Koster v Davenport
2014 NY Slip Op 33879(U)
March 17, 2014
Supreme Court, Nassau County
Docket Number: 10247/13
Judge: Denise L. Sher

[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 34
NASSAU COUNTY

NICOLE M. KOSTER,

Plaintiff,

- against -

Index No.: 10247/13
Motion Seq. No.: 01
Motion Date: 02/03/14

THOMAS M. DAVENPORT, LONG ISLAND PLASTIC SURGICAL GROUP, P.C. and WINTHROP UNIVERSITY HOSPITAL,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Support of Motion and Exhibits	2
Affirmation in Opposition and Exhibits	3
Reply Affirmation	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants Thomas M. Davenport, M.D. s/h/s Thomas Davenport ("Dr. Davenport") and Long Island Plastic Surgical Group ("LI Group") move, pursuant to CPLR § 3103, for a protective order vacating plaintiff's Notice to Admit dated November 19, 2013. Defendant Winthrop University Hospital ("Winthrop") filed an affirmation in support of the motion. Plaintiff opposes the motion.

The instant action is one for alleged medical malpractice. Plaintiff commenced the action

with the filing of a Summons and Verified Complaint on or about August 16, 2013. *See* Defendants Dr. Davenport and LI Group's Affirmation in Support Exhibit A. Issue was joined by defendants Dr. Davenport and LI Group on or about September 16, 2013. *See* Defendants Dr. Davenport and LI Group's Affirmation in Support Exhibit B. Issue was joined by defendant Winthrop on or about September 16, 2013. *See* Defendant Winthrop's Affirmation in Support Exhibit B.

On or about November 19, 2013, plaintiff served defendants with a Notice to Admit. *See* Defendants Dr. Davenport and LI Group's Affirmation in Support Exhibit C. Counsel for defendants Dr. Davenport and LI Group argues that "plaintiff's Notice to Admit is beyond the intended scope of this device, and is improper both in the way in which it is being utilized, and with regard to its content. Therefore, it should be vacated. The information requested in a Notice to Admit must be about matters which, 'the requesting party reasonably believes there can be no substantial dispute.' [citation omitted]. It is designed to resolve and eliminate uncontested matters which would merely present a time-consuming burden at trial. [citation omitted].... Discovery in this case has not yet been completed. The plaintiff recently served his (*sic*) bill of particulars and discovery responses. Moreover, depositions have not been held in this case. Therefore, the questions set forth in the plaintiff's Notice to Admit are improper and more appropriately reserved for the time of the defendant's deposition."

Counsel for defendants Dr. Davenport and LI Group further contends that "[e]ach question of the plaintiff's Notice to Admit seeks an admission or denial of issues which go to the heart of matters at issues involved in this case and pertains to material facts that can only be resolved at trial. The items also seek to obtain information previously alleged in the complaint

and (*sic*) were responded to in the verified answers served on behalf of these defendants.... [I]n this case, plaintiff's Notice to Admit seeks information or responses which are either evidentiary in nature or go to the very heart of the matters at issue in this case and, therefore, clearly will be in dispute at trial.... The Notice to Admit concerns questions that are essentially interrogatory in nature, and properly the subject of an examination before trial. Such is not the proper subject for a Notice to Admit."

In additional support of defendants Dr. Davenport and LI Group's motion, counsel for defendant Winthrop submits that "[o]n or about November 19, 2013, plaintiff's counsel served a Notice to Admit. This Notice to Admit listed thirty items in which plaintiff's counsel requested WINTHROP UNIVERSITY HOSPITAL to either admit or deny.... On December 4, 2013, this office sent a letter to plaintiff's counsel rejecting the Notice to Admit as improper and seeking information, which was impermissible pursuant to CPLR §3123. The letter advised plaintiff's counsel that the Notice to Admit did not seek any admissions that fit within the three criteria outlined in the CPLR §3123 as they did not refer to the genuiness (*sic*) of any papers, the correctness or fairness of any photographs and/or the truth of any matters of fact the plaintiff believed there could be no substantial dispute at trial.... In spite of the rejection of the Notice to Admit in its entirety, this office served a response so we would not be deemed in default.... However, this office was unable to respond to a number of items as there was no way to adequately answer the Notice with an admission or denial without several qualifications being necessary due to the use of the double negative language and/or the inclusion of two defendants in one single statement." *See* Defendant Winthrop's Affirmation in Support Exhibits E and F.

Counsel for defendant Winthrop adds that, "[t]his case is still in the early stages of

discovery. Plaintiff's counsel has recently served a Bill of Particulars and discovery responses. Plaintiff's counsel will have the opportunity to question the defendants with respect to the items outlined in the Notice to Admit at the time of the defendant's respective depositions. In the meantime, plaintiff's counsel may not utilize a Notice to Admit to obtain information concerning matters that constitute the very dispute of this lawsuit or in an effort to avoid the necessity of proving facts of a controversial nature. [citations omitted]."

In opposition to the motion, counsel for plaintiff contends, "[u]pon information and belief, at the time of the third surgery [performed on plaintiff], Davenport, a plastic surgeon, actually believed he was using Monocryl suture material to close plaintiff's skin.... Upon information and belief, Davenport ordered Monocryl from Winthrop for the operation and had every reason to believe that Winthrop complied with his order. Upon information and belief, it was only after the horrific result of the wound closure and several weeks of investigation that Davenport learned that he had not used Monocryl, but in fact, had used Monicryl (*sic*) Plus to suture plaintiff's incisional wound after the third spinal surgery. Ethicon, a Johnson & Johnson company, learned about the plaintiff's adverse reaction from plaintiff's mother and Ethicon contacted Davenport who admitted using Monocryl Plus. Please see copy of letter from Ethicon to plaintiff's mother stating Ethicon's interview with Davenport resulted in an acknowledgment from Davenport that he had used Monocryl Plus to suture plaintiff during the third operation.... So it is clear that plaintiff's Notice to Admit does not contain requests for disputed fact, but does embody known facts that are fundamental to this lawsuit. For defendant (*sic*) to request a protective order is a significant waste of the Court's time and certainly does not promote judicial economy. Plaintiff should not be put to the time and expense of subpoenaing the many people and corporations to whom Davenport has admitted using Monocryl Plus, including plaintiff's

spinal surgeon, because this defendant wants to obfuscate the obvious." *See* Plaintiff's Affirmation in Opposition Exhibits A and B.

Counsel for plaintiff argues, "[t]he purpose of a notice to admit is to eliminate from the issues in the litigation matters which will not really be in dispute at the trial. A notice to admit is not intended to cover ultimate conclusions, which can only be made by the trier of fact. The conclusion to be resolved here is one of negligence. Whether Monocryl Plus was used or not is a simple fact. Whether plaintiff was advised concerning the risks/or rewards of Monocryl Plus is a simple fact. Whether Davenport ordered Monocryl from Winthrop is a simple fact. A notice to admit is used to eliminate issues in litigation about which there should be no dispute at trial. In plaintiff's notice to admit, plaintiff sets forth simple facts based upon actual conversations with Davenport substantially all of which were in the presence of third parties and about which plaintiff believes there can be no dispute.... The ultimate question in this case is whether or not any of the named defendants were negligent. The facts requested are not the ultimate conclusion for which plaintiff requests relief, but they are essential facts which plaintiff believes are not subject to dispute. Plaintiff should not be put to the burden of proving facts that are clearly within the knowledge of this defendant. Nor should the Court be placed to the burden of time and expense necessary to prove that which is unequivocally within the knowledge of the parties."

