

Keyser v Chang

2011 NY Slip Op 33746(U)

July 11, 2011

Sup Ct, Nassau County

Docket Number: 017051/2009

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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**MILLICENT KUGLER KEYSER, as Administratrix
of the Estate of PAUL IRA KEYSER, Deceased , and
MILLICENT KUGLER KEYSER, Individually**

Plaintiffs,

-against-

**SHU-HO S. CHANG, M.D., SOUTH NASSAU
RADIOLOGY, P.C. AND SOUTH NASSAU
COMMUNITIES HOSPITAL,**

Defendants,

-----x

TRIAL PART: 14

NASSAU COUNTY

INDEX NO: 017051/2009

MOTION SEQ. NO:1

SUBMIT DATE: 5/5/11

The following papers having been read on this motion:

- Notice of Motion.....1**
- Opposition.....2**

Defendant Dr. Chang moves for an Order pursuant to 22 NYCRR §202.21(e) to vacate the Note of Issue or in the alternative, pursuant to CPLR §3126 to preclude Plaintiff from introducing any evidence or testimony as to the claim of pecuniary loss.

Plaintiff brought an action for the pre-death pain and suffering and wrongful death of decedent husband. Decedent died on November 10, 2008 at the hospital owned and operated by Defendant South Nassau Communities Hospital. On that date, Defendant Chang, an interventional radiologist, performed a C/T guided biopsy of the liver on decedent. According to the medical examiner's report, during the biopsy, Defendant Chang pierced decedent's heart rather than the liver causing decedent's death. (Plaintiff's Opposition Exhibit "B").

Plaintiff alleges that she is now deprived of the services, society, consortium and companionship, aid and society of the decedent. According to Plaintiff, decedent was the financial planner of the marriage and provided services to the household. (Defendant's Notice of Motion Exhibit "D"). Plaintiff argues that she has incurred expenses and obligation for decedent's medical care and related expenses due to the negligence, carelessness and medical malpractice of Defendants.

By Notice of Discovery and Inspection dated October 22, 2009, Defendant demanded “any and all documentation with respect to the alleged pecuniary loss claimed, including but not limited to any pensions and all of the social security benefits claimed to have been affected by the death of the deceased.” (Defendant’s Notice of Motion Exhibit “C”). Defendant argues that Plaintiff did not comply with the Notice of Discovery and Inspection. On September 15, 2010, Plaintiff served a supplemental bill of particulars identifying and categorizing the economic losses as past and future losses. (Defendant’s Notice of Motion Exhibit “E”). Defendant maintains that Plaintiff failed to specify where the numbers came from or what they represented.

On December 22, 2010, the case was certified by all parties as ready for trial. (Plaintiff’s Opposition Exhibit “G”). The only issue of discovery raised concerned the discovery sought by Plaintiff from Defendant Hospital as evidenced by the parties’ stipulation that Defendant comply with Plaintiff’s Notice of Discovery and Inspection within 30 days of the EBT on November 9, 2010. (Defendant’s Notice of Motion Exhibit “G”).

After certification, Defendants substituted their attorney and new counsel made one request for discovery before moving to vacate the Note of Issue. Defendants requested Plaintiff preserve and maintain any and all pathology slides/specimens of decedent from the autopsy at the medical examiner’s office. (Plaintiff’s Opposition Exhibit “H”). Plaintiff responded that only the medical examiner has possession of the slides.

Plaintiff maintains that Defendants have failed to meet the requisite statutory showing that discovery is incomplete and that the matter is not ready for trial. Plaintiff further argues that if the Certificate of Readiness misstated a material issue of fact or if there was discovery owed at the time, Defendant would not have signed the document or discovery would have been made part of the side stipulation entered on that date. (Defendant’s Notice of Motion Exhibit “G”).

Plaintiff argues that she must not be sanctioned under CPLR §3126 because her conduct was not willful or contumacious. Plaintiff asserts that Defendant should be estopped from seeking discovery because, among other reasons, Defendant certified the matter as ready for trial without reservation. Plaintiff makes the following claims: (1) a Social Security authorization was provided; (2) Defendants had a full and fair opportunity to depose Plaintiff; (3) the Notice of Discovery and Inspection has been responded to with days of its receipt; (4) an expert witness disclosure of the expert economist was provided without objection made thereto; (5) defense counsel entered a

certification order to which a side stipulation was attached and they sought no discovery therein from Plaintiff; and (6) Defendants failed to make good faith efforts to avoid judicial intervention.

A motion to vacate the Note of Issue and Certificate of Readiness made more than 20 days after their filing is granted only where “a material fact in the certificate of readiness is incorrect” or upon “good cause shown.” (See 22 NYCRR §202.21(e)). To satisfy the requirement of “good cause,” the movant must demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the Note of Issue and Certificate of Readiness requiring additional pretrial proceedings to prevent substantial prejudice. (See *Ferraro v. North Babylon Union Free School Dist.*, 69 A.D.3d 559). The substitution of new counsel or the delinquencies of predecessor counsel alone is insufficient to show the presence of unusual or unanticipated circumstances subsequent to the filing of the Note of Issue and Certificate of Readiness. (See *Utica Mut. Ins. Co. v. P.M.A. Corp.*, 34 A.D.3d 793).

Penalties for the failure to comply with disclosure are guided by CPLR §3126. This provision authorizes the court to fashion an appropriate remedy at its sound discretion. (See *Kumar v. Kumar*, 63 A.D.3d 1246). A court may strike pleadings, stay further proceedings, dismiss an action, or render a judgment by default against a disobedient party who fails to obey a court order for disclosure or willfully fails to disclose information. (See CPLR §3126(3)).

Defendant has failed to demonstrate good cause. Defendant correctly acknowledges that the demand for documentation with respect to the alleged pecuniary loss claimed continues until the time of trial under CPLR §3101(h). However, Defendant has failed to offer a reason as to why the discovery sought was not requested before the filing of the Note of Issue or why the case was inexplicably certified as ready for trial with the consent of Defendant’s attorney. (See *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135).

Defendant has also failed to demonstrate an unusual or unanticipated circumstance arising after the filing of the Note of Issue and Certificate of Readiness. Plaintiff correctly points out that over a year before Defendant demanded retention of the slides, an authorization was given to Defendant to allow his expert to review the slides at the medical examiner’s office. (Plaintiff’s Opposition Exhibit “J”). Furthermore, the substitution of new counsel is insufficient to deviate from the general rule that additional pretrial proceedings may not be sought after the Note of Issue has been filed unless good cause is shown. (See *Lyons v. Saperstein*, 202 A.D.2d 401).

With regard to Defendants' request to preclude, Defendant has not established a *prima facie* showing that Plaintiff failed to obey a court order for disclosure or willfully failed to disclose information. Regarding Defendant's demand for any and all documentation with respect to the alleged pecuniary loss claimed, including the social security benefits claimed to have been affected by decedent's death, Defendant had authorization to obtain said documentation for over 1 year preceding Defendant's certification that discovery was complete. (Plaintiff's Opposition Exhibit "J"). Furthermore, Plaintiff represents that there was and is no outstanding discovery owed since the only retirement benefits decedent received were those of social security.

Therefore, Defendant's motion for an Order pursuant to 22 NYCRR §202.21(e) to vacate the Note of Issue or in the alternative, pursuant to CPLR §3126 to preclude Plaintiff from introducing any evidence or testimony as to the claim of pecuniary loss is denied in its entirety.

This constitutes the decision and order of this court.

DATED: July 11, 2011

ENTER


HON. ARTHUR M. DIAMOND

J. S.C.

To

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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE