

Dussich v Sanofi-Aventis, U.S., LLC
2015 NY Slip Op 32932(U)
July 21, 2015
Supreme Court, Nassau County
Docket Number: 1278/09
Judge: Leonard D. Steinman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CAMILLE DUSSICH,

Plaintiff,

-against-

SANOFI-AVENTIS, U.S., LLC, SANOFI-AVENTIS,
U.S., INC., DERMIK LABORATORIES, SCOTT
WELLS, M.D. and JEANNETTE GARF, M.D.,

Defendants.
-----X

LEONARD D. STEINMAN, J.

IAS Part 27

Index No.: 1278/09

Mot. Seq. Nos.: 09, 10, 11,
& 12

DECISION AND ORDER

The following papers have been reviewed in preparing this Decision and Order:

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Defendants have brought various discovery related motions in this nearly six-year-old consolidated medical malpractice action. Defendants Jeannette Graf, M.D. and Scott Wells, M.D. each move pursuant to CPLR §3126 for an order precluding plaintiff from introducing any evidence to support her claims at trial because plaintiff failed to produce a complete copy of her passport and certain photographs and videos as requested in Notices of Discovery and Inspection served by defendants in 2012. Justice Michele M. Woodard ordered plaintiff to “respond in full” to defendants’ discovery demands in a Decision and Order dated November 14, 2014.

Defendants also move for leave to reargue this court’s decision and order read on the record on April 8, 2015 (this court “so-ordered” the transcript on April 17, 2015), which granted plaintiff leave to serve limited interrogatories on defendants. This court granted such leave as part and parcel of its denial of a motion by plaintiff to compel defendants to produce certain documents. Defendant Graf further seeks a protective order striking the interrogatories.

BACKGROUND

This action relates to alleged injuries suffered by plaintiff in 2006 and 2007 which she claims resulted from injections of Sculptra she received from the individual defendants into her face at that time. Plaintiff asserts that defendants committed malpractice by utilizing Sculptra on her for cosmetic purposes. Plaintiff asserts that at the relevant time Sculptra was only FDA-approved for use in patients with HIV and that defendants were experimenting with Sculptra for cosmetic purposes. Defendants allege that their “off-label” use of Sculptra with plaintiff was proper.

MOTION TO REARGUE

Both defendants testified at their depositions in sum and substance that prior to injecting plaintiff with Sculptra they were familiar with literature and attended conferences in which the “off-label” use of Sculptra for cosmetic purposes was positively discussed. But neither of them could recall the precise literature or conferences. And neither had the literature in their possession. Plaintiff nonetheless moved to compel defendants to produce what both swore they did not possess. This court denied plaintiff’s motion but granted plaintiff leave to serve limited interrogatories upon defendants on the issue given its importance as it relates to the appropriate standard of care. (Plaintiff had requested in its motion papers that the court grant all relief which it “deems just and proper.”)

Prior to oral argument on plaintiff’s motion to compel, the court conferenced the matter with counsel and informed it of its likely decision. The court then afforded the parties an opportunity to argue their positions on the record and defendants both asserted that plaintiff should be required to expressly move for leave to serve interrogatories. They further argued that plaintiff was not entitled to serve interrogatories because she had already served a demand for a bill of particulars and taken a deposition. Defendants repeat this latter argument in their motion to reargue.

Pursuant to CPLR § 2221(d) a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” CPLR § 2221(d)(2). A motion to reargue is addressed to “the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or for some reason mistakenly arrived at its earlier decision.” *Beverage Marketing USA, Inc. v. South Beverage Co., Inc.* 58 A.D.3d 657 (2d Dept. 2009); CPLR §2221. A motion for leave to reargue “is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.” *Mazinov v. Rella*, 79 A.D.3d 979, 980 (2d Dept. 2010) quoting *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999); see also *Ahmed v. Pannone*, 116 A.D.3d 802 (2d Dept. 2014).

The court did not overlook any facts or law when it granted plaintiff leave to serve limited interrogatories. Although defendants argue that pursuant to CPLR §3130(1) the court has no discretion to permit plaintiff to serve interrogatories since she had previously served a demand for a bill of particulars, defendants ignore the court's broad discretion to supervise and inherent powers to manage disclosure. *See Constantino v. Dock's Clam Bar and Pasta House*, 60 A.D.3d 612 (2d Dept. 2009)(Supreme Court has broad discretion in supervising disclosure and in resolving discovery disputes). In none of the cases cited by defendants in which interrogatories were struck pursuant to CPLR §3130(1) did the court determine that interrogatories could never be served where a deposition had been taken or a bill of particulars demanded. Instead, leave to do so in those cases was neither sought nor previously granted.

Defendants do not now argue in their motion papers that plaintiff is not entitled to discover the literature or conferences that defendants relied upon when they rendered medical services to plaintiff. Presumably, defendants found the literature authoritative—otherwise they wouldn't have relied upon it. *See Bryant v. Bui*, 265 A.D.2d 848 (4th Dept. 1999)(plaintiff entitled to names of books defendant doctor identified as authoritative). Instead, defendants argue that plaintiff is out of luck because of their fortuitous lapse in memory at their depositions.

It is somewhat ironic that Dr. Graf relies upon plaintiff's bill of particulars demand to oppose the interrogatories given the lack of substance in her bill of particulars.¹ Defendant Graf objected to each and every request for particulars contained in plaintiff's demand and provided no information, limited information or boiler-plate responses to the requests. Furthermore, the demand for particulars was limited to defendants' asserted affirmative defenses and sought no information concerning the appropriate standard of care.

Litigation is not a game. New York has long favored open and far-reaching pretrial discovery and, "restricted only by a test for materiality 'of usefulness and reason', is to be encouraged." *Hoenig v. Westphal*, 52 N.Y.2d 605 (1981). The purpose: to end the presentation of totally unexpected evidence and to substitute honesty and forthrightness for gamesmanship. *DiMichel v. South Buffalo Railway Co.*, 80 N.Y.2d 184, 193 (1992). Proper disclosure advances the function of a trial to ascertain truth and accelerates the disposition of suits. *Rios v. Donovan*, 21 A.D.2d 409 (1st Dept. 1964).

Given defendants' professed memory lapses at their depositions concerning the literature they had reviewed and the conferences attended regarding use of *Sculptra*, and the significance of same to the all-important standard of care determination, this court could have required that supplemental depositions of defendants be conducted prior to trial to safeguard against a newly refreshed recollection that could prejudice plaintiff. By granting the plaintiff the right to serve limited interrogatories on this issue defendants have been spared this inconvenience. And plaintiff will now be secure in knowing that defendants have the obligation under CPLR

¹ Dr. Wells does not include with his motion plaintiff's bill of particulars demand or Dr. Wells' response—he attaches (presumably mistakenly) the demand Wells served upon plaintiff for a bill of particulars and plaintiff's response.

§3101(h) to amend their interrogatory responses if they were to suddenly remember the literature or conferences (assuming they still have no present recollection).

Thus, the motions to reargue are denied. This court had granted defendants permission to object to the substance of the interrogatories once served. Dr. Graf seeks a protective order but fails to identify any particular objectionable interrogatory. Nonetheless, interrogatory numbers 2, 2a-d, 4, 4a, 4b, 6, 6a, 7, 8, 8a, 9, 9a, 13, 13a-d, 15, 15a, 15b, 17, 17a, 19, 19a, 19b, 20, 20a-c are hereby stricken. These interrogatories do not relate to literature or conferences that supported the cosmetic use of Sculptra of which the defendants were aware before administering the injections to plaintiff—the proper subject of the follow-up interrogatories pursuant to the court's order. Interrogatory numbers 10 and 10a are allowed since they bear upon defendants' recollection of such conferences. The interrogatory responses are to be served within ten days of service of Notice of Entry of this Decision and Order

DEFENDANT'S MOTION TO PRECLUDE

In response to defendants' motion to preclude, plaintiff argues that she is not obligated to produce her complete passport; that Justice Woodard's November 14, 2014 order merely required her to *respond* to defendants' discovery demand; and that such a response can include an objection, which was not waived. Nonetheless, plaintiff attached a complete copy of her passport to her opposition papers thereby rendering this portion of defendants' motion moot.

Plaintiff further argues that she has no more photographs or videos to produce to defendants and resists providing an affidavit to this effect to defendants as they had demanded. But plaintiff did testify that at her deposition that she might have in her possession photographs taken of her at her son's wedding in 2009 (one would reasonably assume that she did) and others from her trips to Italy, Hawaii and Florida. Therefore, plaintiff is ordered to either produce such photographs/videos (and any other photograph or video responsive to the discovery demand) or provide to defendants an affidavit in the form annexed as Exhibit A to the reply Affirmation of Thomas Kroczyński within ten days of service of Notice of Entry of this Decision and Order.

This constitutes the Decision and Order of this court. Any relief not specifically addressed herein is denied.

Dated: July 21, 2015
Mineola, New York

ENTER:


LEONARD D. STEINMAN, J.S.C.

ENTERED

JUL 22 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE