Baran v Swift
2011 NY Slip Op 30735(U)
March 28, 2011
Supreme Court, New York County
Docket Number: 106530/2010
Judge: Alice Schlesinger
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SCANNED ON 3/30/2011

[* 1]

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

PRESENT: ALICE SCHLESINGER PART 16

Index Number : 106530/2010

BARAN, JANET

vs

SWIFT, RICHARD

Sequence Number : 002

ORDER OF PROTECTION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by plaintiff for a protective order is granted in accordance with the accompanying memorandum decision.

FILED

MAR 30 2011

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

MAR 28 2011

Dated: March 28, 2011

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--X
JANET BARAN and DR. WILLIAM WINKLER,

Plaintiffs,

-against-

Index No. 106530/10
Mot. Seq. 002

RICHARD W. SWIFT, M.D., and SANOFI-AVENTIS US., INC., and AVENTIS PHARMACEUTICALS, INC.

Defendants.
--X

FILED
MAR 30 2011
NEW YORK
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SCHLESINGER, J.

Plaintiffs have moved in this medical malpractice action for a protective order pursuant to CPLR §3103 with respect to the Notice to Admit served by defendant Dr. Richard Swift on the ground that the Notice was improperly utilized. Alternatively, plaintiff seeks an extension of time to respond to the Notice. In addition, plaintiff seeks costs and sanctions, claiming that defense counsel failed to reasonably resolve the dispute and avoid motion practice. Defendant Dr. Swift vigorously opposes, insisting that the Notice to Admit is proper. The co-defendants have not taken a position on the motion.

Background Facts

Plaintiffs commenced this action alleging that Dr. Swift departed from accepted standards of care by performing a series of injections of a dermal filler know as "Sculptra' for off-label purposes, without regard to the manufacturer's recommendations and warnings, thereby causing injury to Ms. Baran. Plaintiffs also point to the doctor's purported "failure to advise Plaintiff as to the effects of the drug, risks and alternatives" both before and after the injections and his failure to obtain informed consent. (See Plaintiffs' November 15, 2010 Verified Bill of Particulars, Exh B to Defendant's Opposition).

On October 19, 2010, before the Bill of Particulars was served and well before depositions were even scheduled, defendant Dr. Swift served plaintiff with a Notice to Admit (Exh A to Motion) seeking two admissions:

1. Attached as Exhibit "A" is a true copy of the Aftercare Tips brochure that plaintiff was given or obtained from Dr. Swift's office during her course of treatment.

2. Attached as Exhibit "B" is a true copy of the Sculptra brochure that plaintiff was given or obtained from Dr. Swift's office during her course of treatment.

Pursuant to the CPLR, a response was due on November 15, but plaintiff's counsel mailed the response two days later, on November 17. In that response, plaintiff denied receipt of the Aftercare brochure, but admitted receipt of the Sculptra brochure "during her course of treatment." (Exh B to Motion). Defense counsel promptly rejected the response as untimely and asserted that he would consider plaintiff to have admitted receipt of the Aftercare brochure (Exh B), but he obviously was treating both matters as admitted. Efforts by plaintiffs' counsel to resolve the dispute failed (Exh C), and this motion followed.

Discussion

The central dispute between the parties is whether defendant's Notice to Admit was proper pursuant to CPLR §3123. However, defendant also raises various technical arguments, which this Court will address first.

Defendant first urges this Court to summarily deny the motion because it does not include an Affirmation pursuant to 22 NYCRR 202.7 demonstrating that counsel made a good faith effort to resolve the dispute before making the motion. Defendant is wrong. Plaintiff explains in his Affirmation in Support, submitted with the motion, the good faith efforts he made to resolve the dispute, and he has attached the relevant correspondence to his papers. A separate " Affirmation of Good Faith" is not required. Plaintiff has more than satisfied the intent of the law.

Defendant next contends that the motion must be denied because plaintiff neither responded to the Notice to Admit nor moved for an extension of time or a protective order within twenty days after service. This argument, too, must fail. CPLR §3123 gives the court broad discretion to extend a party's time to respond to a Notice to Admit. Further, CPLR

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§3103 contains no time limitation for a motion for a protective order, stating that: "The court may ***at any time*** on its own initiative, or on motion of any party ... make a protective order denying, limiting conditioning or regulating the use of any disclosure device." Therefore, this Court has the authority to entertain plaintiff's motion on the merits, and will do so. The cases relied upon by defendant are all readily distinguishable, applying to instances where the court had no discretion to extend a deadline or where the party had failed to act to protect his rights. Plaintiff's initial response was only two days late, and once defendant rejected it, plaintiff promptly made his objections clear, attempted to resolve the dispute, and then made this motion when it became clear that his efforts were futile.

