

**Gasparre v Northern Westchester Hosp. Ctr. Found.,  
Inc.**

2013 NY Slip Op 32587(U)

March 4, 2013

Sup Ct, Westchester County

Docket Number: 55435/2011

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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

-----X  
JOAN ANN GASPARRE and LOUIS GASPARRE,

Plaintiffs,

**DECISION & ORDER**

-against-

Index No. 55435/11  
Motion Date: March 4, 2013  
Seq. No. 1

NORTHERN WESTCHESTER HOSPITAL CENTER  
FOUNDATION, INC.; NORTHERN WESTCHESTER  
HOSPITAL ASSOCIATION and JANE DOE, a  
fictitious name of an individual described herein; and  
NORTHERN WESTCHESTER HOSPITAL,

Defendants.  
-----X

LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs for an order compelling defendant Northern Westchester Hospital ("Northern Westchester") to produce Adam Hirsch, M.D. ("Dr. Hirsch") for deposition.<sup>1</sup> Northern Westchester opposes the motion.

Order to Show Cause - Affirmation in Support - Exhibits 1-8  
Affirmation in Opposition - Exhibit A

Upon the foregoing papers and the proceedings held on March 4, 2013, this motion is determined as follows:

Plaintiffs commenced this action against defendants for personal injuries resulting from a burn allegedly suffered by plaintiff Louis Gasparre ("Mr. Gasparre") while he was a patient at Northern Westchester. Mr. Gasparre was admitted to Northern Westchester on or about September 27, 2010, for, inter alia, pain in his lower back. Mr. Gasparre had a history of lower back pain and underwent back surgery in August 2010. Plaintiffs allege that on or about October

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<sup>1</sup> Plaintiffs also seek an order granting partial summary judgment and a determination that the issues presented in this case are within the knowledge of a lay person and that expert medical opinion on liability is not required. As this relief goes beyond the scope of the Discovery Motion Briefing Schedule and was stricken from the signed Order To Show Cause, it is not properly before the court and accordingly was not considered.

3, 2010, while Mr. Gasparre was a patient at Northern Westchester, he was administered a hot compress, or heat pack, by one of the hospital's nurses in an attempt to alleviate some of his back pain. Plaintiffs allege that the hot compress was too hot and burned Mr. Gasparre.

Plaintiffs served their verified amended complaint on or about October 13, 2011, and defendants served their verified answer on or about November 15, 2011. On November 28, 2012, plaintiffs deposed registered nurse, Erin Brady ("Brady"), who is currently employed by Northern Westchester and was also a nurse at the hospital at time of the alleged incident. On January 3, 2013, plaintiffs deposed non-party witness Rudonna Atkinson ("Atkinson"), who is currently a registered nurse employed by Somers Manor, a rehabilitative facility. At the time of the alleged incident Atkinson was employed by Northern Westchester as a patient care associate ("PCA").

Plaintiffs bring the instant motion seeking the additional deposition of Northern Westchester by Dr. Adam Hirsch. In support of their motion plaintiffs allege that Brady's deposition testimony was insufficient on the following grounds: Brady was only Mr. Gasparre's nurse for one shift; she was unable to stage burns; she was unaware of a nursing standard of care related to applying a heat pack; she did not know how the heat pack that allegedly injured Mr. Gasparre was warmed; she was not aware of whether the hospital has a written procedure for preparing a heat pack; she was not aware of Northern Westchester's procedures for preparing a heat pack; and, she was not trained in preparing heat packs other than in nursing school. Additionally, plaintiffs argue that Dr. Hirsch's deposition is necessary because he signed notes in Mr. Gasparre's chart and saw Mr. Gasparre on numerous occasions for at least one month following the incident.

In opposition, Northern Westchester argues that plaintiffs have failed to demonstrate the need for Dr. Hirsch's deposition. Northern Westchester points out that plaintiffs have completely failed to mention in their moving papers that they deposed Atkinson. Northern Westchester argues that to the extent Brady was unable to answer certain questions at her deposition, Atkinson was able to fully respond to those unanswered questions: she was trained on the procedure for preparing hot compresses at Northern Westchester as a PCA (Exhibit A, deposition transcript of Rudonna Atkinson, p. 11); she explained her training concerning the procedures and described in detail the methodology for preparing a heat pack (*Id.*); she specifically explained how the hot compress applied to Mr. Gasparre was prepared (Exhibit A at 15); she testified that no written hospital procedure exists for preparing a hot pack (*Id.* at 12-13); and she was able to identify the different stages of burns.

