

Sager v New York Presbyt. Columbia Univ. Med. Ctr.
2014 NY Slip Op 30678(U)
March 14, 2014
Supreme Court, New York County
Docket Number: 100756/10
Judge: lobis
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS
Justice

PART 6

JEROME SAGER and WENDY SAGER,

Plaintiffs,

- v -

NEW YORK PRESBYTERIAN COLUMBIA
UNIVERSITY MEDICAL CENTER, DESMOND
JORDAN, M.D., and JIN J. HUANG, M.D.,

Defendants.

INDEX NO. 100756/10
MOTION DATE 12/17/13
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to compel.

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1 _____
2 _____
3, 4 _____

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

*and
ORDER*

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

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COUNTY CLERK'S OFFICE

Dated: March 14, 2014

JB
JOAN B. LOBIS, 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
NEW YORK COUNTY: IAS PART 6**

-----X
JEROME SAGER and WENDY SAGER,

Plaintiffs,

-against-

Index No. 100756/2010
Decision and Order

NEW YORK PRESBYTERIAN COLUMBIA UNIVERSITY
MEDICAL CENTER, DESMOND JORDAN, M.D., and JIN
J. HUANG, M.D.,

Defendants.

FILED

MAR 19 2014

-----X
JOAN B. LOBIS, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

Post-note of issue in this medical malpractice action, plaintiffs seek to depose the defendant Desmond Jordan, M.D., and have this Court order the production of manuals and protocols relating to New York Presbyterian Columbia University Medical Center (NYP) operations. For the following reasons the motion is denied.

The action was commenced on January 20, 2010. Plaintiffs sue for damages for injuries they allege resulted from the negligent performance of a cardiac ablation on Jerome Sager. Wendy Sager is Jerome Sager's spouse. The procedure was performed at NYP on October 24, 2007. Dr. Desmond Jordan was responsible for intubating Mr. Sager. Dr. Jin J. Huang was the resident who was monitoring the anesthesia during the procedure.

A preliminary conference was held on August 2, 2010. A series of compliance conferences were held and various dates were set for the deposition of Dr. Jordan. The court file

contains a Notice of Discovery and Inspection of Rules and Regulations addressed to the defendant hospital dated May 19, 2010, with an unsigned and undated affidavit of mailing. The Compliance Conference Order of October 5, 2010, listed as an additional directive that Defendants were to provide responses to Plaintiffs' demands for discovery and inspection within 20 days. Subsequent compliance conferences refer to discovery being outstanding or incomplete but do not specifically mention the manuals or protocols of NYP.

The last reference to deposing Dr. Jordan was contained in a stipulation dated December 13, 2011, and it provided that defendant NYP reserved its rights to a deposition of Dr. Jordan within 30 days of the receipt of plaintiffs' amended bill of particulars. No mention was made of plaintiffs reserving their rights. The last reference to documents was also contained in that stipulation. The request was for exhibits marked at a deposition of Dr. Garan, a witness produced by NYP.

In a stipulation dated March 27, 2012, the parties agreed that Dr. Jordan would provide an affidavit saying that he performed the intubation on Mr. Sager. Such an affidavit dated April 25, 2012, was provided. Plaintiffs filed a Note of Issue on May 9, 2012, stating that all necessary discovery was completed. A pre-trial conference was held on June 6, 2012, and a trial date of December 3, 2012, was agreed to and ordered.

The matter first appeared in Part 40 as a trial ready case on October 4, 2013. It was adjourned several times and sent back to my part, Part 6, for consideration of an Order to Show

Cause that I signed on December 2, 2013. The return date was December 17, 2013. The relief requested was to allow a deposition of Dr. Jordan and the production of the manual or protocol of NYP in existence in October 2007 for the departments of anesthesiology and electrophysiology. The plaintiffs have settled with NYP and Dr. Huang.

On December 17, 2013, the motion was submitted and granted on default. One day later the parties entered a stipulation to adjourn the motion until January 21, 2014. My part rules require court approval before adjournments even if the parties consent. The stipulation was not received by the Court until after the order granting plaintiffs' application was signed and entered on December 20, 2013. The defendant now moves to vacate the default order allowing for his deposition and requiring the production of documents. At the oral argument, I indicated to the parties that the order entered on default would be vacated since no intentional default occurred, and the Order to Show Cause of December 2, 2013, would be considered on the merits.

Although he is an attorney admitted to practice in the State of New York, Mr. Sager is now pro se. His previous attorney was relieved by order of the Honorable George Silver, the justice presiding over part 40 on November 4, 2013, while the case was trial ready. Mr. Sager asks that discovery should be completed before he has to start the trial and that his former attorney has perpetrated a fraud on the Court. The defendant argues that plaintiffs should not be allowed to reopen discovery at this late date. He asserts that an affidavit submitted by Dr. Jordan was in lieu of a deposition. Moreover, NYP is the proper party from which to any the documents relating to NYP manuals or protocols. In the alternative, if a deposition of Dr. Jordan is ordered, then the note of issue should be stricken.

The plaintiffs argue in reply that the affidavit of Dr. Jordan is not the equivalent of a deposition. They argue there was never waiver of such discovery. The balance of the reply is devoted to arguing the facts they believe support their claim and disputing the claim that Dr. Jordan cannot produce the manuals or protocols requested.

In Price v. Bloomingdale's, Div. Of Federated Dep't Stores, Inc., 166 A.D.2d 151 (1st Dep't 1990), the court set out the standard for post-note of issue discovery, citing Title 22, Section 202.21(e) of the Codes, Rules, and Regulations of the State of New York. Post-note of issue discovery is prohibited absent a showing of "unusual [and] unanticipated circumstances." Plaintiffs' arguments do not come close to meeting this standard. While it is unusual to forgo a deposition of a party, it cannot be said it was unanticipated given the limited interval between the receipt of the affidavit from Dr. Jordan without an effort to follow up and schedule his deposition and the filing of the note of issue. Moreover it is not clear how the manuals and protocols that the plaintiffs seek are necessary to plaintiffs' case. At best plaintiffs have disagreed with their former attorney's litigation strategy. Their former attorney signed the Note of Issue and checked the box that all necessary discovery was complete. Attached was the attorney's affirmation that affirmed all parties have been deposed. The statement was not accurate, but that fact is not cause to vacate the note.

The motion by plaintiffs is denied and the matter restored to the Part 40 calendar on April 16, 2014. This constitutes the decision and order of this Court.

Dated: *Mar. 14*, 2014

FILED ENTER:

MAR 19 2014
NEW YORK
COUNTY CLERKS OFFICE



JOAN B. LOBIS, J.S.C.