

<b>Bogucki v Lawrence Hosp. Ctr.</b>
2013 NY Slip Op 32698(U)
July 15, 2013
Supreme Court, Westchester County
Docket Number: 59946/11
Judge: Joan B. Lefkowitz
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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  
ANDREW BOGUCKI, as Administrator of the  
Estate of ELISSA K. BOGUCKI,

Plaintiff,

-against-

LAWRENCE HOSPITAL CENTER and  
ERIC GORDON, M.D.,

Defendant.

-----X  
LEFKOWITZ, J.

**DECISION & ORDER**

Index No. 59946/11

Motion Date: July 15, 2013

Seq. no. 1

The following papers were read on this motion by defendants for an order compelling nonparty witnesses to comply with the duly served subpoenas and appear for a deposition, and a conditional order issuing a penalty against the nonparty witnesses pursuant to CPLR 2308 if they fail to appear for a deposition.

Orders to Show Cause-Affirmation in Support-Exhibits A-I  
Affirmation in Opposition-Exhibit A

Upon the foregoing papers and the proceedings held on July 15, 2013, the motion is decided as follows:

In this medical malpractice action, plaintiff claims that plaintiff's decedent died from a pulmonary embolism after sustaining a knee injury. Plaintiff claims, inter alia, that defendants were negligent as follows: failing to make a timely diagnosis and treat plaintiff's decedent's deep venous thrombosis; in failing to heed, appreciate or investigate plaintiff's decedent's complaints of pain in her calf when she stood up; failing to administer treatment for deep venous thrombosis and pulmonary embolism; in failing to administer appropriate anticoagulant treatment and thrombolytic therapy to treat her condition; in failing to consider the decedent's risk factors for deep venous thrombosis and pulmonary embolism; and in failing to refer decedent for appropriate testing.

The Preliminary Conference Order directed that plaintiff appear for a deposition on January 3, 2013 and defendants appear for a deposition on February 28, 2013 and March 14, 2013, respectively. The Preliminary Conference Order also directed that all party depositions be completed on or before April 29, 2013 and nonparty depositions be completed on or before May 30, 2013.

On April 18, 2013, plaintiff Andrew Bogucki appeared for a deposition. Plaintiff testified that he was the husband of decedent, but had not lived with decedent since 1994. Plaintiff also testified that decedent lived with her mother, Vera Sadovsky, and her brother, George Noll. Plaintiff did not know how much decedent earned at the time of her death or her benefits. Although plaintiff testified that decedent financially helped her mother before her death, he did not know specifically what bills decedent paid. Plaintiff testified that decedent stopped smoking two or three years before her death, but did not know if plaintiff had ever been diagnosed with high blood pressure, asthma, heart disease, circulatory problems, and did not know about her family health history. Plaintiff also didn't know if decedent was taking specific medications, did not know if decedent had been treated in an emergency room prior to December, 2009, and didn't know if decedent had sustained a knee injury prior to 2009. Plaintiff obtained his information about decedent's knee injury in December, 2009 from decedent's mother and about her death from a family member.

By letter dated April 23, 2013, defendants' counsel demanded plaintiff produce the nonparty witnesses Vera Sadovsky and George Noll for a deposition. Plaintiff's counsel had earlier indicated that he had control over and would produce the nonparty witnesses for a deposition after defendants' depositions. Defendants' counsel asserted in the letter that he would be serving subpoenas on the nonparty witnesses since plaintiff had "absolutely no pertinent information regarding the medical care and treatment that is the subject of the lawsuit nor of the circumstances surrounding decedent's death."

On April 25, 2013, defendants served the nonparty witnesses with subpoenas and Notices to Take Deposition Upon Oral Examination. The subpoenas directed the nonparty witnesses to appear for a deposition on May 22, 2013.

By letter dated April 30, 2013, plaintiff's counsel advised defendants' counsel that plaintiff intended to go forward with defendants' depositions which the court ordered be completed by April 29, 2013. Plaintiff's counsel asserted that any defenses which may be based on the nonparty witnesses' testimony, should not change defendants' testimony regarding the treatment provided to decedent. Plaintiff's counsel also rejected the request of defendants' counsel that the nonparty witnesses be produced "out of turn." Plaintiff's counsel also disagreed with the assertion of defendants' counsel that plaintiff did not have any pertinent information regarding the medical care and treatment of plaintiff.

The nonparty witnesses failed to appear for depositions on May 22, 2013. As of that date, defendants also had not appeared for depositions.

On June 4, 2013, the parties attended a compliance conference. At the compliance conference, a briefing schedule for the present motion was issued. By Compliance Conference Order dated June 5, 2013, this court directed defendant Gordon appear for a deposition on or before July 26, 2013 and defendant Lawrence Hospital appear for a deposition on or before August 9, 2013.