In reply to plaintiff's opposition, counsel for defendants Dr. Davenport and LI Group argues, "[c]ontrary to plaintiff's assertions, the items of information sought by the plaintiff's Notice to Admit are not merely 'a request to identify simple facts.' The information requested in the Notice to admit (*sic*) seeks to obtain admissions of material issues which are not only contested, but evidentiary in nature and will be in dispute at trial. Many of the items seek admissions either as to facts within the unique knowledge of other parties to the action or request

the defendant to admit ultimate issues or facts which may require expert opinion beyond the scope of the notice to admit. Moreover, the items sought amount to interrogatories or a deposition on written questions which are contrary (*sic*) the basic purpose of the Notice to Admit. Plaintiff in his (*sic*) opposition concedes that he (*sic*) is seeking admissions regarding whether plaintiff was advised of the risks/or rewards of Monocryl Plus (Notice to Admit '3', '9', '10'). As the pleadings served by plaintiff in this case allege a lack of informed consent, these items go to the very heart of the issue concerning whether there was a proper informed consent and that there was a failure by Dr. Davenport to advise plaintiff of the risks and benefits of the Monocryl Plus and that it could cause an adverse reaction."

The Court notes that counsel for plaintiff filed and served a Sur-Reply Affirmation on or about February 4, 2014. First, the subject motion papers were submitted on February 3, 2014 for the Court to render its decision so the Sur-Reply is untimely. Additionally, the Court will not consider plaintiff's Sur-Reply insofar as such is not provided for in the CPLR and the Court did not give plaintiff permission to submit same.

CPLR § 3123 provides for a device known as a Notice to Admit, which authorizes a party to serve on an adverse party a request that the party admit a fact set forth therein. A pretrial motion for a protective order is available to test the reasonableness of the requests made in the notice, which permits the court "to act earlier" to resolve the issue before trial. *See* SIEGAL, PRACTICE COMMENTARIES, C3123:7.

The purpose of a Notice to Admit is only to eliminate from the issues in litigation matters where "there can be no substantial dispute at the trial." *See* CPLR § 3123(a). A Notice to Admit is not intended to cover admissions as to material and ultimate issues which can only be made after a full and complete trial. *See DeSilva v. Rosenberg*, 236 A.D.2d 508, 654 N.Y.S.2d 30 (2d

Dept. 1997); *Ramcharran v. New York Airport Services, LLC*, 108 A.D.3d 610, 969 N.Y.S.2d 497 (2d Dept. 2013); *Priceless Custom Homes, Inc. v. O'Neill*, 104 A.D.3d 664, 960 N.Y.S.2d 455 (2d Dept. 2013); *Lolly v. Brookdale University Hosp. and Medical Center*, 45 A.D.3d 537, 844 N.Y.S.2d 718 (2d Dept. 2007). The purpose of the Notice to Admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial. *See DeSilva v. Rosenberg, supra*; *Ramcharran v. New York Airport Services, supra*; *Lolly v. Brookdale University Hosp. and Medical Center, supra.*

A Notice to Admit cannot be used for the purpose of compelling the admission of fundamental and material issues or ultimate facts that can be resolved only after a full trial. *See DeSilva v. Rosenberg, supra*; *Riner v. Texaco, Inc.*, 222 A.D.2d 571, 635 N.Y.S.2d 658 (2d Dept. 1995). Notices to Admit have been vacated or deemed beyond the proper scope of the disclosure device where they sought admissions regarding the following types of information: negligence or facts establishing negligence; causation; accepted medical practices and procedures; diagnosis; expert medical opinion. *See* 1 MODERN NEW YORK DISCOVERY § 13:7 (2d ed.).

The Court finds that the Notice to Admit in the instant matter goes to the heart of the matters at issue involved in the case. Said Notice to Admit requests admissions from the defendants as to matters which the Court finds are not "clear cut" matters of fact for which there can be no dispute. A Notice to Admit which goes to the heart of the matters at issue is improper and should be stricken. *See `Kalabovic v. Fort Place Co-op., Inc.*, 159 A.D.2d 609, 552 N.Y.S.2d 663 (2d Dept. 1990).

Accordingly, defendants Dr. Davenport and LI Group's motion, pursuant to CPLR § 3103, for a protective order vacating plaintiff's Notice to Admit dated November 19, 2013, as to all defendants, is hereby **GRANTED**.

It is further ordered that the parties shall appear for a Preliminary Conference on May 1, 2014, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
March 17, 2014

ENTERED

MAR 19 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE