To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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SHARON FERRARO, as Preliminary Executrix of the Estate of ERNEST FERRARO, Deceased , and SHARON FERRARO, Individually,

Plaintiffs,

-against-

WHITE PLAINS HOSPITAL CENTER, ABDUL ELFAR, M.D., SCARSDALE MEDICAL GROUP, LLP, LISA YOUKELES, M.D., RYE WALK-IN MEDICAL GROUP, P.C., SANDRA ANG-DESLOSANGELES, M.D. and KIMIKO WILLIAMS, R.N.,

Defendants.

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DECISION & ORDER

Index No.: 50707/2011
Seq# 1

LEFKOWITZ, J.

The following papers were read on this motion by defendants, White Plains Hospital Center ("WPHC"), Abdul Elfar M.D. ("Elfar"), Scarsdale Medical Group, LLP ("SMG") Lisa Youkeles, M.D. ("Youkeles") and Limiko Williams, M.D. ("Williams"), collectively, the moving defendants, for an order granting them leave to "reargue the proceeding that led to the Order" of this Court dated April 3, 2013, and upon such reargument, "vacating the branch of the April 3, 2013 Court Order stating that no further discovery is outstanding" and "allowing defendants to proceed with discovery".

Order to Show Cause – Affirmation, Exhibits
Affirmation in Opposition – Exhibits
Transcript of Oral Argument

Upon the foregoing papers and the proceedings held on May 20, 2013, this motion is determined as follows:

This is a medical malpractice and wrongful death action in which the plaintiffs claim that defendants failed to properly diagnose and treat meningitis, resulting in the death of Ernest Ferraro.

The preliminary conference stipulation and order entered on January 3, 2012, provided that the depositions of all non-party witnesses were to be completed on or before July 31, 2012 and all disclosure was to be completed on or before October 11, 2012. On August 7, 2012, a compliance conference was held and a compliance conference order was issued, establishing a schedule for the depositions of the parties, all to be completed on or before October 15, 2012. On September 28, 2012, a compliance conference was held, and a compliance conference order was issued extending the deadline for completing the depositions of certain defendants. The September 28, 2012 compliance conference order also directed that all discovery be completed on or before November 19, 2012.

On December 19, 2012, the parties again appeared for a compliance conference and a compliance conference order was issued once again extending the deadlines for the defendants' depositions which then remained outstanding and the matter was marked "final to certify" on February 12, 2013.

On March 15, 2013, movants requested authorizations to obtain tax returns and records of the decedent and plaintiff was directed to provide same pursuant to the compliance conference order issued on that date. Once again, the matter was marked "final to certify" on March 26, 20013. At that March 15, 2013 compliance conference, as plaintiff's counsel notes in their affirmation in opposition, for the first time, counsel for movants indicated that they wanted to take the non-party depositions of the decedent's law partner and accountants (Affirmation in Opposition, page 6).

On April 3, 2013, the parties again appeared for a compliance conference and the plaintiff was directed to provide redacted estate tax returns and to resend the decedent's partnership agreement to moving defendants' counsel. The compliance conference order issued on April 5, 2013 stated that depositions were complete and that "pursuant to the prior orders, including the PC Order, the time to conduct depositions, including non-parties has expired."

Contrary to the April 5, 2013 Order, on April 5, 2013, movants served subpoenas to take the depositions of the decedent's law partner and accounting firm on May 6, 2013 and May 7, 2013 respectively, at the offices of movant's counsel in Manhattan.

Movants now seek an order granting them leave to "reargue the proceeding that led to the Order" of this Court dated April 3, 2013, and upon such reargument, "vacating the branch of the April 3, 2013 Court Order stating that no further discovery is outstanding" and "allowing defendants to proceed with discovery."

A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court (*Weiss v Fire Extinguisher Svcs. Co.* 83 AD3d 822, 823 [2d Dept 2011]; *McGill v Goldman*, 261 AD2d 593, 594 [1999]; *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 26 [1st Dept 1992], *lv denied* [1992], *lv dismissed* 80 NY2d 1005 [1993]). On a motion seeking leave to reargue, a party must establish that "the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision" (*Carrillo v PM Realty*

Group, 16 AD3d 611 [2d Dept 2005]; *see* CPLR 2221 [d]; *Weiss v Fire Extinguisher Svcs. Co.* 83 AD3d at 823; *Ickes v Buist*, 68 AD3d 823 [2d Dept 2009]; *E.W. Howell Co. v S.A.F. LaSala Corp.*, 36 AD3d 653, 654 [2d Dept 2007]). Here, movants have failed to establish that this court overlooked or misapprehended any facts or law or for some other reason made a mistake in issuing the April 5, 2013 compliance conference order.

Assuming arguendo, that movant had established any basis for reviewing this court's prior order, no further discovery is warranted in this matter. CPLR 3101(a) provides 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. However, unlimited disclosure is not required, and the rules provide that the 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" (CPLR 3103[a]; *see Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, Spohn–Konen v Town of Brookhaven, 74 AD3d 1049; *Palermo Mason Constr. v Aark Holding Corp.*, 300 AD2d 460).