Defendants now seek, inter alia, an order compelling the nonparty witnesses to comply with the subpoenas and appear for a deposition. Defendants contend that the nonparty witnesses depositions are necessary since plaintiff knew nothing about decedent's medical history or treatment and had no first hand knowledge regarding decedent's financial contributions to her household. Defendants contend that the nonparty witnesses, who lived with decedent at the time of her death, have information which is material and relevant to the issues in this action. Defendants also contend that they should be able to investigate what risk factors were present at the time of her death and whom she made complaints to regarding her leg pain since plaintiff alleges that defendants failed to appreciate decedent's complaints of leg pain and failed to consider decedent's risk factors. Defendants further assert that the nonparties have not moved to quash the subpoenas nor have they stated objections to the subpoenas. Finally, defendants contend that there is no reason to wait to depose the nonparty witnesses until the end of discovery.

Plaintiff partially opposes the motion. Although plaintiff does not object to the nonparty depositions being taken, plaintiff asserts that the party depositions should be completed prior to the nonparty depositions. Plaintiff asserts that there is no reason to change the order of the depositions since the testimony of defendants' witnesses should not change based upon the nonparty witnesses' testimony. Plaintiff relies upon the Preliminary Conference Order, which plaintiff contends directed that party depositions be completed by April 29, 2013 and the nonparty depositions be completed thereafter. Plaintiff also contends that if the nonparty witnesses appear for depositions prior to defendants' depositions, then defendants' witnesses may tailor their testimony to the nonparty witnesses' testimony. Plaintiff finally contends that defendants have failed to show it is necessary to complete the nonparty depositions prior to the completion of the party depositions.

Insofar as plaintiff does not oppose that branch of the motion seeking an order compelling the nonparty witnesses to appear for a deposition and defendants have established that the nonparty witnesses possess relevant and material information regarding decedent's health history and treatment, as well as regarding damages, which could not be obtained from plaintiff, that branch of the motion is granted (*see Kooper v Kooper*, 74 AD3d 6 [2d Dept 2010]). The only disputed issue on this motion is the timing of the nonparty depositions and whether they can be held prior to the completion of defendants' depositions.

Initially, the court notes that, contrary to plaintiff's contention, the Preliminary Conference Order did not direct that party depositions be completed before the nonparty depositions. Notably, the Preliminary Conference Order directs that party depositions be completed on or before April 29, 2013 and nonparty depositions be completed on or before May 30, 2013. Accordingly, pursuant to the Preliminary Conference Order, the nonparty depositions were directed to be held at any time on or before May 30, 2013, and there was no condition that the party depositions be completed prior to the nonparty depositions. Moreover, CPLR 3106 (a) does not state a priority for deposing a nonparty, and any party can seek to depose a nonparty

once the action has been commenced (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3106:1).

Under the circumstances of this case, defendants are entitled to information regarding the decedent's health history, complaints and events surrounding the treatment at issue prior to their own depositions. Notably, in most cases, plaintiff would testify at a deposition prior to defendant and provide defendant with such relevant information. Accordingly, that branch of defendants' motion, which essentially seeks an order compelling the nonparty witnesses to appear for a deposition prior to defendants' depositions is granted. The nonparty witnesses shall appear for a deposition on or before August 9, 2013, at the time and place to be designated by defendants' counsel. The depositions of defendants shall be held after the nonparty depositions are completed, but no later than August 30, 2013.

The branch of the motion seeking an order issuing a penalty against the nonparty witnesses for their continued failure to appear for a deposition is denied with leave to renew in the event that the nonparty witnesses fail to appear for a deposition on or before August 9, 2013.

In view of the foregoing, it is

ORDERED that the branch of defendants' motion seeking an order compelling the nonparty witnesses to comply with the subpoenas served by defendants and appear for a deposition is granted, and nonparties Vera Sadovsky and George Noll are directed to appear for a deposition on or before August 9, 2013 at the time and place to be designated by defendants' counsel; and it is further

ORDERED that the branch of defendants' motion seeking a penalty against the nonparties if they continue to fail to appear for a deposition is denied with leave to renew if the nonparties fail to appear for a deposition on or before August 9, 2013; and it is further

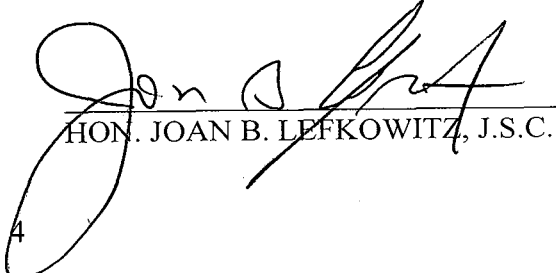
ORDERED that defendants shall appear for a deposition after the nonparty depositions are completed, but no later than August 30, 2013; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff and the nonparties within 10 days of entry; and it is further

ORDERED that all counsel shall appear in the Compliance Part, Courtroom 800, for a conference on September 10, 2013 at 9:30 A.M.

The foregoing constitutes the decision and order of this court.

Dated: White Plains, New York  
July 15, 2013

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

TO:

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cc: Compliance Part Clerk