Hines v Meyer
2011 NY Slip Op 33737(U)
October 25, 2011
Supreme Court, Nassau County
Docket Number: 6444/10
Judge: Jeffrey S. Brown

[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X	**TRIAL/IAS PART 21**
DOROTHY HINES,	**INDEX # 6444/10**
Plaintiff,	**Motion Seq. 2, 3**
	Motion Date 8.26.11
-against-	**Submit Date 9.9.11**
JEFFREY M. MEYER, M.D., ISLAND SPORTS MEDICINE, LLP, DORE BOWER, P.T., P.C, d/b/a COMPLETE CARE PHYSICAL THERAPY and DAVID ETHICAL PHARMACY, INC., ERIC SCHMITT, D.P.T. and DONALD PAGNOTTA, P.T.,	
Defendants.	
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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1,2
Answering Affidavit 3
Reply Affidavit..... 4

This motion by the plaintiff Dorothy Hines for an order pursuant to CPLR 3106(b) compelling non-party witnesses Mark Gentile and Dore Bowers to appear for depositions is determined as provided herein.

This cross-motion by the defendants Dore Bowers, P.T., P.C., d/b/a Complete Care Physical Therapy, Eric B. Schmitt, D.P.T. and Donald Pagnotta, P.T., for an order pursuant to

CPLR 3211 (a)(7), 3212 dismissing the causes of action for negligent hiring, retention, supervision and/or training and an order pursuant to CPLR 3103(a) granting it a protective order excusing Mark Gentile and Dore Bowers from appearing for a deposition is determined as provided herein.

The plaintiff in this action seeks to recover damages for personal injuries she sustained as the result of treatment provided by the defendant Eric P. Schmitt, D.P.T. at Dore Bowers, P.T., P.C., d/b/a Complete Care Physical Therapy. The plaintiff seeks to take depositions of non-party individuals Dore Bowers and Mark Gentile of Complete Care Physical Therapy.

The facts pertinent to the determination of these motions are as follows:

The defendant Dr. Meyer is an orthopedist who was treating the plaintiff for left shoulder pain. He diagnosed her with left shoulder calcification and tendonitis and prescribed physical therapy. That prescription specifically called for "Moist Heat, Cryotherapy, Ultra Sound, Acetic Acid and Range of Motion Exercises," two to three times a week for four weeks. The plaintiff learned at Complete Care Physical Therapy that a prescription was needed for Acetic Acid, however, Dr. Meyer had not provided her with one and so the defendant Donald Pagnotta, P.T., an employee of Complete Care Physical Therapy, volunteered to obtain one for her. He went to Dr. Meyer's office accompanied by Mark Gentile, a shareholder in Complete Care Physical Therapy who was going to Dr. Meyer's office anyway on unrelated business. Pagnotta obtained a prescription for "Acetic Acid" at Dr. Meyer's office which was hand written by Dr. Meyer's secretary and bore Dr. Meyer's electronic signature. Pagnotta delivered the prescription to the plaintiff which she then had filled at the defendant Davis Ethical Pharmacy ("the pharmacy"). A principal of the pharmacy, pharmacist William Davis, provided the plaintiff with an open bottle

of 100% "acetic acid USP (Glacial)." The label says, inter alia, "For Prescription Compounding" and "Federal law prohibits dispensing without a prescription."

The defendant Eric P. Schmitt, D.P.T., an employee of Complete Care Physical Therapy, applied the acetic acid to the plaintiff's shoulder via a soaked pad for the application of an electric current, knows as iontophoresis. Schmitt instructed the plaintiff to leave the patch on until she went to bed. The plaintiff testified at her examination-before-trial that when she awoke the next day, she had discovered that her shoulder was injured. She had sustained a full thickness chemical burn on her left shoulder. She testified that she immediately went to Complete Care Physical Therapy where she spoke with Pagnotta and Dore Bowers, a shareholder and the Director of Complete Care Physical Therapy. She testified that they said that there was nothing they could do for her but Pagnotta advised her to see a doctor.

The bottle of Acetic Acid was retained by Complete Care Physical Therapy until it was released to the plaintiff as a result of motion practice.

At his examination-before-trial, Schmitt testified that there were no written protocols or procedures at Complete Care Physical Therapy regarding the use of Acetic Acid by iontophoresis. He testified that he told both Mark Gentile and Dore Bowers that he did not know why the plaintiff sustained a burn. Schmitt had no information regarding the bottle of Acetic Acid once plaintiff's treatment was provided. In fact, he testified that patients typically took it home with them.

At his examination-before-trial, Pharmacist Davis testified that he learned of the plaintiff's injury from Mark Gentile.

The plaintiff has sought to recover of Dr. Jeffrey Meyer and his practice Island Sports Medicine; Dore Bowers, P.T., P.C. and its employees Schmitt and Pagnotta; and, Davis Ethical Pharmacy for medical malpractice and lack of informed consent.

The plaintiff seeks to depose Dore Bowers and Mark Gentile.

"The scope of discovery in a civil action is governed by CPLR 3101 (a), which provides, in relevant part, that '[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.' " Friel v Papa, ___ AD2d ___, 930 NYS2d 39, 2011 WL4507126 (2nd Dept. 2001). "The phrase 'material and necessary' should be 'interpreted liberally to require 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.' " Freil v Papa, supra, quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 (1968). "In other words, the requested information must be ' "sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable." ' " Friel v Papa, supra, quoting Allen v Crowell-Collier Publ. Co., supra at p.406-407, quoting Weinstein-Korn-Miller, N.Y. Civ. Prac. § 3101.07 (1st ed). "Unlimited disclosure, however, is not required . . .." Giordano v New Rochelle Municipal Housing Authority, 84 AD3d 729, 731 (2nd Dept. 2011), citing Spohn-Konen v Town of Brookhaven, 74 AD3d 1049 (2nd Dept. 2010); Palermo Mason Const. v Aark Holding Corp., 300 AD2d 460, 461 (2nd Dept. 2010). "[T]he Supreme Court may issue a protective order 'denying, limiting, conditioning or regulating the use of any disclosure device' to 'prevent unreasonable

annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.' " Giordano v New Rochelle Municipal Housing Authority, supra, at p. 731, quoting CPLR 3103(a).

For purposes of depositions "a corporate entity has the right to designate, in the first instance, the representatives who shall be [examined]." Giordano v New Rochelle Municipal Housing Authority, supra, at p. 731, citing Nunez v Chase Manhattan Bank, 71 AD3d 967, 968 (2nd Dept. 2010); Sladowski-Casolaro v World Championship Wrestling, Inc., 47 AD3d 803 (2nd Dept. 2008). "To show that additional depositions are warranted, the moving party must demonstrate that 'the representatives already deposed had insufficient knowledge, or were otherwise inadequate,' and that 'there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case.' " Giordano v New Rochelle Municipal Housing Authority, supra, at p. 731, quoting Nunez v Chase Manhattan Bank, supra at p. 968, citing Carter v New York City Bd. of Educ., 225 AD2d 512 (2nd Dept. 1996); Zollner v City of New York, 204 AD2d 626, 627 (2nd Dept. 1993).

The defendants seek to bar the deposition of Dore Bowers on the grounds that Dore Bowers, P.T., P.C. has conceded vicarious liability for Schmitt as its employee. Nevertheless, the individuals produced thus far by Complete Care Physical Therapy have not provided meaningful information regarding Complete Care Physical Therapy's policies regarding the use of Acetic Acid. Despite Complete Care Physical Therapy's concession regarding vicarious liability pursuant to the doctrine of respondeat superior, whether it had a policy regarding the use

of Acetic Acid and, if so, what that policy was and Schmitt's awareness of it is pertinent in this case. The plaintiff has a direct claim against Dore Bowers, P.T., P.C. Her Bill of Particulars sets forth a myriad of negligent acts attributable to Dore Bowers, P.T., P.C., and its policies or lack thereof are indeed relevant. Furthermore, there is a substantial likelihood that Dore Bowers, as the Director of Complete Care Physical Therapy, may possess this information which is material and necessary in establishing the plaintiff's claim against Dore Bowers, P.T., P.C. Furthermore, there is also a likelihood that she may possess pertinent information regarding the chain of custody of the Acetic Acid, which is also relevant to the plaintiff's claim. Dore Bowers is accordingly directed to appear for a deposition. See, Trueforge Global Machinery Corp. v Viraj Group, 84 AD3d 938 (2nd Dept. 2011). The plaintiff's motion to compel Dore Bowers' deposition is **granted** and the defendants' motion for a protective order with respect thereto is **denied.**

The plaintiff has not established that Mark Gentile may possess any material and necessary information pertinent to her claim. Neither Gentile's interest in Complete Care Physical Therapy, his alleged ownership of the building nor his attenuated conversations with Schmitt or the pharmacist are indicative of any knowledge on his part pertinent to the plaintiff's claims. The plaintiff's application for an order directing that he appear before a deposition is **denied.** The defendants' motion pursuant to CPLR 3103(a) for a protective order excusing Gentile from appearing at a deposition is **granted**.

Finally, the defendants' application to dismiss the plaintiff's claim for negligent hiring, retention, supervision and/or training is **granted** without opposition to the extent that the plaintiff has even advanced any such claim. In view of Dore Bowers, P.T., P.C. not contesting that any of

Schmitt's actions were performed in the course of his employment, any such claim would be dismissed in any event. Maroon v New York City Transit Authority, 241 AD2d 323 (1st Dept. 1970); see also, Eckardt v City of White Plains, ___ AD ___, 2011 WL 4389777 (2nd Dept. 2011).

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
October 25, 2011

ENTER:

HON. JEFFREY S. BROWN, JSC

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