

Kowalski v Ritterband
2012 NY Slip Op 30197(U)
January 26, 2012
Supreme Court, New York County
Docket Number: 116846/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

KOWALSKI, ELAINE,
ET AL.
- v -
DAVID L. RITTERBAND, M.D.,
ET AL.

INDEX NO. 116846/08
MOTION DATE 1-24-12
MOTION SEQ. NO. 05
MOTION CAL. NO. _____

The following papers, numbered 1 to 34 were read on this motion to/for preclude

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

PAPERS NUMBERED
1-15
xmot 16-31
32-34

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

JAN 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 1/26/12

JB
JOAN B. LOBIS 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
ELAINA KOWALSKI and JOSEPH KOWALSKI,

Plaintiffs,

Index No. 116846/08

-against-

Decision and Order

DAVID C. RITTERBAND, M.D., and OPHTHALMIC
CONSULTANTS/CORNEAL AND REFRACTIVE
SURGERY ASSOCIATES, P.C.,

FILED

Defendants.

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

JAN 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

In Motion Sequence Number 005, defendants David C. Ritterband, M.D., and Ophthalmic Consultants/Corneal and Refractive Surgery Associates, P.C. move, by order to show cause, for a court order, pursuant to C.P.L.R. §§ 3101, 3121, and 3126, precluding plaintiffs Elaina and Joseph Kowalski from offering expert testimony or evidence at the time of trial as to Ms. Kowalski's physical condition, as described either in reports issued by any examining physician after the filing of the note of issue or by any examining physician at trial, on the grounds that plaintiffs failed to timely complete their physical/ophthalmological examination and exchange the physician's report. Plaintiffs oppose defendants' motion and cross-move for an order protecting the qualifications of their expert from further disclosure.

This action sounding in medical malpractice and lack of informed consent arises out of Dr. Ritterband's performance of a LASIK eye surgery procedure on Ms. Kowalski on September 27, 2007. Plaintiffs' bill of particulars and two supplemental bills of particulars set forth that they are alleging that Dr. Ritterband failed to diagnose Ms. Kowalski's pre-operative conditions, such as cornea disease and pellucid marginal degeneration ("PMD"), the presence of which are

contraindications to LASIK surgery. Plaintiffs contend that as a result of the alleged negligence, Ms. Kowalski suffers from a permanent ectatic disorder involving the progressive thinning of her corneas, including permanent loss of vision and the need for a corneal transplant.

The parties proceeded through discovery and on or about July 8, 2011, plaintiff filed a note of issue. On August 2, 2011, the parties appeared in court for a pre-trial conference, wherein, inter alia, the trial date was set for January 30, 2012; plaintiffs and defendants were ordered to exchange C.P.L.R. § 3101(d) disclosures no later than forty-five (45) and thirty (30) days before trial, respectively; and the outstanding medical examinations were set to be completed, and reports of such examinations exchanged, at least ninety (90) days and sixty (60) days prior to trial, respectively.

On or about December 16, 2011, plaintiffs served their C.P.L.R. § 3101(d) expert witness disclosures. As pertains to this dispute, plaintiffs intend to call two ophthalmologists; a doctor who performs visual simulation testing, Roger Davis, Ph.D.; and an economist. As to the ophthalmologists, plaintiffs expect to call an (unidentified) ophthalmologist licensed to practice ophthalmology with post-doctoral fellowship training in cornea/external disease and refractive surgery. The ophthalmologist is expected to testify, amongst other things, that Ms. Kowalski has been diagnosed with keratoconus, PMD, and post-LASIK ectasia; that where her prior optometrists and Dr. Ritterband diagnosed Ms. Kowalski with keratoconus, it was a departure from the standard of care to perform LASIK surgery; and that as a result of the LASIK surgery, Ms. Kowalski suffers from post-LASIK ectasia, a permanent partial disability. The basis for the expert's opinions is his/her review of, amongst other things, the medical records, the deposition transcripts, the legal papers from the case, the report of defendants' independent medical examination ("IME") dated July

14, 2010, and the examination note of Elizabeth A. Davis, M.D., dated December 5, 2011. Additionally, plaintiffs expect to call Elizabeth A. Davis, M.D., F.A.C.S., as an expert witness in ophthalmology. Dr. Elizabeth Davis' expected testimony and the basis of such is similar to that expected from the unidentified ophthalmologist. Together with their section 3101(d) disclosure as to Dr. Elizabeth Davis, plaintiffs provided defendants with a HIPAA-compliant authorization permitting them to obtain copies of Dr. Elizabeth Davis' records for Ms. Kowalski.

At this juncture, defendants argue that plaintiffs failed to obtain an ophthalmological examination of Ms. Kowalski prior to ninety (90) days before trial, therefore they should be precluded from offering evidence at trial related to this late examination. They maintain that plaintiffs are unable to show that this examination was needed in order to avoid substantial prejudice arising out of unusual or unanticipated circumstances. Defendants maintain that plaintiffs never disclosed Dr. Elizabeth Davis' report of December 5, 2011, but that if plaintiffs are proposing to serve a report of a physical examination on the eve of trial, they are attempting to add a new theory of recovery, which amounts to an improper and belated attempt to amend their pleadings. As to plaintiffs' disclosure of Dr. Roger Davis' expected testimony, defendants state that he also performed testing of Ms. Kowalski on the eve of trial, although this fact is not clear. Defendants' argument for precluding Dr. Roger Davis' testimony is not well articulated; their focus is primarily on precluding any use of Dr. Elizabeth Davis' examination of Ms. Kowalski at trial.

In opposition, plaintiffs argue that Ms. Kowalski is entitled to seek continuing treatment for her injuries, and the mere fact that she sought treatment from her expert should not preclude reference to those findings. Plaintiffs set forth that since March 2010, due to prior motion

practice, defendants have known that plaintiffs' liability expert is Dr. Elizabeth Davis. Plaintiffs argue that they have good cause as to why Ms. Kowalski sought treatment from Dr. Elizabeth Davis so late, as Ms. Kowalski could not obtain an appointment with Dr. Elizabeth Davis for treatment until December 5, 2011, due to scheduling conflicts and the need for Ms. Kowalski to travel with her husband due to her impaired vision (Dr. Elizabeth Davis' practice is apparently in Bloomington, Minnesota). They maintain that they exchanged copies of Dr. Elizabeth Davis' treatment notes once they received them on January 3, 2012, prior to defendants' service of the motion (the notes are annexed to plaintiffs' papers). They further argue that defendants have failed to articulate any prejudice from reference at trial to Dr. Elizabeth Davis' treatment notes, and imply that there is no surprise as Dr. Elizabeth Davis' treatment notes allegedly reflect the same findings that defendants' IME physician Wing Chu, M.D., set forth in his July 14, 2010 report.

The December 5, 2011 "report" is actually the medical record of Ms. Kowalski's single presentation before Dr. Elizabeth Davis. While plaintiffs characterize this appointment as for "treatment" and not for their expert to evaluate Ms. Kowalski, this characterization is fairly disingenuous. Plaintiffs concede that they have expected Dr. Elizabeth Davis to testify as their expert since March 2010, and there is no plausible explanation as to why they failed to obtain her physical examination of Ms. Kowalski prior to the 90-day deadline before trial of November 2, 2011, nearly nineteen months later. This late examination and exchange of records certainly violates the deadlines imposed in the pre-trial conference stipulation and order that physical examinations be completed prior to ninety (90) days before trial, and reports of such exchanged prior to sixty (60) days before trial. Nevertheless, in that the parties clearly agreed that physical examinations could be conducted post-note of issue, plaintiffs' delay in complying with the 90/60-day deadline is only

significant if it caused prejudice to defendants. Defendants state that plaintiffs' delay deprived them of their ability to adequately evaluate plaintiffs' physical condition and irreparably prejudiced them in having a full and fair opportunity to defend the claims set forth in the pleadings. Defendants fail to articulate in what way the delay caused this alleged prejudice, especially when they exercised their own right to conduct an IME and they have had the pleadings for years. Further, Dr. Elizabeth Davis' notes from this examination indicate that Ms. Kowalski has post-LASIK ectasia, which hardly differs from the alleged injuries in plaintiffs' bills of particulars. Accordingly, precluding plaintiffs from referencing Dr. Elizabeth Davis' notes during trial is not warranted at this time.

