

Amlung v Feldstein

2010 NY Slip Op 33087(U)

October 22, 2010

Supreme Court, New York County

Docket Number: 100461/2009

Judge: Joan B. Lobis

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

PRESENT: LOBIS
Justice

PART 6

ANLUNG, WILLIAM, ET AL.

INDEX NO.

100461/09

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
SULIA FELDSTEIN, M.D., ET AL.

The following papers, numbered 1 to 19 were read on this motion to/for protective order

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

PAPERS NUMBERED

1-6

Answering Affidavits — Exhibits _____

7-16

Replying Affidavits _____

17-19

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

and order.

FILED

OCT 29 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10/22/10

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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
WILLIAM AMLUNG and SUSAN AMLUNG,

Plaintiffs,

Index No. 100461/2009

-against-

Decision and Order

JULIE FELDSTEIN, M.D., RICHARD WONG, M.D.,
DENNIS KRAUS, M.D., ANDREA PUSIC, M.D., and
MEMORIAL HOSPITAL FOR CANCER AND ALLIED
DISEASES,

FILED

OCT 29 2010

Defendants.

**NEW YORK
COUNTY CLERKS OFFICE**

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

Defendants Julie Feldstein, M.D., Richard Wong, M.D., Dennis Kraus, M.D., Andrea Pusic, M.D., and Memorial Hospital for Cancer and Allied Diseases ("Memorial") move, by order to show cause pursuant to C.P.L.R. § 3103, for a protective order precluding plaintiffs from deposing Antonio Macias, M.D., and from obtaining certain discovery demands made in a Demand for Discovery and Inspection dated June 7, 2010. For the reasons stated below, the motion is denied.

This action, sounding in medical malpractice, concerns a misinterpreted biopsy taken from tissue in William Amlung's jaw that resulted in unnecessary surgery. On or about September 20, 2007, Dr. Feldstein, director of Memorial's Immunohistochemistry laboratory, examined a biopsy of tissue taken from Mr. Amlung's jaw and determined that it manifested squamous cell carcinoma. Mr. Amlung continued to visit with Dr. Kraus and Dr. Wong and underwent radiological studies of his left jaw. On November 14, 2007, Dr. Wong performed neck dissection surgery and a tracheostomy and removed a portion of the lower jaw. Dr. Pustic then performed a flap reconstruction procedure whereby she removed skin from Mr. Amlung's chest and used it to cover

the area around his lower jaw. Specimens from the surgery were sent to Memorial's Department of Pathology. According to the pathology report from November 2007, all specimens were negative for carcinoma, but positive for a bacterial infection. On March 11, 2009, after the lawsuit was commenced, the biopsy report was amended, diagnosing the specimen as manifesting no evidence of malignancy. Plaintiffs allege that the surgery was unnecessary and has left Mr. Amlung with permanent injuries including deformity, difficulty eating and speaking, lack of energy, weight loss, and severe diarrhea.

Plaintiffs commenced this action on or about January 13, 2009, by the filing of a summons and complaint. Defendants answered by separate answers in February 2009. In their answers, all defendants stated that they "rendered certain professional care . . . in accordance with acceptable medical standards of due care and begs leave to refer all questions of fact to the trier of fact[.]" All defendants assert C.P.L.R. § 1600, the apportionment of liability statute for multiple tortfeasors, as an affirmative defense. On or about November 9, 2009, after both plaintiffs were deposed, Dr. Feldstein served an amended answer. She excised the statement that she acted "in accordance with accepted medical standards of due care" and admitted to misinterpreting the biopsy. Dr. Feldstein continues to assert C.P.L.R. § 1600 as an affirmative defense. No other defendants served amended answers.

On March 23, 2010, the parties appeared for a compliance conference and entered into a so-ordered stipulation whereby they agreed to a schedule for Dr. Feldstein's and Dr. Wong's depositions. Dr. Feldstein's deposition was held on May 28, 2010. During the deposition, the

parties contacted chambers for a ruling. Counsel for plaintiff attempted to ask Dr. Feldstein about Memorial's policies and procedures in place at the time of her alleged malpractice "regarding how [pathology] slides were prepared." Defense counsel objected on the grounds that Dr. Feldstein and Memorial, as her employer, had previously conceded that there had been a departure so the question was irrelevant. The court, citing the Uniform Rules for Conduct of Depositions, ruled that the question was not improper and that there was no reason to limit plaintiff's discovery on whether defendants committed malpractice. Over the course of the deposition, Dr. Feldstein revealed that biopsies are first reviewed by a pathology fellow. The fellow gives an initial impression of it. The impression is either handwritten or typed into a computer system called Co-Path. Dr. Feldstein also testified that she doubted whether she had actually reviewed the first biopsy report.

On June 7, 2010, plaintiffs sent a letter dated June 7, requesting a deposition of Antonio Macias, M.D., the pathology fellow on staff in September 2007, who first reviewed the specimen and gave an initial impression of it. On the same date, plaintiffs served a Notice of Discovery and Inspection, seeking the table of contents for rules and regulations of Memorial's pathology department; the handwritten impression written by Dr. Macias "and/or any other personnel interpreting that biopsy;" emails between Dr. Wong and Dr. Feldstein regarding the March 2009 amendment to the pathology report of the biopsy; and all biopsy records on the Co-Path system.

In support of their motion for a protective order, defendants argue that discovery should be limited to what will actually be at issue at trial and that all other discovery is not material and necessary. Defendants contend that Dr. Feldstein has admitted liability in her answer. Thus,

discovery should be limited to determining causation and plaintiffs' damages.

In opposition, plaintiffs argue that Dr. Feldstein has never formally admitted that she was negligent. They point out that none of the other defendant's have admitted negligence; and that the extent of each defendant's negligence is still an issue. They further contend that the discovery that they requested is necessary, because it may reveal grounds for punitive damages. Plaintiffs also assert that Mr. Amlung has an absolute right to his medical records. Annexed to their opposition papers, plaintiffs also attach an affidavit from Ernest Atlas, M.D., who is board certified in internal medicine and infectious diseases. Dr. Atlas asserts that the discovery requested is relevant to causation. He asserts that any description of the biopsy could enable him to determine the extent of Mr. Amlung's bacterial infection in September 2007, so as to help him discern whether the infection could have been treated immediately with antibiotics or with a less extensive surgery than Mr. Amlung underwent.

In reply, defendants attach amended answers from Dr. Feldstein and Memorial. Dr. Feldstein she admits that her misinterpretation of the biopsy was a departure from the standard of care. Memorial continues to maintain that it "rendered certain professional care . . . in accordance with acceptable medical standards of due care[.]" In one paragraph, however, it asserts that Dr. Feldstein departed from the standard of care. Neither amended answer asserts C.P.L.R. § 1600 as an affirmative defense. Defendants also dispute plaintiffs' claim that the biopsy records could assist in determining causation, although they do so without an expert affidavit. Defendants also assert that punitive damages are rarely granted in medical malpractice cases.

ORDERED that within fifteen (15), days defendants respond to plaintiffs' letter dated June 7, 2010 requesting a deposition of Antonio Macias, M.D., and it is further

ORDERED that the parties shall appear for a compliance conference on December 7, 2010 at 9:30 a.m.

Dated: October 22, 2010



JOAN B. LOBIS, J.S.C.

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