

Weiser v New York City Health & Hosps. Corp.

2013 NY Slip Op 32364(U)

September 30, 2013

Supreme Court, New York County

Docket Number: 800230/11

Judge: Harris Kluger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Judy H. Kluger
Judice

PART 38

Index Number : 800230/2011
WEISER, ADAM D.
vs
NEW YORK CITY HEALTH
Sequence Number : 001
VACATE

INDEX NO. 800 230/11
MOTION DATE _____
MOTION SEQ. NO. (001)

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

granted in part as per the written decision dated September 30, 2013. The plaintiff's cross-motion is denied for the reasons set forth in that same written decision.

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

FILED

OCT 04 2013

NEW YORK
COUNTY CLERK'S OFFICE

Hon. Judy Harris Kluger

Dated: 9/30/13

[Signature]
_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 38

CC COPY

-----X
ADAM WEISER,

Plaintiff,

- against -

DECISION AND ORDER

September 30, 2013

Index No. 800230/11

New York City Health and Hospitals Corporation, Bellevue Hospital Center, William L. Goldberg, Ramesh H. Gidumal, NYU Hospital for Joint Diseases, NYU Hospitals Center, New York University Medical Center, Jodi B. Cohen, Cornelia Golimbu, NYU Imaging, FPO Radiology, NYU Faculty Practice Radiology, Craig S. Radnay,

Defendants.

-----X
Judy Harris Kluger, J.:

FILED
OCT 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

Defendants, NYU Hospitals Center, Ramesh H. Gidumal, MD, Jodi B. Cohen, MD and Cornelia Golimbu, MD, move for an Order pursuant to CPLR §3103 vacating plaintiff's notice to take the videotaped deposition of Robert I. Grossman, MD, and for a protective order for all records that do not pertain to the care and treatment of the plaintiff; in addition, defendants move for an Order pursuant to 22 NYCRR 130-1.1 for costs and sanctions due to plaintiff's counsel's continual abusive prosecutorial efforts. Plaintiff, Adam D. Weiser, opposes the relief requested and cross-moves for an Order directing the noticed witness, Robert I. Grossman, MD, to appear for deposition and for sanctions, costs and attorneys fees for defense counsel's continued obstructionist conduct.

The court has reviewed the defendants' notice of motion, affirmation in support and exhibits dated May 2, 2013; the plaintiff's affirmation in opposition to the motion together with his cross-motion, affirmation in support and exhibits dated June 11, 2013; the defendants' reply affirmation in support of the motion to vacate together with their affirmation in opposition to the cross-motion and exhibits dated July 3, 2013; and, plaintiff's reply affirmation in further support of his cross-motion dated July 30, 2013. For the reasons stated below, the defendants' motion is granted in part and the plaintiff's cross-motion is denied.

Based upon the submissions before this court, it is undisputed that plaintiff, Adam D. Weiser, alleges that defendants who are the subject of the within motion (NYU Hospitals Center, Dr. Gidumal, Dr. Cohen and Dr. Golimbu) failed to properly diagnose and treat a navicular fracture between April 26, 2010 and June 3, 2010. More specifically, the Bills of Particular allege that Dr. Golimbu, a radiologist, negligently interpreted x-rays performed on April 26, 2010 and May 3, 2010; Dr. Cohen, also a radiologist, failed to properly interpret x-rays performed on May 17, 2010 and June 3,

2010; and that Dr. Gidumal's negligence occurred on April 26, 2010 and continued through July 15, 2010.¹

Defendants' Motion

In a motion dated May 2, 2013, the defendants seek an order from this court vacating plaintiff's notice to depose Robert I. Grossman, MD.² The defendants also aver that Dr. Grossman is entitled to a protective order to prevent harassment, time away from his responsibilities to the public and abuse of process. It is undisputed that Dr. Grossman is currently the dean and CEO of NYU Langone Medical Center and that he leads both NYU School of Medicine and NYU Hospitals Center (which is comprised of Tisch Hospital, the Hospital for Joint Diseases, the Hassenfeld Pediatric Center and the Rusk Institute of Rehabilitation Medicine).

Defendants concede that Dr. Grossman was in fact the Chairman of the Department of Radiology at some point in his career at NYU. However, he assumed his current responsibilities as CEO on July 1, 2007, three years prior to the alleged medical malpractice at issue.³ In that regard, it is defendants' position that Dr. Grossman was in no way involved in the treatment rendered to the plaintiff either directly or indirectly such that the noticed deposition would be warranted. To be sure, Dr. Grossman has also supplied an affidavit in which he confirms his various positions and titles at NYU and that he never treated or had any physician-patient relationship with the plaintiff. He further states that he did not supervise any of the named defendants in this matter. Moreover, Dr. Grossman unequivocally avers that he has no material information regarding the care and treatment of the plaintiff nor any relevant information to provide at a deposition.

