Rosen v Bitan
2014 NY Slip Op 30780(U)
March 17, 2014
Supreme Court, Suffolk County
Docket Number: 07-16128
Judge: Joseph A. Santorelli
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 07-16128

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 8-14-13
MOTION DATE 9-25-13
ADJ. DATE 2-11-14
Mot. Seq. # 009 - MotD
010 - MotD

NANCY ROSEN and PAUL B. ROSEN, Plaintiffs, -against- FABIAN D. BITAN, M.D., ROBERT BRADY, M.D., NORMAN BLOOM, M.D., BETH ISRAEL MEDICAL CENTER and JEAN-PIERRE CLAUDE FARCY, M.D., Defendants.	CHRISTOPHER S. OLSON, ESQ. Attorney for Plaintiffs 434 New York Avenue Huntington, New York 11743 AARONSON RAPPAPORT & FEINSTEIN Attorney for Defendants Bitan & Beth Israel 600 Third Avenue, 5th Floor New York, New York 10016 SANTANGELO & SLATTERY Attorney for Defendant Bloom 1800 Northern Boulevard Roslyn, New York 11576 HEIDELL, PITTONI, MURPHY BACH Attorney for Defendant Farcy 1050 Franklin Avenue Garden City, New York 11530 PATTERSON, BELKNAP, WEBB Attorney for Non Party DePuy Orthopaedics & Depuy Synthes Products 1133 Avenue of the Americas New York, New York 10036-6710

Upon the following papers numbered 1 to 53 read on these motions to quash subpoenas ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9, 33 - 40 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 18, 21 - 29, 41 - 51 ; Replying Affidavits and supporting papers 30 - 32, 52 - 53 ; Other Statement of Nonparty 19 - 20 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion (#009) by the defendant Fabian D. Bitan for an order quashing the subpoena duces tecum dated June 28, 2013 served by the plaintiffs upon nonparties Depuy Orthopaedics, Products, Inc. and CT Corporation System, for a protective order pursuant to CPLR 3103, and for sanctions pursuant to CPLR 8106, 22 NYCRR § 130-1.1 and CPLR 8383-a(c)(1), is granted to the extent that the issue whether said subpoena is enforceable is deemed to have been rendered academic by the service of a subsequent subpoena by the plaintiffs, and is otherwise denied; and it is further

ORDERED that this motion (#010) by the defendant Fabian D. Bitan for an order quashing the subpoena duces tecum dated July 29, 2013 served by the plaintiffs upon nonparties Depuy Synthes, Inc. and CT Corporation System, for a protective order pursuant to CPLR 3103, and for sanctions pursuant to CPLR 8106, 22 NYCRR § 130-1.1 and CPLR 8303-a(c)(1), is granted to the extent that said subpoena is quashed and the protective order issued June 26, 2013 (Jones, Jr., J.) remains in effect, and is otherwise denied.

The plaintiffs commenced this action to recover for personal injuries arising out of alleged medical malpractice while the plaintiff Nancy Rosen (Rosen) was a patient from December 2, 2004 through December 15, 2004 at Beth Israel Medical Center. In their complaint, the plaintiffs allege in their first cause of action that the defendants performed a contraindicated surgery upon Rosen, and that they negligently performed a second surgical procedure on December 15, 2004. Said cause of action also includes allegations that the defendants' actions were "predicated on reprehensible motives, and constituted outrageous, willfully [*sic*] indifference to the plaintiff's well-being and/or ... grossly negligent behavior," entitling the plaintiffs to punitive damages. The second cause of action in the complaint is based upon allegations of lack of informed consent, and a loss of services claim is asserted on behalf of the plaintiff Paul B. Rosen in the third cause of action. The substance of the plaintiffs' claim for punitive damages is that the defendant Fabian D. Bitan, M.D. intentionally inserted a contraindicated prosthetic spinal disc, known as the SB Charite Disc and manufactured by "Depuy," into the plaintiff based on financial gain and his business affiliation with said manufacturer.