Particularly devoid of merit is defendant's claim that plaintiff has waived any objections to the Notice to Admit by sending a response that was not in proper form. The absence of a sworn statement from the plaintiff is a minor defect which has been corrected. (Exh C to Reply). Further, defendant did not reject the response on that ground; the rejection was based on timeliness only. (Exh B to Motion). More importantly, though, as demonstrated below, there can be no waiver of the plaintiff's rights where, as here, the Notice to Admit was improper and must be stricken.

Turning to the central issue, this Court finds that defendant's Notice to Admit was improper and that plaintiff is entitled to a protective order striking the Notice and barring defendant from relying on any part or the whole of plaintiff's response. The governing statute, CPLR §3123, limits the type of admissions that can be sought, allowing a party to:

> serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents ... described in and served with the request, or of the truth of any matters of fact set forth in the request, ***as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial*** and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.

(Emphasis added).

The appellate courts have firmly and repeatedly enforced that part of the statute emphasized above that bars a party from utilizing a Notice to Admit regarding matters likely to be in dispute or that address material issues. Thus, for example, in *Marguess v City of New York*, 30 AD2d 782 (1st Dep't 1968), *aff'd* 28 NY2d 527 (1971), the Appellate Division found that "the sweeping, generalized demands of the plaintiff's notice, relating to questions of ultimate liability, were not attuned to any reasonable belief that they were free from substantial dispute, and thus, admissible matter." Similarly, in the medical malpractice action *Wolin v St. Vincent's Hosp. and Medical Center of New York,* 304 AD2d 348, 349 (1st Dep't 2003), the Appellate Division, citing its 1986 decision in *Taylor v Blair,* 116 AD2d 204, found that "the court properly granted a protective order with regard to plaintiff's notice to admit since plaintiff was improperly using such device to limit the scope of disclosure rather than for its intended purpose — to resolve factual matters pertaining to the elements of her claim which will not be in dispute at trial."

In *Taylor,* in addition to declaring that "a notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts," the Appellate Division emphasized that the Notice may "not [be used] to obtain information in lieu of other disclosure devices ..." 116 AD2d at 206 (citations omitted). The *Taylor* case was a wrongful death action where the decedent, a tenant, had died from asphyxiation due to carbon monoxide poisoning in the apartment. The court found that the requests, such as to admit whether certain matters were known to the manufacturer of the gas burner in use at the premises, were more in the nature of interrogatories or a deposition on written questions, rather than a Notice to Admit.

In another medical malpractice action, *Berg v Flower Fifth Ave. Hospital,* 102 AD2d 760 (1st Dep't 1984), the Appellate Division granted a full protective order as to plaintiff's entire Notice to Admit, which sought admissions relating to key issues such as accepted

medical practices and procedures and causation. Finding that the questions went "clearly beyond the scope of a notice to admit as a disclosure device," the court stated:

> To allow the notice to admit to become perverted into a further form of deposition in the nature of written interrogatories would defeat and detract from its intended purpose.

102 AD2d at 760-61.

The same rationale applies here. Not only does the plaintiff assert a cause of action for lack of informed consent in this case, but central to the departure claim is whether the defendant physician utilized the dermal filler Sculptra "off-label" and in a manner contrary to the manufacturer's warnings. Thus, whether the plaintiff received certain brochures relating to Sculptra and its use is a material issue. Wholly disingenuous is any claim that the defendant doctor is merely seeking to confirm the genuineness of the brochures.

Further, the questions are broadly phrased, asking whether the brochures were "given or obtained from Dr. Swift's office during her course of treatment." The questions raise issues more appropriately explored at plaintiff's deposition, where the brochures can be marked as exhibits and both defense counsel can inquire fully as to whether or not the plaintiff received them, from whom, and under what circumstances.

Therefore, the Notice to Admit is stricken. However, the Court in its discretion declines to award the plaintiffs costs or sanctions.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a protective order is granted to the extent that the Notice to Admit served by counsel for defendant Dr. Swift is stricken and the Notice and any response from the plaintiff shall be treated as a nullity for all purposes.

FILED

Dated: March 28, 2011

MAR 28 2011

MAR 30 2011

NEW YORK
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J.S.C.

ALICE SCHLESINGER