In addition to the above relief, the defendant is seeking costs and sanctions against the plaintiff based upon plaintiff's counsel's alleged improper conduct and lack of any basis to pursue the deposition of Dr. Grossman.

The plaintiff contends that the testimony of the CEO is relevant and the scope of the questions to be asked will focus on, among other things, his training, experience and qualifications to be the Chief Executive Officer of the institution, as well as his knowledge of the relationship between the six named institutional defendants. By maintaining that the testimony is relevant, plaintiff refutes defendants' call for sanctions.

¹In his Bill of Particular, plaintiff states that the last date of treatment by Dr. Gidumal was June 3, 2010. So, while it seems that the reference to July 15 may be a typographical error, a resolution of this issue is not relevant to the outcome of the instant motions.

²The notice to depose Dr. Grossman is dated May 1, 2013.

³While it is true that during her deposition testimony, Dr. Jodi Cohen mentioned Dr. Grossman as the possible department chair, it is undisputed at this point that Dr. Michael Recht was, in fact, the chairman of her department at the time of the alleged malpractice.

Plaintiff's Cross-Motion

In the plaintiff's response and cross-motion, in addition to opposing the relief requested by the defendants as outlined above, the plaintiff seeks sanctions, costs and attorney's fees for what he alleges is a continuous pattern of obstructionist conduct by defendants' counsel during the course of the previously held depositions. Plaintiff cites and includes sample colloquy from the depositions of the defendants as well as the numerous objections made by defendants' counsel during the course of the examinations.

The defendants oppose the relief requested and maintain that although the objections made were numerous, they were made in good faith and to preserve the record for an eventual trial in this matter.

Based upon the foregoing, the court finds that CPLR §3101(a) provides for "full disclosure of all matter material and necessary in the prosecution and defense of an action . . ." The Court of Appeals held decades ago that "[t]he words, 'material and necessary', are . . . to 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." Allen v. Crowell-Collier Publishing Company, 21 NY 2d 403, 406 (1968). *See also*, Bustos v. Lenox Hill Hospital, 29 AD 3d 424 (1st Dept. 2006).

While this court is certainly cognizant of the fact that this long-standing and well established law as it pertains to disclosure is quite liberal, the court finds that Dr. Grossman's testimony would serve virtually no purpose in this case.⁴ Not only is his affidavit compelling in that he has no relevant information to offer but, even plaintiff's proffered line of questioning fails to establish any relevance to the issues in this case. *See e.g.*, Arendt v. General Electric, 270 AD 2d 622 (3rd Dept. 2000)(Third Department affirmed lower court's finding that plaintiffs failed to establish that CEO possessed necessary and relevant information germane to their lawsuit); Thomas v. Good Samaritan Hospital, 237 AD 2d 429 (2d Dept. 1997)(Given that corporate defendant submitted an affidavit stating that he had no personal knowledge of any of the facts relevant to the case, the plaintiffs were not entitled to demand his deposition).

With respect to the defendants' and plaintiff's cross-motions seeking sanctions and costs pursuant to 22 NYCRR 130-1.1, the court finds that while the relationship between the attorneys has been somewhat contentious, the court is declining to impose sanctions, costs and/or attorneys fees at this time. However, the court is strongly cautioning the attorneys to conduct themselves in a professional and courteous manner as this matter progresses.

⁴While plaintiff cites the knowledge of the CEO to explain the relationship between the six named institutional defendants and the chain of authority between them for the purpose of establishing liability, the defendants point to a previously provided affidavit dated January 4, 2012 from the Vice President of Medical Affairs which clarifies the identity of three of these entities as billing entities only.

Accordingly, the defendants' motion is granted to the extent of vacating plaintiff's notice to take the deposition of Robert I. Grossman, MD.⁵ The defendants' motion is denied in all other respects. Plaintiff's cross-motion for costs and sanctions is also denied.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York
September 30, 2013



Judy Harris Kluger, J.S.C.

FILED
OCT 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

⁵Counsel for plaintiff and defendants should be prepared to discuss the designation and scheduling of the deposition of an alternate witness at the next court conference on October 3, 2013.