

Lunt v Mt. Sinai Hosp.
2010 NY Slip Op 32468(U)
September 8, 2010
Supreme Court, New York County
Docket Number: 110193/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

LUNT, ROBERT

INDEX NO. 110193/00 2008

Plaintiff(s),

MOTION DATE 7/28/10

- v -

MOTION SEQ. NO. 002

MT. SINAI HOSP.

MOTION CAL. NO.

Defendant(s).

The following papers, numbered 1 to 11, were read on this motion to compel further deposition.

	<u>PAPERS NUMBERED</u>
<u>Notice of Motion / Order to Show Cause – Affidavits – Exhibits</u>	<u>1-4</u>
<u>Answering Affidavits – Exhibits</u>	<u>5-10</u>
<u>Replying Affidavits</u>	<u>11</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision and order.

FILED
SEP 10 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/8/10

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG. SETTLE ORDER/JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
ROBERT LUNT and ELIZABETH LUNT, his wife,

Plaintiffs,

Index No. 110193/08

- against -

Decision and Order

MT. SINAI HOSPITAL,

Defendant.

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

In Motion Sequence Number 002, plaintiffs move for an order, pursuant to C.P.L.R. Rule 3124, compelling Alexis Grucela, M.D., the witness produced on behalf of defendant Mt. Sinai Hospital (the "Hospital"), to appear for a further deposition, and for monetary sanctions in the form of the costs of making the motion pursuant to C.P.L.R. § 3126 and 22 N.Y.C.R.R. 221.2.

Plaintiffs allege medical malpractice and negligence against the Hospital for failure to properly diagnose and treat decubitus ulcers that plaintiff Robert Lunt ("Mr. Lunt") acquired while hospitalized. Mr. Lunt was hospitalized at the Hospital from September 2005 through the end of February 2006. Plaintiffs claim that the plastic surgery team at the Hospital was responsible for the care and treatment of Mr. Lunt's decubitus ulcers. At the time of the alleged malpractice in January 2006, Dr. Grucela was an unlicensed, first year general surgery intern, who was participating in a one-month rotation with the plastic surgery team, consisting of herself, a fourth year resident, and a sixth year resident. At her April 21, 2010 deposition, she explained that her job was to observe the senior residents' examinations of the patients and to write notes in the chart. Outside of her review of Mr. Lunt's medical records, Dr. Grucela had no recollection of Mr. Lunt.

During Dr. Grucela's deposition, defendant's attorney objected to six of plaintiffs' counsel's questions and directed Dr. Grucela not to answer those questions. Five of the blocked questions related to a photograph or photographs that had been previously marked as "Defendant's Exhibit J". At Mr. Lunt's prior deposition, he had identified Defendant's Exhibit J as a photograph that his wife, plaintiff Elizabeth Lunt, allegedly took of a decubitus ulcer on Mr. Lunt's body. Although it is unclear precisely when the photograph was taken, plaintiffs claim that the photograph was taken after Mr. Lunt was discharged from defendant Hospital while he was at a facility referred to as Jewish Home and Hospital ("Jewish Home"). Mr. Lunt was admitted to Jewish Home from defendant Hospital on February 28, 2006. After determining whether Dr. Grucela was familiar with the different stages of decubitus ulcers, plaintiffs' attorney produced Defendant's Exhibit J and said to the deponent, "I'm going to show you a picture now and ask you if you can say what stage this sore is." The Hospital's attorney blocked this question on the grounds that the time, date, and subject matter of the photograph could not be objectively identified and that the deponent had never seen that photograph before. Plaintiff's attorney then asked Dr. Grucela, "Can you tell me what stage decubitus ulcer is depicted in this photograph?" The Hospital's attorney blocked this question for similar reasons as the first. The third challenged question was, "During the time that you cared for this patient, did he have a decubitus ulcer at or near the location which is shown in this exhibit?" The Hospital's attorney objected and stated that she would not allow Dr. Grucela to answer any questions about the photographs. After Dr. Grucela testified that she did not know whether the photograph marked as Defendant's Exhibit J was a picture of Mr. Lunt, plaintiff's attorney asked whether the patient's subcutaneous tissue was exposed and whether the patient's muscle tissue was exposed in Defendant's Exhibit J. The Hospital's attorney refused to allow Dr. Grucela to answer

either of those two questions. The sixth challenged question does not relate to Defendant's Exhibit J. After Dr. Grucela read a January 9, 2006 note into the record that had been authored by her supervisor during her supervisor's examination of plaintiff—at which Dr. Grucela had not been present—plaintiff's attorney asked her whether Mr. Lunt's condition had changed from January 8, 2006 to January 9, 2006. Defendant's attorney objected on the ground that Dr. Grucela was being asked to speculate as to what her supervisor meant in his note.

Plaintiffs argue that, pursuant to 22 N.Y.C.R.R. § 221.1, defendant failed to articulate a valid objection to the six challenge questions, and that the deponent should be compelled to appear for a second deposition and answer those questions. Defendant argues that the questions related to the photograph are plainly improper because the photograph was taken after defendant's care ended and there was no way to objectively identify the photograph. With respect to the sixth question, defendant argues that Dr. Grucela should not be compelled to opine on Mr. Lunt's condition based on a note that she did not author from a date that she did not examine Mr. Lunt. As for prejudice, defendant argues that compelling Dr. Grucela to answer clearly improper questions is prejudicial to Dr. Grucela and the Hospital. Defendant also argues that compelling Dr. Grucela to answer the sixth question about another physician's notes is prejudicial because it is “impossible . . . to answer truthfully” and it would force Dr. Grucela to give compromising testimony.

C.P.L.R. Rule 3115 and Part 221 of the Uniform Rules for the Conduct of Depositions govern objections at depositions. Pursuant to 22 N.Y.C.R.R. § 221.2, “[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, caused significant prejudice any person.” This court favors a liberal approach to discovery, and generally, while a question may not be relevant and may not be admissible at trial, the court directs the deponent to answer the question unless the deponent can articulate “significant prejudice.” Although the challenged questions lacked proper form and foundation, and are likely to be inadmissible at trial, the court is not persuaded by defendant’s conclusory argument that the Hospital and Dr. Grucela would be significantly prejudiced by Dr. Grucela answering the challenged questions.

Dr. Grucela shall appear for a continued deposition, limited to the challenged questions and those questions that flow from her responses. Dr. Grucela is directed to answer the challenged questions to the extent that she can and to the best of her ability. The continued deposition shall take place on Thursday, September 30, 2010, unless the parties mutually agree to an alternate date prior to September 30. That branch of plaintiffs’ motion seeking the costs in making this motion is denied, as plaintiffs failed to cite any basis for such relief pursuant to C.P.L.R. § 3126 and 22 N.Y.C.R.R. 221.2, the statutes under which plaintiffs purport to seek costs, nor does the court find defendant’s objections so frivolous as to warrant costs under 22 N.Y.C.R.R. § 130-1.1. Accordingly, it is hereby

ORDERED that the branch of plaintiffs’ motion seeking to compel a further deposition of Dr. Grucela is granted, to the extent set forth above; and it is further

ORDERED that the branch of plaintiffs' motion seeking the costs of the motion is denied; and it is further

ORDERED that the parties shall appear in Part 6 for their previously scheduled status conference on October 5, 2010, at 10:00 a.m.

Dated: September 8, 2010

ENTER:



JOAN B. LOBIS, J.S.C.

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