In general, supervision of disclosure is left to the broad discretion of the trial court, which shall balance the parties' competing interests (*Accent Collections, Inc. v Cappelli Enters. Inc.*, 84 AD3d at 1283; *see Kooper v Kooper*, 74 AD3d 6, 17; *Palermo Mason Constr. v Aark Holding Corp.*, 300 AD2d at 461).

With respect to non-party disclosure, a party seeking same pursuant to CPLR 3101(a)(4) must state the "circumstances or reasons" warranting discovery from the non-party (*Tenore v Tenore*, 45 AD3d 571 [2d Dept 2007]; *Smith v Moore*, 31 AD3d 628 [2d Dept 2006]; *Matter of Lutz v Goldstone*, 31 AD3d 449 [2d Dept 2006]). The moving party must demonstrate that non-party discovery sought is material, necessary and unavailable by means other than the non-party (*Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]; *Kondratick v Orthodox Church in America*, 73 AD3d 708 [2d Dept 2010]).[1]

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[1] Pursuant to CPLR §3101 (a)(4), a non-party is only required to participate in the discovery process after receiving "notice stating the circumstances or reasons such disclosure is sought or required." CPLR § 3101(a)(4); *see Knitwork Productions Corp. v Helfat*, 234 AD2d 345, 346 [2d Dep't 1996]. As such, a subpoena served on a non-party must meet the CPLR § 3101(a)(4) notice requirement to be deemed enforceable. *See Knitwork Productions Corp.*, 234 AD2d at 346; *Rickcki v Borden Chemical*, 195 AD2d 986 [2d Dep't 1993] The subpoenas at issue here, improperly returnable at movants' counsel's office in Manhattan, simply state "the reason such notice [sic] is sought is that defendants seek to obtain your testimony relating to the plaintiff herein." Such is insufficient notice of the reason why disclosure was sought (*see In the Matter of Validation Review Associates, Inc.*, 237 AD2d 614 [2d Dep't 1997]. Consequently, the subpoenas are facially defective.

Here, movants' basis for deposing the decedent's law partner and accountants can only be viewed as speculative at best. Indeed, they argue that Mr. Wyatt "may know" what the decedent's overall medical condition was throughout his partnership and in the week prior to his death. In Mr. Wyatt's affidavit submitted on this motion, Mr. Wyatt asserts that he did not notice anything unusual about the decedent's health, that he did not complain about any problems with his health, he was unaware of any significant medical history and that to his knowledge, the decedent was "a young, healthy man up until the events leading to his death" (Exhibit J to opposition papers). Similarly, movants seek to depose the firm's accountants, who have also submitted an affidavit stating that they have no further financial information regarding the decedent or his firm that is not provided in the tax returns (Exhibit "K" to opposition papers). Given the opportunity at oral argument to speak to the materiality or necessity of the non-party depositions, movants' counsel counsel could not articulate what information, if any, these non-parties would possess that would be material or necessary. Further, counsel could not justify that the information sought was unavailable by means other than the non-parties. For example, movants' counsel argued that she wanted to explore with Mr. Wyatt the hours worked by the decedent. However, in so far as the hours the decedent worked may be relevant, plaintiff has testified to the hours worked by her husband.

Therefore, moving defendants did not demonstrate that the non-party discovery sought is material, necessary and unavailable by means other than the non-party (*Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]; *Kondratick v Orthodox Church in America*, 73 AD3d 708 [2d Dept 2010]).[2]

Moreover, it must be noted that the service of the non-party subpoenas was untimely. The time to do pursuant to prior court orders had expired. In issuing the last compliance conference order, this court determined that this matter was trial ready. In flagrant disregard of that order,

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[2] Pursuant to CPLR §3101 (a)(4), a non-party is only required to participate in the discovery process after receiving "notice stating the circumstances or reasons such disclosure is sought or required" (CPLR § 3101(a)(4); *see Knitwork Productions Corp. v Helfat*, 234 AD2d 345, 346 [2d Dept1996]). A subpoena served on a non-party must meet the CPLR § 3101(a)(4) notice requirement to be deemed enforceable (*see Knitwork Productions Corp.*, 234 AD2d at 346; *Rickcki v Borden Chemical*, 195 AD2d 986 [2d Dept 1993]). The subpoenas at issue here, improperly returnable at movant defendants' counsel's office in Manhattan, simply state "the reason such notice [sic] is sought is that defendants seek to obtain your testimony relating to the plaintiff herein." Such is insufficient notice of the reason why disclosure was sought (see *In the Matter of Validation Review Associates, Inc.*, 237 AD2d 614 [2d Dept 1997]).

movants served facially defective subpoenas upon the non-parties. Movant's argument that discovery is not yet complete in that no note of issue has been filed is disingenuous since the court declined to issue a trial readiness order directing plaintiff to file a note of issue earlier in this action due to movants insistance in making this application. Consequently, a trial readiness order will now be issued.

As noted by the Court of Appeals, "if the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer,* 94 NY2d 118, 123 [1999]; *see also Gibbs v St. Barnabas Hospital*, 16 NY3d 74, 81 [2010]). "The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic non-compliance with deadlines also breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution" (*Gibbs,* 16 NY3d at 81).

The Court has considered the parties' remaining contentions an finds them without merit.

Accordingly, it is

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that a trial readiness order will issue on this date.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
October 3, 2013

HON. JOAN B. LEFKOWITZ, J.S.C.

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