

Giacinto v Shapiro

2013 NY Slip Op 32818(U)

February 13, 2013

Supreme Court, Westchester County

Docket Number: 52228/12

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
BENITO GIACINTO, as Administrator of the Estate of
LUCIA GIACINTO AND BENITO GIACINTO,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 52228/12
Motion Date: Feb. 11, 2013
Seq. No. 1

GEORGE SHAPIRO, M.D., JEFFREY SHAPIRO, M.D.,
MICHAEL MORELLI, M.D., SADIA SABOOR, M.D.,
AND LAWRENCE HOSPITAL CENTER,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read upon this application by defendants Michael Morelli, M.D. and Lawrence Hospital Center (hereinafter "movants") for an order, pursuant to CPLR §2308 (b) compelling non-party witness Giovanna Sinno (hereinafter "Ms. Sinno") to comply with the duly served subpoena and appear for her deposition or upon continued failure to appear for her deposition for a penalty as specified in CPLR § 2308 (b). Plaintiffs oppose the motion.

Order to Show Cause - Attorney Affirmation -
Exhibits A-G
Affirmation in Opposition

Upon the foregoing papers and the proceedings held on February 11, 2013,¹ this motion is decided as follows.

Plaintiffs, Benito Giacinto (hereinafter "Mr. Giacinto"), and Benito Giacinto, as Administrator of the Estate of Lucia Giacinto, bring this action to recover damages alleging medical malpractice and wrongful death of Mr. Giacinto's wife, Lucia (hereinafter the "decedent"). The action was commenced by the filing of a summons and verified complaint on February 15, 2012. Issue was joined by movants on April 16, 2012, with service of a verified answer. Plaintiffs allege, inter alia, that defendants misdiagnosed the decedent's medical condition and negligently prescribed a toxic combination of drugs resulting in toxicity, lactic

¹ Plaintiffs' counsel appeared on this motion by telephone.

acidosis and her death. Pursuant to the Preliminary Conference Order filed on June 4, 2012, all depositions of the parties were to occur by November 14, 2012 and all non-party depositions were to be completed by November 28, 2012.

Mr. Giacinto appeared and was deposed by the attorneys for all of the defendants in this action on September 24, 2012. Movants state that at his deposition Mr. Giacinto was unable to provide any relevant information and that nearly all of his responses consisted of “I don’t know”, “I don’t remember”, or “my daughters know all of this information.” (Ex. E, Deposition Transcript of Benito Giacinto, September 24, 2012). Movants contend that Mr. Giacinto was unable to testify about the decedent’s medical history or medications (Ex. E at pp 33-4). Additionally, movants state Mr. Giacinto testified that his daughters were with the decedent most of the time during her hospitalization and that they were the ones who primarily interacted with the decedent’s physicians (Ex. E at pp 30-1, and 52).

On November 16, 2012, movants served non-party witness, Ms. Sinno, one of Mr. Giacinto’s daughters, with a subpoena to appear for her deposition on December 14, 2012. The parties were served with the subpoena and notice of deposition by mail on November 15, 2012. Movants allege that on December 13, 2012, they were advised by plaintiffs’ counsel that Ms. Sinno would not be appearing for her deposition scheduled for the next day, and in fact Ms. Sinno did not appear for her deposition. On December 18, 2012, the parties appeared for a compliance conference at which time movants aver that plaintiffs’ counsel acknowledged that he had advised Ms. Sinno not to appear for the deposition.² A Discovery Motion Briefing Schedule was issued at that conference pursuant to which the instant motion is made.

In support of their motion movants argue that pursuant to CPLR §2308, Ms. Sinno should be compelled to comply with the duly served subpoena as she improperly failed to appear for her deposition. Movants further argue that if a non-party witness who is subject to a non-judicial subpoena for a deposition does not intend to appear for the deposition, the appropriate remedy is for the non-party witness to challenge the subpoena in court and specify the grounds for their objection. Movants contend that Ms. Sinno has not objected to the service, validity or scope of the non-party subpoena served upon her by movants, but rather has chosen to, or was advised to, ignore the subpoena. Movants contend that the generally accepted convention which provides that non-party witnesses are produced after named defendants must give way in a situation such as this when the named plaintiff is unable to give testimony relevant to the lawsuit and the non-party witness and her two sisters are the only sources of testimony concerning such important issues as the decedent’s prior medical and medication history, her physical condition preceding her hospitalization and recollection of any conversations with decedent’s care providers during her hospitalization. Movants argue the information they seek is material and necessary in order to fully understand all the medical issues involved and to evaluate potential liability.

In opposition plaintiffs argue that they have always offered to produce Ms. Sinno, but had agreed to produce her only after the completion of the parties’ depositions. Plaintiffs argue that the CPLR clearly provides for depositions to go forward in the order in which they are noticed

² This allegation is not refuted or denied in plaintiffs’ opposition papers.

and that since Ms. Sinno's deposition was noticed after those of defendants then those depositions must be completed prior to Ms. Sinno's.

Generally speaking, CPLR§3101 (a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." A party seeking disclosure from a non-party pursuant to CPLR §3101(a)(4) must state "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 party must demonstrate 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]).

A review of Mr. Giacinto's deposition testimony clearly shows that he is unable to provide information concerning the decedent's medical history, her physical condition, the medications she was taking prior to her hospitalization, or the interactions between the decedent and her care providers during her hospitalization. In Mr. Giacinto's own words, the persons with this knowledge are his daughters, which includes Ms. Sinno. Movants are clearly entitled to Ms. Sinno's deposition.

CPLR §3106 provides in pertinent part that after the commencement of an action, any party may take the deposition of any person with the additional requirement that in the case of non-parties the notice be served by a subpoena. A review of the subpoena and affidavits of service show that the subpoena was duly served upon Ms. Sinno and the parties to this action. Nothing in the record suggests that Ms. Sinno (or plaintiffs for that matter) moved to quash the subject subpoena, sought an order of protection or made any other requests for its withdrawal or modification (see *Siegel*, NY Prac §384, at 675 [5th ed]). In fact, the only argument plaintiffs proffer in opposition is that they should be able to complete the depositions of the remaining defendants before Ms. Sinno can be deposed. In light of the circumstances of this case, especially Mr. Giacinto's inability to provide any relevant testimony concerning the issues central to this case, the Court finds that movants are entitled to Ms. Sinno's deposition and find plaintiffs' arguments to the contrary unpersuasive.

CPLR §2308 (b) allows for the imposition of costs not exceeding \$50.00 if a court finds that a non-party has failed to obey an authorized subpoena. Additionally, the statute provides that the "...subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply." To the extent that Ms. Sinno has failed to comply with the subpoena as served upon her, she is subject to this statute. However, the only evidence before the court concerning the reason Ms. Sinno failed to honor the subpoena is the deeply troubling and unrefuted assertion that plaintiff's counsel told her not to appear. Under these circumstances, the court will not impose the statutory costs and penalties upon Ms. Sinno. Instead, plaintiff's counsel is directed to pay movants' counsel \$250.00, on or before February 20, 2013, for the costs associated with this motion and to reinforce the fact that when an individual wishes to question a subpoena the only appropriate course of conduct is to apply to the court for relief.

Accordingly, it is

ORDERED that the motion by defendants Michael Morelli, M.D. and Lawrence Hospital Center to compel the deposition of Giovanna Sinno is granted and Giovanna Sinno is directed to

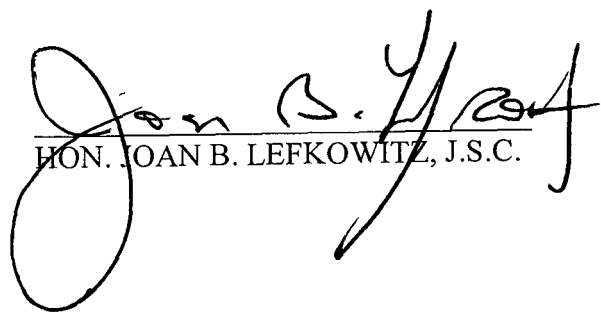
appear for her deposition on or before February 28, 2013, at a time and place mutually agreed upon by her and the parties; and it is further

ORDERED that plaintiff's counsel is directed to pay to movants' counsel the sum of \$250.00 on or before February 20, 2013, for the costs associated with this motion; and it is further

ORDERED that defendants Michael Morelli, M.D. and Lawrence Hospital Center are directed to serve a copy of this Order with Notice of Entry upon counsel for defendant George Shapiro, M.D. and Giovanna Sinno within ten (10) days of entry; and it is further

ORDERED that Counsel are directed to appear in the Compliance Part, Courtroom 800, on March 1, 2013 at 9:30 a.m. for a conference.

Dated: White Plains, New York
February 13, 2013


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

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CC: Compliance Part Clerk