

**Kelley v South Shore Healthcare**

2010 NY Slip Op 33404(U)

November 9, 2010

Supreme Court, Nassau County

Docket Number: 4324/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

\_\_\_\_\_  
CATHERINE KELLEY, individually and as the  
Executor of the Estate of ED KELLEY,

Plaintiff,

- against -

SOUTH SHORE HEALTHCARE, OLAF BUTCHMA, D.O.  
and SOUTH NASSAU COMMUNITIES HOSPITAL,

Defendants.  
\_\_\_\_\_

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 4324/09  
Motion Seq. Nos: 06, 07  
Motion Dates: 09/16/10  
09/16/10

**The following papers have been read on these motions:**

	Papers Numbered
<u>Order to Show Cause, Affirmation and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion, Affirmation and Exhibits</u>	<u>2</u>
<u>Reply Affirmation and Exhibit</u>	<u>3</u>
<u>Reply Affirmation and Exhibit</u>	<u>4</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant South Nassau Communities Hospital ("South Nassau") moves (Seq. No. 06), pursuant to CPLR § 2304, for an order quashing plaintiff's subpoena seeking the deposition of Nurse Hyesuk Lee. Plaintiff cross-moves (Seq. No. 07), pursuant to CPLR § 3101 and 3126, for an order compelling the deposition of the non-party witness, Hyesuk Lee, R.N.

This is a medical malpractice action in which plaintiff alleges personal injuries and wrongful death stemming from defendants' alleged failure to prevent and properly treat a left heel ulcer and a decubitus ulcer in plaintiff decedent, Ed Kelley. Mr. Kelley had been admitted

to defendant South Nassau on two occasions in 2007. He was first admitted to the hospital on November 9, 2007 to undergo a left hip joint replacement surgery following a fracture that occurred while at home. Mr. Kelley, then age eighty-five, was discharged from defendant South Nassau on November 16, 2007, and transferred to defendant South Shore Health Care Facility (“South Shore”) for short-term rehabilitation. Mr. Kelley remained at defendant South Shore through December 20, 2007. On December 20, 2007, Mr. Kelley was readmitted to defendant South Nassau with a diagnosis of skin ulcers and sepsis. Plaintiff alleges that defendants’ malpractice led to the necessity of an above-the-knee amputation performed in mid-January 2008 at defendant South Nassau, and ultimately to Mr. Kelley’s death in February 2008.

Plaintiff served a Summons and Verified Complaint on or about February 24, 2009. Defendant South Nassau served its Verified Answer on or about April 1, 2009.

Defendant submits that, on June 15, 2010, the parties appeared in Nassau County Supreme Court and entered into a Certification Order at which time plaintiff’s attorney certified that all discovery was complete with the exception of three items. Plaintiff’s attorney requested the deposition of Nurse Anitha Matthew, a nurse previously identified at plaintiff’s request. In addition to that deposition, plaintiff’s attorney requested a copy of the Deficiency Checklist previously identified at Nurse Norma Bigay’s deposition, as well as the hospital protocols regarding the prevention and treatment of pressure ulcers in effect at this time of this incident. On or about August 20, 2010, defendant South Nassau’s attorney received a copy of a Judicial Subpoena that was purportedly served upon Hyesuk Lee, R.N. Defendant South Nassau states that, in May 2010, it advised plaintiff that Hyesuk Lee, R.N. was no longer employed by defendant South Nassau and provided plaintiff with Lee’s last known address. Defendant contends that at no point prior to plaintiff’s attorney certifying this case on June 15, 2010 did said attorney request the deposition of Hyesuk Lee. Defendant argues that since discovery is

complete and plaintiff's attorney has certified the case as ready for trial, no further depositions, including depositions of non-parties, should take place. Defendant argues that, as of May 2010, plaintiff was aware of the involvement of Hyesuk Lee, R.N. in this case, but despite being in possession of this information from said date, plaintiff did not pursue the deposition of Hyesuk Lee, R.N. until three months later - two months after the case was certified. Defendant further argues that plaintiff's Judicial Subpoena served upon Hyesuk Lee is defective on its face - that it lacked sufficient notice to the parties, that it was not "so ordered" and plaintiff's attorney never provided any of the defendants with notice that a subpoena for the deposition of Hyesuk Lee, R.N. had been served.

In plaintiff's cross-motion, plaintiff asserts that defendant South Nassau's Order to Show Cause fails to provide the Court with a full and accurate picture of what transpired in the instant matter. Plaintiff submits that then the Court issued a Certification Order that was signed over plaintiff's counsel's objection. Additionally, plaintiff contends that at said Certification Conference, counsel for plaintiff advised defendants' counsel that plaintiff would be seeking and issuing a subpoena for the deposition of Hyesuk Lee, R.N. and that plaintiff did not consider discovery to be complete. Plaintiff further argues that, at the time the instant motion was filed, plaintiff had not filed the Note of Issue and therefore there is no requirement that plaintiff show any "unusual or unanticipated circumstances" to conduct the requested depositions. Plaintiff's counsel claims that the letter written by them on August 5, 2010, provided defendant South Nassau with notice that they were looking to depose Hyesuk Lee, R.N. and therefore defendant South Nassau's counsel's affirmation that plaintiff's request for a deposition of Hyesuk Lee, R.N. is something new is false. Plaintiff argues that the testimony of Hyesuk Lee, R.N. is both material and necessary to the action as Nurse Lee was involved with the decedent plaintiff, Ed Kelley, during his second admission to defendant South Nassau.

In reply to the cross-motion, defendant South Nassau states that plaintiff's claims that the issue of Hyesuk Lee, R.N.'s deposition was discussed at the time of the Certification Conference on June 15, 2010, is untrue. The only deposition that plaintiff's attorney mentioned was the deposition of Nurse Anitha Mathew and, as such, Ms. Mathew was produced for a deposition on June 10, 2010. Defendant also contends that, since plaintiff's attorney was provided with the last known address of Nurse Hyesuk Lee two months prior to the Certification Conference, the failure to subpoena her at that time is demonstrative of their lack of intent to pursue her deposition.

Plaintiff's reply affirmation argues that when counsel for plaintiff arrived at defendant South Nassau's counsel's office on July 19, 2010 to conduct the deposition of defendant South Nassau's employee, Nurse Anitha Mathew, he was told by counsel for defendant South Nassau that Ms. Mathew was the wrong witness to testify concerning the decedent plaintiff, Ed Kelley's, condition when he presented to defendant South Nassau's emergency room after being transferred from defendant South Shore with a gangrenous ulcer of his left heel. Nurse Mathews was only the triage nurse while Nurse Lee was the primary care nurse who did the full assessment as reflected in the chart. Plaintiff's counsel claims that counsel for defendant South Nassau agreed with him that they would conduct a deposition of Hyesuk Lee, without objection. However, plaintiff's counsel states that, while defendant South Nassau's counsel recalled the aforementioned conversation, she has a somewhat different recollection which amounted to refusing to produce Hyesuk Lee for depositions without court order.

The Court notes that plaintiff's counsel is correct in the assertion that the present matter was certified over plaintiff's objection. The Court would also note that the stipulation entered into by the parties on the same date as the certification conference and order, June 15, 2010, was not so-ordered by the Court and only mentions the outstanding deposition of Nurse Anita Mathews and not that of Nurse Hyesuk Lee. Additionally, the Judicial Subpoena was dated August 20, 2010, with a date to appear for testimony on August 25, 2010. Said dates were prior

to plaintiff filing her Note of Issue and Certificate of Readiness on September 10, 2010, as per the requirements of the Court. Therefore, plaintiff, as the party issuing the subpoena, need not have to demonstrate "unusual or unanticipated circumstances" to warrant the issuing of said subpoena.

Based upon the facts and arguments set before it, the Court finds that the testimony of Hyesuk Lee, R.N. is material and necessary in the present matter. Therefore, defendant South Nassau's motion (seq. No. 06), pursuant to CPLR § 2304, for an order quashing plaintiff's subpoena seeking the deposition of Nurse Hyesuk Lee is hereby denied. Plaintiff's motion (Seq. No. 07), pursuant to CPLR § 3101 and 3126, for an order compelling the deposition of the non-party witness, Hyesuk Lee, R.N. is hereby granted. The parties are ordered to conduct said deposition on or before December 24, 2010.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
November 9, 2010

**ENTERED**  
NOV 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE