

Hedtrich v Wong

2014 NY Slip Op 33822(U)

December 16, 2014

Supreme Court, Nassau County

Docket Number: 12257-10

Judge: Steven M. Jaeger

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

JOAN HEDTRICH,

Plaintiff,

-against-

PETER J. WONG, M.D., AND OPHTHALMIC
CONSULTANTS OF LONG ISLAND,

Defendants.

TRIAL/IAS, PART 39
NASSAU COUNTY
INDEX NO.: 12257-10

MOTION SUBMISSION
DATE: 10-21-14

MOTION SEQUENCE
NO. 001

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Defendants' Memorandum of Law in Opposition	X
Affirmation of Steven A. Lavietes, Esq.	X
Reply Affirmation	X

Plaintiff moves to strike Defendants' Answer or preclude Defendants from utilizing at a re-trial certain medical records and/or for sanctions against Defendants and their counsel. Defendants oppose the motion.

This is a medical malpractice action tried before this Court and a jury commencing in April, 2014. On May 1, 20-14, at the request of plaintiff, a mistrial was declared during the cross-examination of the Defendant Doctor Peter J. Wong. Plaintiff's counsel questioned Dr. Wong regarding differences between

the copy of plaintiff's chart provided in discovery and the original chart produced by Dr. Wong at this deposition on February 14, 2012. Dr. Wong stated that there was "an administrative chart" for the procedure maintained in his main office in Rockville Centre. Plaintiff had been seen at satellite offices in Suffolk County and the procedure at issue was done in a surgery center in Brentwood.

Plaintiff's counsel asked Dr. Wong if the witness requested the administrative chart be provided to him for purposes of trial testimony. Defendant's counsel, for the first time, and in the presence of the jury, stated that said chart was "here" and counsel produced it (it was later marked for identification as Defendant's A). Thereafter, a mistrial was declared.

Pursuant to the Preliminary Conference Order dated April 18, 2011, defendants were directed to produce the "entire" chart and records, including photographs and billing records. After much delay, defendants provided copies of the "office records, including billing records and color photos" on or about January 27, 2012.

During Dr. Wong's deposition on February 14, 2012, he produced the original file. Plaintiff's counsel noted that this chart contained additional documents not previously provided. Dr. Wong gave further deposition testimony that there might be a separate "billing record file" maintained in the Rockville

Centre office that also contains copies of the clinical notes and paperwork done in a "satellite" office.

Plaintiff's counsel thereafter renewed the demand for the complete billing file, including any other records or documents contained in said file, by letter dated February 23, 2012. In response, Defendants provided an Affidavit from an employee that "a complete copy" of the billing records had already been provided.

Plaintiff contends that this willfully and intentionally misled her counsel and was in violation and disregard of the Court's Preliminary Conference Order. This, it is argued, was made clear during Dr. Wong's trial testimony. Counsel states that a comparison of the "medical chart" produced during discovery and the "administrative chart" produced during trial reveals documents in the administrative that were not previously produced. Most significantly, the medical chart contains a procedure form dated April 16, 2009 which includes the words "mid face elevation". The administrative chart contains a procedure form dated April 22, 2009 (signed by a different person) which does not include "mid face evaluation" and the administrative chart does not contain the April 16, 2009 form.

While defendants oppose the motion, they do not dispute that the "entire" medical chart and records were not provided. Rather, defendants deny that there

was any willfull or intentional failure to provide court-ordered discovery and that any violation was minimal.

The Court has no doubt that defendants failed to provide the court-ordered discovery. Further, while not questioning their good faith prior to trial, there is also no doubt that at some point before or during trial it came known to defendants and their counsel that portions of the entire chart had not been disclosed as required.

Counsel for defendants now acknowledges that his failure to advise the Court and plaintiff's counsel for the "administrative chart" outside of the jury's presence and before his client's cross-examination on May 1, 2014, was not "prudent".

Under all the circumstances set forth above, including the granting of a mistrial and the discovery violation, the Court grants plaintiff's motion to the extent that defendants are precluded from introducing, utilizing, or otherwise referring to the existence of any documents contained in the "administrative chart" previously marked as Defendants A for identification at any further proceedings herein.

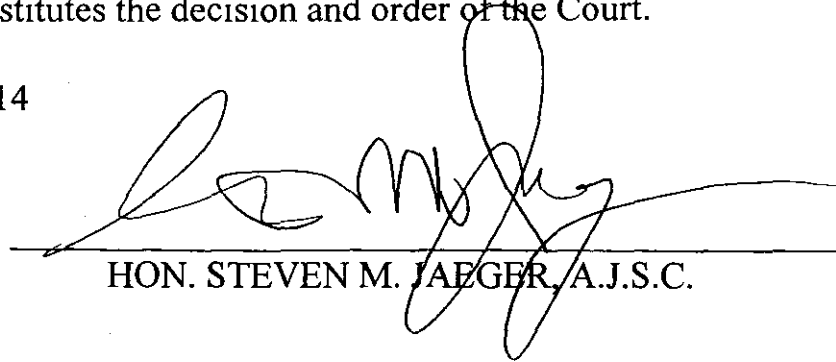
While the Court does not find Defendants' and counsel's actions to rise to the level of willful and contumacious conduct necessary to justify either striking

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the Answer or imposing sanctions, the Court awards plaintiff the sum of \$3,500 as
and for attorney's fees.

All other requests for relief are denied.

The foregoing constitutes the decision and order of the Court.

Dated: December 16, 2014



A handwritten signature in black ink, appearing to read 'Steven M. Jaeger', is written over a horizontal line. The signature is fluid and cursive.

HON. STEVEN M. JAEGER, A.J.S.C.

ENTERED

DEC 18 2014

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