

Giletta-Jenkins v Rubinstein

2012 NY Slip Op 31935(U)

July 24, 2012

Supreme Court, Ulster County

Docket Number: 14452-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ULSTER

SOPHIE GILETTA-JENKINS,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 1445-08
RJI NO. 55-08-01129

SANFORD RUBINSTEIN and
SANFORD M. RUBINSTEIN, DDS, P.C.,

Defendants.

SANFORD RUBINSTEIN and
SANFORD M. RUBINSTEIN, DDS, P.C.,

Third-Party Plaintiff,

-against-

INDEX NO. 4794-10

FRANSISCUS XAVERIUS, D.D.S.

Third-Party Defendant.

Supreme Court Ulster County All Purpose Term, July 17, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

In this dental malpractice action a jury trial date certain is set for August 6, 2012.

Defendants/Third Party Plaintiffs (hereinafter “Rubinstein”) now move, in limine, to limit the evidence Plaintiff may introduce at trial and seek to preclude Third Party Defendant (hereinafter “Xaverius”) from testifying at trial. Plaintiff and Xaverius¹ oppose the motion. On this record, while Rubinstein demonstrated his entitlement to limit some of Plaintiff’s proof he is not entitled to a preclusion order prohibiting Xaverius’ testimony.

First, Rubinstein correctly seeks to limit Plaintiff’s proof to those incidents not dismissed by the Hon. Henry Zwack’s Decision/Order, dated May 2, 2012. The Decision/Order granted, in part, Rubinstein’s summary judgment motion dismissing all but two incidents of alleged dental malpractice. Only Plaintiff’s April 10 and 26, 2006 malpractice claims remain viable. To the extent Plaintiff intended to introduce evidence of the now dismissed incidents at trial, the law of the case doctrine precludes her from doing so. Plaintiff neither demonstrated “the absence of a full and fair opportunity to litigate the issue” previously, nor that her pending appeal and motion to reargue stay the Decision/Order’s dismissal. (Briggs v Chapman, 53 AD3d 900, 902 [3d Dept 2008]; Dolaway v Urology Assoc. of Northeastern New York, P.C., 72 AD3d 1238, 1239 [3d

¹ Although Xaverius served his opposition late, Rubinstein filed a reply to it after the return date of this motion had past. Because these papers clarify the issues presented and neither party has been prejudiced, both are considered pursuant to CPLR §2004. The return date of this motion is amended accordingly.

Dept 2010]). Instead, the law of the case doctrine prohibits Plaintiff from relitigating her dismissed claims and precludes her offering proof of the dismissed claims at trial.

While the specific acts of alleged dental malpractice that were previously dismissed by the Decision/Order cannot be introduced at trial, because Plaintiff's dental history may be specifically relevant to the treatment she received on April 10 and 26, 2006 such evidence is potentially admissible. The law of the case doctrine does not prohibit Plaintiff from proving her April 10 and 26, 2006 malpractice claims, which may be fully explored at trial. If Plaintiff's proof of her April 10 and 26, 2006 malpractice claims require dental history evidence, Plaintiff's introduction of her dental history would not relitigate the Decision/Order's holding and cannot be precluded on this motion. This proof, however, must be specifically tailored to Plaintiff's April 10 and 26, 2006 malpractice claims.

Rubinstein, as unopposed by Plaintiff, also demonstrated his entitlement to an order prohibiting Plaintiff from offering incidents of malpractice Rubinstein allegedly performed on other individuals. The record is undisputed that Plaintiff's counsel represents numerous plaintiffs in dental malpractice actions against Rubinstein. While Plaintiff's counsel is in the possession of depositions and other discovery from those actions, he explicitly states that he has no intention to use Rubinstein's acts in those cases as proof of malpractice in this action. If, however, Rubinstein or his witnesses offer testimony that is inconsistent with statements they previously made, any such party or witness may be impeached by use of their prior inconsistent statement. (CPLR §4515).

In accord with Rubinstein's motion, Plaintiff similarly agrees not to offer, as evidence in chief, proof arising out of a breach of contract action between Rubinstein and Xaverius. Plaintiff

correctly notes, however, that she may use any inconsistent statements made in that action for impeachment purposes. (CPLR §4515). Contrary to Rubinstein's assertions, the use of a prior inconsistent statement is offered "not as substantive proof of the truth of such statement, but as tending to discredit" the inconsistently testifying witness. (Larkin v Nassau Electric R. Co., 205 NY 267 [1912]; Prince, Richardson on Evidence §§6-411 and 412 [Farrell 11th ed.]).

Lastly, Rubinstein failed to demonstrate his entitlement to an order precluding Xaverius from testifying at the trial of this matter. Although Rubinstein's motion is premised upon Xaverius' continuing failure to be deposed, he proffered no proof that Xaverius violated a specific Court ordered deposition date or a conditional preclusion order. Nor has Rubinstein either previously moved to compel Xaverius' deposition or demonstrated that Xaverius willfully refused to be deposed. As such, the drastic sanction of precluding Xaverius' testimony is not warranted and would unfairly prejudice Plaintiff who intends to call Xaverius as a witness. (Thomas v Benedictine Hosp., 296 AD2d 781 [3d Dept 2002]; Altu v Clark, 20 AD3d 749, 751 [3d Dept 2005]). Instead, because the trial of this matter is set to begin next month, Xaverius is hereby Ordered to be deposed on or before July 30, 2012 and shall bring with him, for the parties' review, Plaintiff's entire file including the file created and maintained by Rubinstein. In the event Xaverius fails to comply with such directive, he shall be precluded from testifying at the trial of this matter.

This Decision and Order is being returned to the attorneys for Rubinstein. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 24, 2012
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated June 28, 2012, Affirmation of Gregory Bower, dated June 28, 2012, with attached Exhibits "A" - "E".
2. Affidavit of Robert Haskins, dated July 9, 2012, with attached Exhibit "A".
3. Affirmation of John Katz, dated July 9, 2012, with attached Exhibit "A".
4. Affirmation of Gregory Bower, dated July 12, 2012.
5. Affirmation of Gregory Bower, dated July 16, 2012.