As to plaintiffs' cross motion, they seek a protective order shielding plaintiffs' unidentified ophthalmologist's qualifications from further disclosure. They maintain that any further disclosure of their expert's qualifications would lead to defendants' inevitable identification of the name of this person, which plaintiffs argue they are entitled to protect. They aver that the disclosure of the identity of their liability expert puts him/her at risk of professional harm and retribution. Plaintiffs claim that this harm was potentially realized when, in October 2011, an anonymous sender wrote a letter to this ophthalmologist's supervisor, stating that the expert is "a highly paid professional witness for the plaintiff bar" and asking that the supervisor "put an end to this." Defendants object to the protective order and ask that plaintiffs be required to disclose information regarding their expert's qualifications in satisfaction with Yablon v. Coburn, 219 A.D.2d 560 (1st Dep't 1995). Defendants maintain that plaintiffs failed to attach any evidence of fear or retaliation anticipated by their unidentified expert.

While, in New York, parties are not obligated to disclose their expert's name, they must disclose the expert's qualifications. C.P.L.R. § 3101(d)(1)(i). If they are seeking to protect those qualifications from disclosure, they must show that the information disclosed would likely lead to the identification of the witness, and that there is a real risk that the witness would be subject to threats or harassment if his or her identity were revealed. The court agrees that plaintiffs have failed to meet their burden in showing that a real risk of threats or harassment exists as to their expert in this particular case. Plaintiffs point out two other cases in which the plaintiffs were granted protective orders for their experts' credentials in LASIK cases. See Schiffer v. Speaker, 2004 N.Y. Slip Op. 51768(U) (Sup. Ct. N.Y. Co. 2004) (Schlesinger, J.). See also decision and order on Motion Sequence Number 003, Devadas v. Niksarli, Index No. 107637/2007 (Sup. Ct. N.Y. Co. 2008) (Carey, J.) (unpublished), available at <http://iapps.courts.state.ny.us/iscroll> (enter index number and follow hyperlink to decision and short form order on Sequence Number 003). However, in both of those cases, the plaintiffs provided affidavits from their unidentified experts indicating that they feared professional repercussions would result from their identities being disclosed. Plaintiffs provide no such affidavit,¹ but rather rely on materials that are not specific to this case and are not clearly contemporaneous. Plaintiffs fail to make "a factual showing that there exists a concrete risk, under the special circumstances of [this] particular case, that [their] prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial" Thomas v. Alleyne, 302 A.D.2d 36, 46 (2d Dep't 2002). Additionally, plaintiffs failed to seek this relief prior to the time for service of their expert disclosures. Given the fact that this case

¹ At oral argument, plaintiffs' attorney offered to provide an affidavit from the unidentified ophthalmologist, but the court declined to accept these papers as they were not offered with plaintiffs' initial motion papers.

is proceeding to trial in a matter of days, when the identity of the expert shall be revealed, the harm that plaintiffs seek to prevent with the protective order is so minimal as to render it unnecessary. The protective order is denied, and plaintiffs shall immediately disclose this expert's medical school, residency, and fellowships, and the states in which the witness is licensed to practice medicine. Accordingly, it is hereby

ORDERED that defendants' motion and plaintiffs' cross motion are denied in their entirety.

FILED

JAN 30 2012

Dated: January 26, 2012


NEW YORK COUNTY CLERK'S OFFICE
JOAN B. LOBIS, J.S.C.