

Silverstein v Nezhat

2010 NY Slip Op 32119(U)

July 29, 2010

Sup Ct, NY County

Docket Number: 109486/06

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

BARBARA SILVERSTEIN

- v -

FARU NEZHAS, M.D.

INDEX NO. 109488/06
MOTION DATE 7/14/10
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____ xmot.

Replying Affidavits _____

PAPERS NUMBERED

1-31

32-45

46-64 jcs

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION &
ORDER**

Dated: 7/29/10

JBL
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
BARBARA SILVERSTEIN,

Plaintiff,

-against-

FARR NEZHAT, M.D., OB/GYN FACULTY
PRACTICE ASSOCIATION and THE MOUNT
SINAI HOSPITAL,

Defendants.

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

Index No. 109486/06

Decision and Order

FILED
AUG 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Barbara Silverstein moves, by order to show cause, for a protective order, barring defendants from obtaining an invasive medical examination of plaintiff or using an examining physician to depose plaintiff. She also seeks an order striking defendants' request for a copy of plaintiff's medical insurance card, her "monthly refrigerator calendar" listing family events and appointments, and her disability papers in her possession, and striking defendants' request for an authorization for Express Scripts' records. Defendants Farr Nezhat, M.D. ("Dr. Nezhat"), OB/GYN Faculty Practice Association, and The Mount Sinai Hospital (collectively "defendants") oppose plaintiff's motion and cross-move for an order compelling plaintiff to appear for an independent medical examination ("IME") before defendants' expert urologist Elizabeth Kavalier, M.D., within thirty (30) days or, in the alternative, precluding plaintiff from offering any testimony, medical records, or evidence at the time of trial; compelling plaintiff to appear for a further examination before trial ("EBT") regarding medical treatment performed during the pendency of the lawsuit; precluding plaintiff from introducing evidence or testimony at trial or, in the alternative, striking plaintiff's complaint, as to any matter for which plaintiff has failed to provide discovery; compelling plaintiff to provide "Arons" authorizations; and denying the protective order.

This is a complex case sounding in medical malpractice and lack of informed consent related to a hysterectomy that Dr. Nezhat performed on plaintiff. Plaintiff had a history of chronic pelvic pain and had previously been diagnosed with endometriosis and pelvic floor weakness. She underwent rectal prolapse surgery in 1995, which corrected the problem related to the rectal prolapse. Prior to consulting Dr. Nezhat, plaintiff had developed severe and chronic constipation due to pain medication and hormonal drugs. Dr. Nezhat sent plaintiff for an MRI which indicated that she had adenomyosis, or endometriosis in her uterine lining. Dr. Nezhat recommended a hysterectomy. Plaintiff alleges, amongst other claims, that Dr. Nezhat departed from the standard of care by not first sending plaintiff for specialized physical therapy for pelvic floor dysfunction. Plaintiff maintains that she requested a supra-cervical hysterectomy, where the cervix is preserved to aid in supporting the pelvic floor. On July 13, 2005, Dr. Nezhat performed a total hysterectomy, including the removal of her cervix and the creation of a vaginal cuff. Plaintiff alleges that the total hysterectomy was performed against her wishes and contrary to the pre-operative plan and her written consent to the surgery. She was discharged home two days later. She experienced pain and difficulty moving her bowels and restarted the stool softeners and laxatives that she had been taking prior to the surgery and hospitalization. On August 11, 2005, plaintiff was attempting to move her bowels when she allegedly suffered an evisceration of approximately two feet of her small intestine through her vaginal cuff. She underwent emergency surgery to remove the eighteen inches of her small intestine that had become gangrenous, reattach her bowel, and patch back together her vaginal cuff. She has since undergone numerous surgeries and procedures to correct complicated and painful urogynecological issues that developed after the emergency surgery. Her doctors have attempted to alleviate what is described as the extreme damage to and pain in her urogynecological region, although it appears from certain medical records that her condition continues to worsen.

The discovery phase of this litigation has been complicated by the fact that plaintiff has seen numerous providers and continues to undergo treatment related to her medical malpractice claim. This protective order arises, in part, from defendants' recent discovery demand that their expert, Dr. Kavalier, be permitted to perform an internal pelvic examination and urodynamic testing on plaintiff. Prior to defendants' recent request, I had previously limited defendants' physical examination of plaintiff to exclude an invasive physical exam. See compliance conference orders dated June 16, 2009 and September 22, 2009.

On February 24, 2010, plaintiff appeared for her scheduled IME before Dr. Kavalier, accompanied by a paralegal from her attorneys' office. An attorney from defendants' counsel's office, Tyler Sill, also appeared for the IME, together with a court stenographer, who was purportedly there to transcribe the IME. Mr. Sill apparently wanted plaintiff to be sworn in and to have her oral history of her medical treatment transcribed, but plaintiff and the paralegal objected. The transcript indicates that plaintiff did not want Mr. Sill or the stenographer present during the examination, and so they left the room. According to plaintiff, Dr. Kavalier then performed a non-invasive examination. Plaintiff also provided Dr. Kavalier with a list of her surgeries to date and current medications, and a copy of records and videotaped testing performed by Victor Nitti, M.D., a urogynecologist, in June 2009. Plaintiff recalls Dr. Kavalier stating to plaintiff that the records she provided were sufficient for Dr. Kavalier's purposes and it would not be necessary for her to repeat the urological tests. Dr. Kavalier, however, in an affidavit annexed to defendants' motion, sets forth that plaintiff refused to answer questions regarding her medical history and refused a physical examination.

The parties appeared in court for a conference on March 3, 2010, and the attorneys raised issues relative to the IME. I ordered defendants to provide plaintiff with a list of the examinations, tests, or studies that their expert wished to perform on plaintiff, and plaintiff reserved the right to object to the tests and move for a protective order. By letter dated March 15, 2010, defense counsel informed plaintiff's counsel that Dr. Kavalier "has indicated that she must conduct a pelvic examination and a uro-flow study" (uro-flow measures the flow and force of a urine stream) of plaintiff. This motion for a protective order followed.

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) (citation omitted). 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.

Plaintiff, in her own affidavit, contends that an invasive examination will cause her a great deal of pain. She also submits an affirmation from Steven Grenell, M.D., a physician duly

licensed to practice in New York and a specialist in neurology and pain management. Dr. Grenell has been treating plaintiff since February 5, 2007. He sets forth that plaintiff has severe neurological damage to her pelvic region, resulting from the many pelvic surgeries that have been performed on her since July 2005. He states that he has prescribed oral medication for plaintiff's nerve damage pain for over three years, and has also prescribed an intrathecal medication pump. Plaintiff had this pump installed in her body on August 10, 2009, because the oral medications were not controlling her pain. The pump is attached to her spinal cord and provides a continuous flow of hydromorphone daily. She has had the dose adjusted several times since the pump was installed, and Dr. Grenell has had to increase her dose slowly over time. The pump is not enough, however, and plaintiff still has to take methadone, pamelor, atavan, and oxycodone daily. Dr. Grenell maintains that pelvic and bladder examinations and testing cause plaintiff additional, extreme pain. She has to take additional doses of oral medication and use heating pads to help with this severe pain. Additionally, he states, she underwent extensive bladder testing in June 2009 and a specialized "Defeco MRI" (defecography by dynamic magnetic resonance imaging) in June 2008, both of which diagnosed urinary retention. Dr. Grenell states that plaintiff was told by her new urologist that she should use a catheter four times a day to empty her bladder. She has been told by many well qualified pelvic surgeons that they will not operate on her to fix her bladder or other pelvic problems unless she can no longer go to the bathroom because she has had too many surgeries and could end up in a worse condition than she is now. In light of the previous tests, and especially the extreme pain plaintiff experiences following pelvic and bladder testing and examinations, Dr. Grenell opines that "no medical reason exists to warrant subjecting [plaintiff] to further urological testing and pelvic examinations."

In opposition, defendants provide an affidavit from their IME physician, Dr. Kavalier, a physician duly licensed to practice in New York and board certified in urology. Dr. Kavalier opines that she requires a pelvic examination and uro-flow study in order to assess damages. She further opines that these examinations will not endanger plaintiff's life or health, nor cause plaintiff any permanent damage. She cites to the fact that plaintiff's records reflect that multiple other physicians have performed these tests on plaintiff during the pendency of the litigation in order to assess her condition, symptoms, and urogynecological complaints. Dr. Kavalier describes how a pelvic examination is conventionally performed and sets forth that, in her experience, a pelvic examination is not dangerous or harmful. She also sets forth that urodynamic testing is a conventionally accepted method of physical examination and, in her experience, is not considered painful. Dr. Kavalier notes that the MRI studies of plaintiff's pelvis are not the "gold standard" for assessing pelvic pain, pelvic floor dysfunction, and urinary retention, and are not substitutes for pelvic examination and urodynamic testing. She concludes that in order to properly assess plaintiff, she must be able to perform a pelvic examination and urodynamic testing, and that she cannot rely solely upon plaintiff's subjective reports or the prior records and findings of physicians selected by plaintiff during the course of the litigation.

Consistent with my two prior orders, and after evaluating the two experts' opinions, I will continue to exclude invasive physical examinations from defendants' IME of plaintiff. Contrary to defendants' arguments, Dr. Grenell's affirmation was not conclusory, but rather relied on certain facts supported in the medical records and supported plaintiff's claim that an invasive physical examination will cause her additional extreme pain on top of what she already experiences

daily. Cf. Humphrey v. Cartagena, 55 A.D.3d 333 (1st Dep't 2008) (allowing invasive physical examination on the basis that plaintiff's expert's opinion against such examination was conclusory). While Dr. Kavalier opined that it is her experience that the tests she wishes to perform are not harmful, she did not rebut Dr. Grenell's opinion that these tests are extremely painful to this particular patient; did not address how plaintiff's current documented condition affects her tolerance of invasive urogynecological exams or testing; and did not address the contention that plaintiff would be required to take additional oral painkillers in order to withstand the pain. She did not propose any precautions that she would take in performing these examinations in order to reduce or eliminate any additional pain to plaintiff. Dr. Kavalier also did not refute the validity of plaintiff's most recent pelvic and urological exams, the records of which she states that she reviewed. Dr. Kavalier did not provide any information or opinion that those tests are unreliable, invalid, or inconsistent. Accordingly, that branch of plaintiff's motion seeking a protective order regarding an invasive physical examination is granted. If plaintiff prevented Dr. Kavalier from conducting any otherwise noninvasive physical examinations of plaintiff at the prior IME, and in light of plaintiff's inappropriate refusal to answer questions about her medical history, defendants are entitled to a further IME limited to plaintiff's medical history and a noninvasive physical examination, which may include a visual inspection of plaintiff's outer urogenitalia. Defendants have not demonstrated any entitlement to have a stenographer present during the IME to transcribe the examination. This act is precluded.

Plaintiff concedes that defendants are entitled to an updated EBT regarding treatment related to her injuries that has taken place since she was last deposed. Unless, prior to their

for copies of her insurance card, her monthly refrigerator calendar, or the disability records in her possession, are granted; and it is further

ORDERED that the remainder of the discovery requests shall be determined in a separate order at the parties' next conference; and it is further

ORDERED that the parties shall appear for a status conference on August 10, 2010.

Dated: July 29, 2010

ENTER:



JOAN B. LOBIS, J.S.C.

FILED
AUG 05 2010
NEW YORK
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