Additionally, Northern Westchester states that Atkinson was on duty when the incident occurred and that she personally responded to Mr. Gasparre's complaints concerning the hot compress. According to her deposition testimony, Atkinson was also the person who removed the hot compress from Mr. Gasparre's back. Northern Westchester states that Atkinson had a "vivid" recollection of Mr. Gasparre and of having observed his back after removal of the heat pack.

Northern Westchester argues that the combined testimony of Brady and Atkinson is sufficient to address the concerns raised by plaintiffs and that plaintiffs are not entitled to any further deposition of Northern Westchester. Northern Westchester further argues that other than a conclusory statement that Dr. Hirsch is an appropriate additional witness, plaintiffs have failed to identify any particular subject matter for which he could provide relevant testimony.

A corporate entity has the right to designate which of its representatives will appear for a deposition (*Barone v A&P*, 260 AD2d 417 [2d Dept 1999]). However, depositions of additional witnesses may be ordered “where it is demonstrated that the employee who had already been deposed had insufficient knowledge, or was otherwise inadequate, and that the employee proposed to be deposed can offer information that is material and necessary to the prosecution of the case” (*Bentze v Island Trees Union Free School Dist.*, 92 AD3d 709 [2d Dept 2012]); *Aronson v Im*, 2011 NY Slip Op 633 [2d Dept 2011]; *Mercado v Alexander*, 227 AD2d 391 [2d Dept 1996]; *Zollner v City of New York*, 204 AD2d 626 [2d Dept 1994]). The burden is on the examining party to show the witness already deposed did not have sufficient knowledge of the relevant facts or was otherwise inadequate (*Seattle Pac. Indus., Inc. v Golden Val. Realty Assoc.*, 54 AD3d 930 [2d Dept 2008]).

At the outset, plaintiff’s apparent attempt to mislead the court by completely omitting the fact that Atkinson’s deposition occurred is highly troubling. Were this court to rely solely on Brady’s testimony it is conceivable that plaintiffs would be entitled to further examination of Northern Westchester by an additional witness. However, in light of the deposition testimony by Atkinson which adequately provides the information plaintiffs sought but were unable to obtain from Brady’s deposition, plaintiffs have failed to demonstrate that they are entitled to a further deposition of Northern Westchester.

Moreover there is nothing in the record or in plaintiffs’ papers which supports the contention that Dr. Hirsch’s testimony is necessary. Plaintiffs’ contention that they are entitled to Dr. Hirsch’s deposition because he signed “many” of the notes in Mr. Gasparre’s charts is unavailing. A review of Exhibit 5 which includes excerpts from Mr. Gasparre’s hospital chart indicates that Mr. Gasparre was admitted to Northern Westchester on September 27, 2010 and was discharged from the hospital on November 3, 2010. Exhibit A includes 19 documents; of those documents Dr. Hirsch signed only eight, the remaining 11 documents were progress notes and evaluations prepared by a combination of eight other doctors or nurses. Notably, while Hirsch signed the progress note for October 3, 2010, he signed it prior to the occurrence of the incident. The addendum to the progress note which described the response to the incident was signed by a different physician entirely. Additionally, since Exhibit A includes only excerpts from Mr. Gasparre’s chart it is impossible to determine what weight those eight documents signed by Dr. Hirsch should be given relative to Mr. Gasparre’s entire chart and entire stay at Northern Westchester. Plaintiffs having offered no other reasons why they should be allowed to depose Dr. Hirsch, have failed to demonstrate an entitlement to further examination of Northern Westchester at this time.

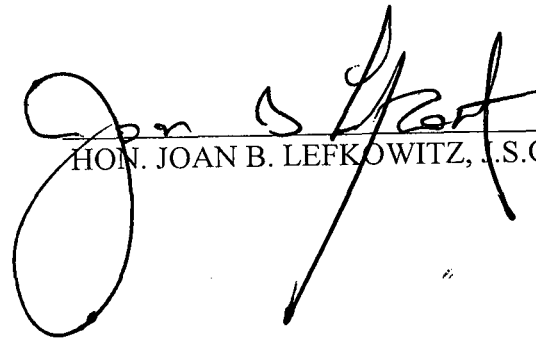
In view of the foregoing, it is

ORDERED that the branch of plaintiffs' motion seeking an order compelling the deposition of Dr. Adam Hirsch on behalf of defendant Northern Westchester Hospital is denied; and it is further

ORDERED that it otherwise appearing that all disclosure previously ordered herein has been completed or waived, and that the matter is ready for trial, a trial readiness order shall issue herewith.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
March 4, 2013

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

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cc: Compliance Part Clerk