

Rodriguez v Clarke Worley Goodman, M.D.
2015 NY Slip Op 31412(U)
July 28, 2015
Supreme Court, New York County
Docket Number: 805453-2013
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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LETICIA PIZARRO RODRIGUEZ

Plaintiff,

Index No. 805453-2013

-against-

DECISION/ORDER

Motion Sequence No. 002

CLARKE WORLEY GOODMAN, M.D.,
THOMAS NGUYON, M.D., AND
BETH ISRAEL MEDICAL CENTER,

Defendants.

-----X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation & Collective Exhibits Annexed.....	<u>1, 2, 3</u>
Affirmation in Opposition & Exhibit Annexed.....	<u>4, 5</u>
Reply Affirmation.....	<u>6</u>

Leticia Pizarro Rodriguez (“Plaintiff”) alleges in this action for medical malpractice that defendants Clarke Worley Goodman M.D., (“Dr. Goodman”)Thomas Nguyen M.D., and Beth Israel Medical Center (“Beth Israel”) (collectively “Defendants”) deviated from good and accepted medical and/or emergency medicine practices in their treatment of Plaintiff on August 2, 2013. As a direct result of their alleged malpractice, Plaintiff claims that she suffered a myocardial infarction, conscious pain and suffering and permanent damage to her heart. On November 4, 2014 a deposition of Dr. Goodman was conducted. Dr. Goodman was accompanied by his attorney Darshan Patel, Esq., of Heidell, Pittoni, Murphy & Bach (“Attorney Patel”), and questioned by attorney for Plaintiff Daniel Gluck of Zaremba, Brownell and Brown (“Attorney Gluck”). This matter comes before the court on Plaintiff’s application for an order (1) directing defense counsel to produce Dr. Goodman for a further deposition at defense counsel’s expense and compelling the witness to answer certain deposition questions; (2) for sanctions against the firm Heidell, Pittoni, Murphy & Bach, LLP for violations of Section 221 of the Uniform Rules for the Conduct of Depositions; (3) Compelling responses to Plaintiff’s Second

Notice for Discovery and Inspection dated July 30, 2014 and the Compliance Conference Order dated September 17, 2014 (Plaintiff's Mem. Supp. at 1). Defendants oppose. Further, in her Reply, Plaintiff argues that Defendants' opposition is untimely and should not be considered. Defendants make no argument as to the timeliness of their opposition.

A. Defendants' Delayed Response

The Court has discretion to consider untimely opposition papers, particularly where the delay in submission was minimal (*Rodriguez v. Tiwari*, 265 AD2d 247, 248 [1st Dept 1999]). Here, the Court finds a delay of five days to be minimal, and because Plaintiff was not prejudiced, will exercise its discretion and consider Defendants' opposition.

B. Attorney Patel's Instructions Not to Answer

Plaintiff argues that Attorney Patel's instructions to Dr. Goodman not to answer were improper. Plaintiff does not seek a ruling on a deposition question here, nor does Plaintiff make arguments about specific questions. However, after reviewing the full transcript, the court has found three instances where Attorney Patel instructed the deponent not to answer.

The law regarding when an attorney can instruct a deponent not to answer was summarized by Justice Bransten in *Freidman v. Fayenson*, where she wrote:

Uniform Rule 221.2 addresses the limited context in which a deponent may refuse to answer a question posed at a deposition when an objection is made. *See* 22 NYCRR 221.2. It provides that “[a] deponent shall answer all questions at a deposition, except (I) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.” 22 NYCRR 221.2. Attorneys may not instruct a deponent not to answer unless CPLR 3115 or 22 NYCRR 221.2 provides a basis for doing so. 22 NYCRR 221.2. When a deponent refuses to answer a question, or an attorney instructs a deponent not to answer, such refusal or instruction “shall be accompanied by a succinct and clear statement of the basis therefor.” 22 NYCRR 221.2. Also, where a deponent does not answer a question, the deposition proceeds, and “the examining party shall have the right to complete the remainder of the deposition.” 22 NYCRR 221.2.

CPLR 3115(b), (c), and (d) provide certain limited bases for making objections during depositions including errors which might be obviated if known promptly, disqualification of the person taking the deposition, and competency of witnesses or admissibility of testimony. *See* CPLR 3115(b)-(d). However, despite its inclusion in Uniform Rule 221.2, CPLR 3115 does not provide any separate basis for refusing to answer questions or for an attorney to direct a deponent to not answer questions. *See* CPLR 3115; 22 NYCRR 221.2. Furthermore, Uniform Rule 221.1(a) provides that objections made at a deposition “shall

be noted by the officer before whom the deposition is taken, *and the answer shall be given and the deposition shall proceed subject to the objections* and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.” 22 NYCRR 221.1(a) (*Freidman v. Fayenson*, 41 Misc 3d 1236[A], 2013 NY Slip Op 52038[U], *4 [Sup Ct, NY County 2013]).

1. First Instruction Not to Answer

Attorney Gluck was questioning Dr. Goodman about his diagnostic approach and asked whether Dr. Goodman practiced the so-called “worst is first” method (Plaintiff’s Ex. H at 58:10–12). Attorney Patel objected on the ground that the question was too vague and asked Attorney Gluck to rephrase (*Id.* at 58:13–19). Attorney Gluck then asked, “if you [Dr. Goodman] prioritize the most potentially ... immediately lethal possible diagnosis first.” (*Id.* at 58:20–23). Again, Attorney Patel interjected, claiming that the question is too abstract to answer. Dr. Goodman answered anyway, stating “it really depends on likelihood and ratios if – because a lot of times the worst case scenario workup or treatment also has high risks associated with it.” (*Id.* at 59:8–12). Attorney Gluck then asked, “[w]ould you agree that as a doctor in the emergency room at Beth Israel in August of 2013 that you first have to exclude the most life-threatening diagnoses as soon as possible?” (*Id.* at 59:18–22). Attorney Patel then directed his client not to answer, stating, “you just asked that question two questions ago with worst to first. He just answered the question.” (*Id.* at 59:23–60:3).

The two questions are substantially similar. However, under Uniform Rule 221.2, a deponent cannot refuse to answer a question on the grounds that the question was already asked and answered. Thus, because the instruction not to answer does not fall within any of the enumerated categories of Uniform Rule 221.2, the first instruction not to answer was improper.

2. Second Instruction Not to Answer

Later in the deposition, Attorney Gluck asked Dr. Goodman, “[w]hat’s the potential danger for misdiagnosing a STEMI as pericarditis in the ER?” (*Id.* at 78:18–20). Attorney Patel objected to the question and instructed Dr. Goodman not to answer (*Id.* at 78:21–22). At the time of the speaking objection, Attorney Patel did not explain his objection, stating only “don’t answer that.” (*Id.*).

Defendants, in their opposition papers, argue that the question “palpably improper because it is extremely speculative because an MI can produce a wide variety of outcomes and the question does not give any type of detail as to the patient’s clinical presentation, history, stability or when and how the patient was eventually diagnosed.” (Defendants’ Mem. Opp. at ¶ 33). Even leaving aside whether the underlying question is, in fact, “palpably improper,” to qualify under 221.2 (c), the question must be “plainly improper and ... if answered, cause significant prejudice to any person.” (22 NYCRR 221.2 [c]). Defendants offer no showing of significant prejudice. Thus, the instruction not to answer does not fall within any of the enumerated categories of Uniform Rule 221.2, and the second instruction not to answer was improper.

3. Third Instruction Not to Answer

Attorney Gluck asked Dr. Goodman if he would, “agree that the patient was suffering a STEMI while she was in the ER?” (Defendants’ Ex. H at 187:10–12). Attorney Patel instructed his client not to answer the question (*Id.* at 187:13–17). Defendants claim that “among other things, that is an issue of fact for the trier of fact, and Dr. Goodman repeatedly testified that an MI is a process, not a singular event.” (Defendants’ Mem. Opp. at ¶ 44). Following this interchange, Attorney Gluck rephrased his question, asking “can we agree that as of the time that the patient was discharged from the ER that she was suffering from a STEMI?” (Plaintiff’s Ex. H at 187:18–20). Dr. Goodman did answer this, and explained his belief that the patient had a mostly stenosed lesion or coronary artery disease upon her departure from the ER into the Coronary Care Unit (*Id.* at 189:3–8).