In considering these motions, it is appropriate to set forth some background information regarding the plaintiffs' earlier attempt to obtain the information sought in these subpoenas. The plaintiffs originally served a subpoena duces tecum dated March 28, 2013 (Subpoena 1) upon nonparties Depuy Orthopaedics, Products, Inc. and CT Corporation System. The defendant Fabien D. Bitan, M.D., sued herein as Fabian D. Bitan, M.D. (Bitan) moved for an order quashing Subpoena 1 and for a protective order. By order dated June 26, 2013, the Court (Jones, Jr., J.) granted Bitan's motion in its entirety, and provided, in pertinent part:

> The motion to quash the subpoena and for a protective order is granted. The subpoena ... is facially defective and unenforceable ... In any event, "[m]ore than mere relevance and materiality is necessary to warrant disclosure from a nonparty" (citations omitted) ... The parties are directed to appear for a compliance conference ... to set a schedule for the remaining discovery to be completed in the case. If further discovery, including the defendant's deposition testimony in this case, warrants discovery from a nonparty, the Plaintiff may apply for it at that time

> supporting the application with more than conclusory assertions that the sought after discovery is material and necessary to the prosecution of the action.

Two days later, the plaintiffs served a subpoena duces tecum dated June 28, 2013 (Subpoena 2) upon nonparties Depuy Orthopaedics, Products, Inc. and CT Corporation System which purported to cure the "facially defective" nature of Subpoena 1 without conducting further discovery as directed by the Court. Bitan's motion (#009) seeks to quash Subpoena 2 on the grounds, among other things, that the materials sought are not material and necessary in this action, that said subpoena is being used improperly to seek discovery or the existence of evidence, and that the effort violates the protective order granted on June 26, 2013. In support of his motion, Bitan submits copies of Subpoena 1 and 2, the court order dated June 26, 2013, an order in an unrelated case, and a letter to counsel for the plaintiffs from counsel for the named nonparties regarding Subpoena 2.

By letter dated July 16, 2013, and before the return date set forth in Subpoena 2, counsel for "Depuy Orthopaedics" objected to said subpoena on the grounds that it did not allow the recipients at least 20 days for the production of documents pursuant to CPLR 3120, that it requested information and documents not relevant to the litigation, and that there is no legal entity named "Depuy Orthopaedics, Products, Inc." It is undisputed that, in response to said objections, the plaintiffs served a third subpoena dated July 29, 2013 (Subpoena 3) upon nonparties Depuy Synthes, Inc. (formerly Depuy, Inc.) and CT Corporation System (collectively Depuy). In addition, nonparties Depuy Orthopaedics, Products, Inc. and Depuy Synthes Products, LLC (Depuy) submitted a "Statement" in support of Bitan's motion (#009) setting forth its contentions that Subpoena 2 should be quashed.

In opposition to Bitan's motion (#009), the plaintiffs contend that the information sought in Subpoena 2 is relevant, and material and necessary to enable them to prosecute their claim that they are entitled to punitive damages in their action. However, they do not address the procedural issues raised by Bitan and the named nonparties. That is, the contentions that Subpoena 2 is procedurally defective, that the intended recipient is not a legal entity, and that they seek information covered by the Court's protective order dated June 26, 2013. In light of the plaintiffs' failure to address these issues, and their implied if not express acknowledgment that Subpoena 2 is unenforceable, Bitan's motion (#009) is granted to the extent that said subpoena is quashed on the ground that it is academic.[1]

Less than two weeks after receiving the letter from counsel for the named nonparties, the plaintiffs served a subpoena duces tecum dated July 29, 2013 (Subpoena 3) upon nonparties Depuy Synthes, Inc. and CT Corporation System (Depuy). Bitan's motion (#010) seeks to quash Subpoena 3 on the same grounds as set forth in his motion #009. That is, among other things, that the materials sought are not material and necessary in this action, that said subpoena is being used improperly to seek discovery or the existence of evidence, and that the effort violates the protective order granted on June

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[1] Because Subpoena 2 and Subpoena 3 are identical except for the date they were issued and the return date, the substantive issues raised by the plaintiffs are nonetheless resolved by the determinations set forth in the Court's discussion of Bitan's motion #010.

26, 2013.

All three of the subject subpoenas contain an identical demand for the production of documents from the intended recipients. In addition, Subpoena 2 and 3 contain identical exhibits entitled "Circumstances And Reasons For Requesting The Aforementioned Disclosure." The exhibits are intended to cure the Court's determination in its order dated June 26, 2013 that Subpoena 1 was facially defective in that it failed to include a notice setting forth such information. While the plaintiffs have addressed the Court's concerns regarding the procedural issues regarding its subpoenas, they have failed to consider the Court's concerns regarding the substance of said subpoenas, all of which demand the production of:

> "any and all information in connection with compensation, remuneration and/or rebate to Dr. [Fabian] Bitan or to any entity on behalf of or, on account of Dr. Fabian Bitan, for professional or other services, including but not limited to the use, sale, distribution, studies, consultation, training, promotion, speaking engagements, lectures, poster presentations, CME course, seminars, etc.; payment for associated expenses; as well as gifts and gratuities, in relation to or in connection with, both the surgery involving the Charite disc and the Charite disc and its components beginning in the year 2000 up to the present time ..."

A subpoena should be quashed when the materials sought are irrelevant or when it is being used as a fishing expedition to ascertain the existence of evidence (*see* ***Matter of Terry D.***, 81 NY2d 1042, 601 NYS2d 452 [1993]; ***Law Firm of Ravi Batra, P.C. v Rabinowich***, 77 AD3d 532, 909 NYS2d 706 [1st Dept 2010]; ***Matter of Constantine v Leto***, 157 AD2d 376, 557 NYS2d 611 [3d Dept 1990]; ***Matter of Gelderman***, 111 AD2d 332, 489 NYS2d 315 [2d Dept 1985]; *see also* ***Oak Beach Inn Corp. v Town of Babylon***, 239 AD2d 568, 658 NYS2d 72 [2d Dept 1997]). In addition, courts have broad discretion to determine when the demands in a subpoena are overly broad or in the nature of discovery (*see* ***Conte v County of Nassau***, 87 AD3d 558, 929 NYS2d 741 [2d Dept 2011]; ***Young v Baker***, 21 AD3d 550, 799 NYS2d 913 [2d Dept 2005]; *see also* ***Genevit Creations v Gueits Adams & Co.***, 306 AD2d 142, 760 NYS2d 323 [1st Dept 2003]; ***Tower Bldg. Restoration v 20 E. 9th St. Apt. Corp.***, 290 AD2d 275, 736 NYS2d 24 [1st Dept 202]; ***Oak Beach Inn v Town of Babylon***, *supra*; ***Mestel & Co v Smythe Masterson & Judd***, 215 AD2d 329, 627 NYS2d 37 [1st Dept 1995]).

In its order dated June 26, 2013, the Court (Jones, Jr., J.) previously determined that, at this time, the plaintiffs have failed to demonstrate that the information and records sought from the nonparties is material and necessary to its claims (*see* ***Humphrey v Kulbaski***, 78 AD3d 786, 911 NYS2d 138 [2d Dept 2010]; ***Mendelovitz v Cohen***, 49 AD3d 612, 852 NYS2d 795 [2d Dept 2008]), and cannot be obtained from other sources (*see* ***Conte v County of Nassau***, *supra*; ***Troy Sand & Gravel Co., Inc. v Town of Nassau***, 80 AD3d 199, 912 NYS2d 798 [3d Dept 2010]; ***Kooper v Kooper***, 74 AD3d 6, 901 NYS2d 312 [2d Dept 2010]). In light of that determination, by order dated June 26, 2013, the Court (Jones, Jr., J.) granted Bitan a protective order requiring the plaintiffs to conduct discovery, and most importantly to conduct the deposition of Bitan, to obtain information enabling them to establish the elements necessary to support the service of a subpoena or subpoenas to obtain the information and

documents initially requested.

Under the circumstances, considering that the parties have treated motion #009 and #010 as related, and in light of the Court's determination that the instant motions be consolidated for this determination, the Court will consider all of the contentions set forth by the parties, whether or not they are set forth in the papers submitted in support of, or opposition to, one or the other motion. In opposition to these motions, the plaintiffs contend that the order dated June 26, 2013 "did not dispose of the issue of whether or not plaintiff was entitled to the information sought in the subpoena," and they imply that said order is somehow not final, noting that the "court also noted on the bottom of the second page of its decision that the order was "NON-FINAL DISPOSITION." The plaintiffs' first contention is without merit as explained above, and their implication is based on their mistaken concept of what the subject notation means within the context of court proceedings.

In addition, the plaintiffs contend that Bitan's motions to quash should be denied as untimely in that they both were made after the return dates of their respective subpoena. A "motion to quash ... should be made prior to the return date" (***Matter of Santangello v People***, 38 NY2d 536, 539, 381 NYS2d 472, 473 [1976]). However, CPLR 2304 states, in pertinent part, that a "motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable." The statute does not specify the time within which a motion to quash has to be made. "It only states that the motion should be made "promptly," which automatically makes the question of timeliness sui generis" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C2304:3). Under the specific circumstances herein, including the plaintiffs' mistaken impression of their ability to proceed without seeking additional discovery as directed by the Court, it is determined that the motions to quash are timely. In any event, the Court has discretion to ensure that the parties comply with its order dated June 26, 2013 granting Bitan a protective order, especially when said order has not been the subject of a motion to renew or reargue and a notice of appeal has not been filed.

In any event, the plaintiffs have again failed to demonstrate that the information and records sought from the nonparties is material and necessary to its claims, and that the information is not available from other sources. As noted in the order of the Court dated June 26, 2013, the plaintiffs' reliance on an unsigned and uncertified deposition of Bitan in an unrelated matter, in the absence of a deposition herein, does not alter that fact. Neither does the plaintiffs efforts to discover information via computerized searches, as the plaintiffs do not dispute Depuy's contention that they have yet to learn which entity might have the information they seek. Moreover, it is interesting to note that, in an effort to establish that they cannot obtain the information sought, the plaintiffs rely on court orders in two cases, one in Superior Court, Massachusetts, the other in Supreme Court, New York County, involving Bitan's financial compensation from Depuy where protective orders were granted in Bitan's or Depuy's favor. Accordingly, the plaintiffs' subpoena dated July 29, 2013 (Subpoena 3) served upon nonparties Depuy Synthes, Inc. (formerly Depuy, Inc.) and CT Corporation System is quashed.[2]

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[2] The plaintiffs point out that Bitan's order to show cause in motion #010 seeking to quash Subpoena 3 erroneously refers to Depuy Orthopaedics, Products, Inc., which is the intended recipient of Subpoena 2, instead of Depuy Synthes, Inc., which is the intended recipient of Subpoena 3. However, all parties have addressed their

Nonetheless, the Court determines that costs upon the motion are not warranted pursuant to CPLR 8106, that the issuance of the subject subpoenas was not in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another pursuant to CPLR 8303-a(c)(i). In addition, the court has considered that portion of Bitan's motion seeking sanctions pursuant to 22 NYCRR 130-1.1. Based on the record herein, the Court finds the plaintiffs' actions to be non-frivolous. Accordingly, that branch of Bitan's motion for sanctions is denied.

Dated: MAR 17 2014

J.S.C.
HON. JOSEPH A. SANTORELLI

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION** JSC

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arguments referencing the appropriate nonparties, the plaintiffs do not claim any prejudice due to the error, and the error is not fatal (CPLR 2001).