in the medical record, at length. Mr. Konopka states that he never spoke to Dr. Sanborn (Kramer Affidavit, Exhibit B, p.59-60) and the only hobby that took place in the home involved his personal chemistry set that was owned when he was 14 to 16 years old (Id. at 15-16). At that time Karen Tedrick (who was nine years his senior), was a flight attendant for Continental Airlines and was living independently (Id. at 16).

Colgate's attorney, Faith Gay, Esq. had specifically asked Richard Konopka about the Social History note in Dr. Sanborn's report and the following testimony was offered:

Q Before we took a break, I had referenced some notes from a Dr. Sanborn to the effect that your father had some sort of hobby activity or other project in the family basement as Karen was growing up, which the patient's brother reports did involve having asbestos in the basement. Is that the chemistry set you were talking about?

A Yes.

Q And you told that to Dr. Sanborn?

MS. RAPHAEL: Objection.

A No.

Q So you never had a conversation with him?¹

MS. RAPHAEL: Objection.

A Right.

Q Did you have a conversation with any doctor, nurse, or other medical professional, concerning the asbestos in the chemistry set.

A No.

(Exhibit B, p.59-60, l.13-9.)

Ms. Gay went on to ask Mr. Konopka questions about whether or not the decedent, Karen Tedrick, discussed her potential asbestos exposure. The following testimony was elicited:

Q Did she ever ask you anything about your recollections of the times that she and you lived together?

A Yes, but it wasn't in regards to a lawsuit.

Q What did she ask you?

A With regards to her medical situation.

¹ The court believes that Ms. Gay meant "her" and not "him" when referring to Dr. Sanborn.

Q What did she ask you?

A If I remembered anything growing up that would have been a problem.

Q What did you understand her to mean by would have been a problem.

A Anything that would have had asbestos in it.

Q And what was your response?

A I told her that I had a chemistry set that my dad had bought me when I was about 14, and that had a Bunsen burner, and in order to keep the flasks from cracking you've got a piece of screen that has a piece of asbestos embedded in it. They make it wet and stick it in there. You buy it. It's commercially made.

Q Where was that kept when you were growing up?

A It wasn't when I was growing up. I was almost 14. It was at the back bar area. There was a wet bar in the basement. In the back of that bar was a shelf. That's where that was kept. Because the bar wasn't being used any longer.

(Exhibit B, p.14-15, l.11-9.)

In questioning whether or not his sister used the basement, the following testimony was offered:

Q Did the family use the basement?

MS. RAPHAEL: Objection to form. What family, when, what year?

Q Do you understand my question?

A Well, the family used the basement. My sister is nine years older than me. She wasn't living in the house.

Q Where was she living?

A By that time I think she was a stewardess.

(Exhibit, p.16, l.4-13.)

Further, a reading of the whole medical record that contains this statement puts the issue in perspective. The Social History section also includes information about Ms. Tedrick's diet and exercise habits. This information was provided for medical reasons, not for litigation. Moreover, the record includes a statement by Dr. Rachel Sanborn that "I spent 90 minutes with the patient and her husband today in primary face-to-face consultation." (Kramer Affidavit, Exhibit A.) There is no mention of spending time with Mr. Konopka. Clearly, Karen Tedrick's brother was not present.

CPLR 3101(a) provides for "full disclosure of all matter material and necessary". However, the court may limit disclosure "to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." (Pomeranz v. Pomeranz, 99 A.D.2d 407, 407 [1st Dept., 1984].) "It is not the norm to seek the deposition of a treating physician and it should not generally be directed unless necessary to prove a fact unrelated to diagnosis and treatment." (Ramsey v. New York University Hospital Center, 14 A.D.3d 349, 350 [1st Dept., 2005], citing Schroder v. Consolidated Edison Co., 249 A.D.2d 69 [1998].) In Ramsey, 14 A.D.3d 349 [2005], the court granted plaintiff's motion for a protective order quashing defendants' subpoena to take the deposition of plaintiff's treating psychiatrist. Defendant had sought this deposition in order to clarify the meaning of certain handwritten notes the doctor made of conversations he had with plaintiff's supervisor. The court found that plaintiff's psychiatrist's testimony was not the only means of discovering the tenor of the conversations constituting the subject matter of the notes, and thus granted the protective order.

Similarly, in Zallie v. Brigham, 2009 WL 2844429 (N.Y. Sup.), Slip Op. 31944(U), the court granted a protective order to quash a subpoena finding that it was not necessary to depose the Planned Parenthood representatives to obtain statistical material used to prepare a Planned

Parenthood fact sheet. In making this determination, the court found that in addition to the general test of whether the discovery sought is material and necessary, the party seeking disclosure must show that the materials cannot be obtained from one of the defendants or from an alternate source, citing Murray v. New York City Health & Hospitals Corp., 215 A.D. 2d 736 (2nd Dept., 1995).

In this case, Colgate deposed Richard Konopka about the Social History notation at length. He has first-hand knowledge of what he said or did not say regarding residential asbestos exposure. The defendant's extensive questioning did not reveal any connection between himself and Dr. Sanborn. His response regarding the hobby clearly identified a chemistry set which contained asbestos. The testimony also did not reveal an alternative asbestos source from which Karen Tedrick was exposed. His testimony is unambiguous and renders any further inquiry unnecessary.

Roeck v. Columbia, 248 A.D.2d 921 [3rd Dept., 1998] is not to the contrary. In considering whether or not defendants have a right to depose a party's treating physician if such non-party resides more than 100 miles from the place of trial, the material and necessary standard still applies, CPLR 3101(a). In Roeck, supra, the defendant testified, in his medical malpractice action, that he discussed the plaintiff's case with the third-party treating physician (who was also plaintiff's brother-in-law), both before and after the surgery. Accordingly, the information was material and there was not an alternate source from which to obtain the disclosure.

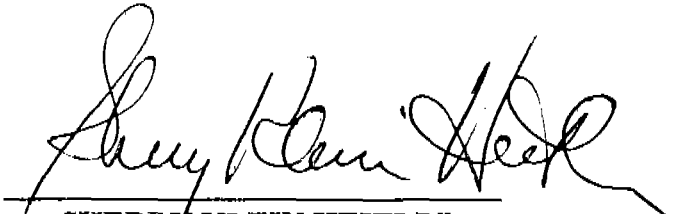
Colgate also requests the medical records of Dr. Rachel Sanborn. The plaintiffs oppose this application and argue that these records were already made available to Colgate. Nevertheless, should there be any outstanding records at this time, plaintiffs' counsel shall assist defense counsel in obtaining same from Record Track within 15 days of today's date. If there are additional medical records produced and these documents demonstrate that Dr. Rachel Sanborn communicated with

Richard Konopka either in person, on the phone, by letter or email, the court will reconsider this order.

Accordingly, Colgate's application to depose Dr. Rachel Sanborn is denied and its application to obtain medical records is granted to the extent this remains an issue.

This shall constitute the decision and order of the court.

DATED: JULY 6, 2010


SHERRY KLEIN HEITLER
J.S.C.

FILED
JUL 09 2010
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NEW YORK