Part 221.2(iii) of the Uniform Code permits deponents to not answer questions that are “plainly improper and would, if answered, cause significant prejudice to any person.” (22 NYCRR 221.2 [iii]). Further, at a deposition, a witness cannot “be compelled to answer questions seeking legal and factual conclusions or questions asking him or her to draw inferences from the facts.” (*Shiotani v. Walters*, 2012 WL 6621279, *7 [SD NY, Dec. 3, 2012, No. 10 CIV. 1375 RJS] *affd.*, 555 Fed Appx 90 [2d Cir 2014] citing *Mayer v. Hoang*, 83 AD3d 1516 [4th Dept 2011]). In this instance, the question of whether Plaintiff suffered a STEMI in the Beth Israel Emergency Room is factually in dispute. Thus, asking the deponent to speculate as to whether or not Plaintiff was suffering from a STEMI at the aforementioned time would require him to draw factual conclusions or infer based on the facts.

In this case, the deponent correctly reserved his right to not answer a question that was plainly improper. As such, the third instruction not to answer was proper.

B. Speaking Objections

As noted above, Uniform Rule 221.1(a) allows for limited objections during depositions, providing that “[n]o objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule.” (22 NYCRR 221.1). Uniform Rule 221.1(b) elaborates slightly, specifying that “[e]very objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity (*Id.*). Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.” (*Id.*).

Further, Uniform Rule 221.3 governs communications by an attorney with a deponent during a deposition, and provides that “[a]n attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth

in section 221.2 of these rules.” (22 NYCRR 221.3) Moreover, in the event of such a communication, “the reason for the communication shall be stated for the record succinctly and clearly.” (*Id.*).

Plaintiff asserts that Attorney Patel made improper speaking objections, suggested answers for his client through the use of objections to form, and made other interfering statements (Plaintiff’s Mem. Supp. at ¶ 25). Defendants argue that all objections were made to clarify Attorney Gluck’s questions, or were otherwise proper (Defendants’ Mem. Opp. at ¶ 11). And further, that Attorney Gluck was given wide latitude when conducting his deposition, and that Attorney Patel “did not answer, suggest or coach specific answers for Dr. Goodman.” (*Id.*).

However, based on a review of the deposition transcripts, the Court finds that Attorney Patel committed multiple violations of the Uniform Rules. Although attempts to clarify an ambiguous question do not necessarily demonstrate interference with the deposition’s orderly progress, Attorney Patel’s comments frequently went beyond clarification (*see Koch v. Sheresky, Aronson & Mayefsky LLP*, 33 Misc. 3d 1228(A) [Sup Ct, NY County 2011]). For instance, at one point Attorney Gluck asked, “if the nurse did this primary survey earlier and you did your review at 12:14, how would you have known these results?” (Plaintiff’s Ex. H at 120:11–14). Before the deponent answers, Attorney Patel interjects, stating, “[w]ell, then he wouldn’t have known it,” to which Dr. Goodman replies, “[o]f her primary survey, from that clicking, yeah, if I clicked off at 12:15, and she entered it at 12:40, then I probably didn’t see it when I reviewed the referral info.” (*Id.* at 120:11–121:4). Attorney Patel’s comment is, at a minimum, suggestive of an answer.

At another point in the deposition, Attorney Gluck asked “[o]n a relatively busy night, would you see them within an hour under that circumstance?” (*Id.* at 47:2–4). When Dr. Goodman begins to respond, Attorney Patel interrupts, saying “can we go off the record a second? He saw him in 15 minutes, this isn’t an issue. I know you’re going to say it might be an issue for you, but this isn’t an issue, he saw him within 15 minutes.” (*Id.* at 47:5–20). Again, Attorney Patel suggests an answer for his client, both by characterizing the question as a non-issue and by explicitly stating that he saw him in 15 minutes. Attorney Gluck was entitled to inquire as to the time frame of the event in question, and Attorney Patel improperly interrupted by suggesting an answer.

At another juncture in the deposition, the following interchange took place:

Gluck: In your experience, was there any custom and practice within how long an EKG result would be reviewed after it was taken?

Patel: Objection to form. A custom and practice is linked to a particular individual, so you’re asking about –

Gluck: No. I’m asking if there was a custom and practice–

Patel: Standard of care.

Gluck: I’m asking if there was a custom and practice in the ER within how long an EKG would be–

Patel: whose custom and practice?

Gluck: The custom and practice in the ER.

Patel: The ER is not a person. Only people can have a custom and practice.

Gluck: Are you instructing him not to answer the question?

Patel: I'm asking you to be more specific with your question.

Gluck: That's my exact question.

Patel: Okay. I'll object to form (*Id.* at 76:5–77:5).

In this instance, Attorney Gluck stated the question plainly, and Attorney Patel's attempts to clarify the question only served as interruptions that disturbed the deposition's progress. Here, the inquiry was not a compound question, argumentative, presumptive, misleading, or excessively broad. As such, the objection itself was unwarranted and disruptive.

These examples, among others, lead the Court to conclude that Attorney Patel, through speaking objections and suggesting answers during the deposition of Dr. Goodman, violated Uniform Rules 221.1 and 221.3

C. Plaintiff's Document Request

Plaintiff also seeks an order compelling the production of documents responsive to their Second Notice for Discovery and Inspection ("D&I") dated July 30, 2014 and the Compliance Conference Order dated September 17, 2014. On May 19, 2014, Defendants served Plaintiff with responses to Plaintiff's First D&I. However, Plaintiff alleges these responses were insufficient, whereupon Plaintiff filed a motion to compel. The motion was resolved by stipulation. On July 30, 2014, Plaintiff served Defendants with a Second D&I seeking, "[a]ll Hospital rules, regulations and protocols as to triage, admission, treatment and discharge of patients who present with chest pain and or the signs or symptoms suspicious of heart attack, myocardial infarction, or ACS." A compliance conference was held on September 17, 2014 whereupon this Court ordered Defendants to respond to Plaintiff's Second D&I, "within 30 days."

Defendants did not respond within 30 days, but instead emailed Plaintiff's attorney on January 26, 2015 and attached what Attorney Patel termed, "practice guidelines." (Defendants' Ex. A). This email comes after Defendants' counsel's statement, in an email to Plaintiff's counsel dated October 31, 2014, that Beth Israel "does not maintain any other protocols, policies, or regulations concerning the information you are seeking and your demand has been responded in its entirety." (Plaintiff's Ex. J). As a result of Defendants' delay, Plaintiff was forced to conduct the deposition of Dr. Goodman without the Emergency Room protocols.

D. Remedy

For the violations described above, Plaintiff seeks the entry of an order (1) compelling responses to Plaintiff's Second Notice for Discovery and Inspection dated July 30, 2014 and the Compliance Conference Order dated September 17, 2014; (2) compelling further deposition of Dr. Goodman at defense counsel's expense, and compelling the witness to answer certain deposition questions; (3) for sanctions against Heidell, Pittoni, Murphy & Bach, LLP for violations of Section 221 of the Uniform Rules for the Conduct of Depositions; and (4) for such

other, further and different relief as the Court may deem just and proper (Plaintiff's Mem. Supp. at 1).

First, CPLR 3124 provides that "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." (CPLR 3124). Further, in a motion to compel production under CPLR 3124, the burden is on the moving party to establish a basis for the production sought (*Freidman v. Fayenson*, 41 Misc 3d 1236[A], 2013 NY Slip Op 52038[U] [Sup Ct, NY County 2013]) citing *Dabrowski v. ABAX Inc.*, 2012 NY Slip Op. 31652[U], at *6 [Sup Ct, NY County 2012]).

Plaintiff has satisfied her burden by demonstrating Defendants' failure to comply with the outstanding discovery demand and court order directing the production of documents in a timely fashion. Thus, the burden shifts to Defendants to establish a reasonable excuse for their defaults (*Pimental v. City of New York*, 246 AD2d 467, 468 [1st Dept 1998]). Defendants' do not offer an excuse, but state that the January 26, 2015 email attachment, "fully responds to your prior demands for same in this case." (Defendants' Ex. A).

Plaintiff's motion to compel is granted, and Beth Israel is ordered to respond to the second D&I dated July 30, 2014, and the compliance conference order dated September 17, 2014 within 45 days of service of this order with notice of entry. In the alternative, if no such documents exist, Beth Israel is to serve Plaintiff's counsel with an affidavit from the appropriate record keeper stating that no such documents exist within 45 days of service of this order with notice of entry.

Second, Attorney Patel's violations of Uniform Rules 221.1–221.3 resulted in Attorney Gluck not being able to conduct a thorough deposition of Dr. Goodman. Therefore, Attorney Gluck is entitled to conduct a second deposition at defense counsel's expense. The scope of the second deposition shall be limited to 1) the two questions to which the improper instructions not to answer were given by Attorney Patel, 2) questions regarding the January 26, 2015 email attachment and any other materials responsive to the second D&I dated July 30, 2014 and compliance conference order dated September 17, 2014, and 3) those questions that flow from the Dr. Goodman's responses to 1) and 2) above.

Third, under Uniform Rule 130-1.1, it is within the Court's discretion to "impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which she be payable as provided in section 130-1.3 of this Part. (22 NYCRR 130-1.1) Further, conduct is frivolous where:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.”

(22 NYCRR 130-1.1[c])

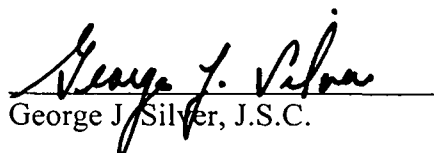
Attorney Patel’s first two instructions not to answer, and certain objections made during the deposition, were in violation of Uniform Rules 221.1–221.3 and are therefore without merit in law. However, the Court declines to impose sanctions at this time because Attorney Patel’s conduct does not rise to the level of a “continuous pattern of conduct” such that financial sanctions are necessary to deter future frivolous conduct (*cf. Grayson v. New York City Dep’t of Parks & Recreation*, 99 AD3d 418, 419 [1st Dept 2012]). Thus, financial sanctions are not warranted and such relief is denied. Accordingly, it is hereby

ORDERED that Plaintiff’s motion is granted as follows: (1) Beth Israel is ordered to respond to the second D&I dated July 30, 2014, and the compliance conference order dated September 17, 2014 within 45 days of service of this order with notice of entry. In the alternative, if no such documents exist, Beth Israel is to serve Plaintiff’s counsel with an affidavit from the appropriate record keeper stating that no such documents exist within 45 days of service of this order with notice of entry, (2) Defendants are ordered to produce Dr. Goodman for a second deposition, at defense counsel’s expense, within 45 days of service of documents referenced in (1) above. The scope of the second deposition shall be limited to 1) the two questions to which the improper instructions not to answer were given by Attorney Patel, 2) questions regarding the January 26, 2015 email attachment and any other materials responsive to the second D&I dated July 30, 2014 and compliance conference order dated September 17, 2014, and 3) those questions that flow from the Dr. Goodman’s responses to 1) and 2) above; and it is further

ORDERED that the parties are to appear for a status conference on August 12, 2015 at 2:30 pm in room 422 of the courthouse located at 60 Centre St. New York, NY 10007; and it is further

ORDERED that Plaintiff is to serve a copy of this order, with notice of entry, upon Defendants within 20 days of entry.

Dated: 7/28/15
New York County


George J. Silver, J.S.C.

GEORGE J. SILVER