Strong v Delemos
2015 NY Slip Op 32955(U)
April 9, 2015
Supreme Court, Suffolk County
Docket Number: 29926/2010
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Damon Strong, as Administrator of the Estate of LaToya Williams, deceased,

Plaintiff,

-against-

Michelle Delemos, M.D. and Louis Merriam,

Defendants.

Clerk of the Court

Index No.: 29926/2010

Motion Sequence No.: 008; MG
Motion Date: 5/14/14
Submitted: 9/3/14

Motion Sequence No.: 009; MG
Motion Date: 8/20/14
Submitted: 9/3/14

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Upon the following papers numbered 1 to 61 read upon this motion to vacate note of issue and this motion to compel: Notice of Motion and supporting papers, 1 - 23; 33 - 55; Answering Affidavits and supporting papers, 24 - 30; 56 - 59; Replying Affidavits and supporting papers, 31 - 31; 60 - 61;it is

ORDERED that the motions (#008 and #009) by defendants Michelle Delemos, M.D., and Louis Merriam, M.D., hereby are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants for, inter alia, an order vacating the note of issue and certificate of readiness, and striking the matter from the trial calendar is granted; and it is

ORDERED that the motion by defendants for, inter alia, an order directing nonparty witnesses Vernicia Raymond and Stacey Williams Bertram to appear for a deposition and compelling the production of documents in advance of their depositions is granted; and it is further

ORDERED that the conditional preclusion order issued by this Court on March 17, 2014 hereby is recalled and vacated.

Plaintiff Damon Strong, as administrator of the estate of Latoya Williams, commenced this action to recover damages for medical malpractice and lack of informed consent. The complaint alleges that defendants, Dr. Michelle Delemos and Dr. Louis Merriam, failed to diagnose plaintiff's wife, Latoya Williams, the decedent, with cardiomyopathy prior to providing medical clearance for her to undergo a laparoscopic cholecystectomy procedure at Stony Brook University Hospital on January 14, 2009. Plaintiff further alleges that this failure to diagnose Williams with cardiomyopathy allowed the performance of a surgery that was contraindicated for an individual with Williams' condition and resulted in her death on January 16, 2009.

Defendants now move for an order vacating the note of issue filed by plaintiff on April 7, 2014 and striking the matter from the trial calendar, arguing the certificate of readiness contains a material defect since discovery is not complete in this matter. Specifically, defendants assert that plaintiff has failed to respond to their notices of discovery and inspection, dated January 23, 2013 and March 7, 2013, and that plaintiff has failed to provide a response to the July 11, 2012 compliance conference order directing plaintiff to provide all outstanding discovery in this action. Defendants also seek to vacate the conditional preclusion order issued on March 17, 2014. Plaintiff opposes the motion on the ground that he already has fully complied with defendants' notices for discovery and inspection, and with the July 11, 2012 compliance conference order. Plaintiff also asserts that the note of issue and certificate of readiness have been filed and, therefore, discovery is complete. Plaintiff further contends that the preclusion order issued by the court is conditional, and that Dr. Merriam still has the opportunity to offer evidence at trial once he appears for a deposition.

CPLR 3402 (a) provides that the note of issue may be filed at any time after issue is joined or 40 days after service of the summons irrespective of the joinder of issue, and must be accompanied by whatever date is required by the applicable rules of the court. The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial (***Tirado v Miller***, 75 AD3d 153, 156, 901 NYS2d 358 [2d Dept 2010], *quoting* ***Mazzara v Town of Pittsford***, 30 AD2d 634, 634, 290 NYS2d 435 [4th Dept 1968]). Moreover, a certificate of readiness certifies that all discovery is complete, waived or not required, and that the action is ready for trial (*see* 22 NYCRR § 202.21[b]). The effect of a statement of readiness is to ordinarily foreclose further discovery (*see* ***Tirado v Miller***, *supra*).

Vacatur of the note of issue is governed by Section 202.21 of the Uniform Rules for Trial Courts. This provision states, in pertinent part, that where a party timely moves, upon affidavit, to vacate the note of issue, the party only needs to show that "a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of 22 NYCRR§ 202.21(e) in some material respect" (***Vargas v Villa Josefa Realty Corp.***, 28 AD3d 389,

390, 815 NYS2d 30 [1st Dept 2006]; *see* ***Witherspoon v Surat Realty Corp.***, 82 AD3d 1087, 918 NYS2d 889 [2d Dept 2011]; ***Shoop v Augst***, 305 AD2d 1016, 758 NYS2d 747 [4th Dept 2003]; ***Aviles v 938 SCY Ltd.***, 283 AD2d 935, 725 NYS2d 256 [4th Dept 2001]; *cf.* ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Here, defendants have established, prima facie, that a material fact in the certificate of readiness is incorrect, because it sets forth that all discovery has been completed (*see* ***Jacobs v Johnston***, 97 AD3d 538, 948 NYS2d 321 [2d Dept 2012]; ***Moss v McKelvey***, 32 AD3d 1281, 822 NYS2d 198 [4th Dept 2006]; ***Shoop v Augst***, *supra*; ***Aviles v 938 SCY Ltd.***, *supra*; ***Oritz v Arias***, 285 AD2d 390, 727 NYS2d 879 [1st Dept 2001]). Furthermore, defendants' motion, dated April 22, 2014, was made within 20 days after the service of the note of issue and certificate of readiness (*see* ***Jacobs v Johnston***, 97 AD3d 538, 948 NYS2d 321 [2d Dept 20102]; ***Torres v Saint Vincents Catholic Med. Ctrs.***, 71 AD3d 873, 895 NYS2d 861 [2d Dept 2010]; ***Munoz v 147 Corp.***, 309 AD2d 647, 767 NYS2d 1 [1st Dept 2003]; ***Rizzo v Simone***, 287 AD2d 609, 731 NYS2d 857 [2d Dept 2001]; ***Perla v Wilson***, 287 AD2d 606, 732 NYS2d 35 [2d Dept 2001]; *cf.* ***Kelley v Zavalidrogai***, 55 AD3d 1391, 864 NYS2d 819 [4th Dept 2008]; ***Mark v Morrison***, 275 AD2d 1027, 714 NYS2d 167 [4th Dept 2000]). Plaintiff, in opposition, failed to demonstrate that he has fully complied with the notices for discovery and inspection at issue or the July 11, 2012 compliance conference order.

Accordingly, defendants' motion for, inter alia, an order vacating the note of issue and certificate of readiness is granted, and the order of this Court, dated March 17, 2014, is recalled and vacated (*see* CPLR 2221).

Defendants also move to compel nonparty witnesses Vernicia Raymond and Stacey Williams Bertram to appear for depositions and to produce all requested documents within their control pertaining to plaintiff's medical malpractice and pecuniary loss claims pursuant to the non-judicial subpoenas served upon them on June 3, 2014. Defendants contend that they are prejudiced by the failure of both Raymond and Williams Bertram to appear for the scheduled depositions, and that the subpoenas served upon them are authorized, because both Raymond and Williams Bertram possess direct knowledge and documents relevant to the claims at issue, and that their depositions are material and necessary. Defendants, in support of the motion, submit copies of the pleadings, plaintiff's deposition transcripts, copies of the non-judicial subpoenas served upon Raymond and Williams Bertram and letters of correspondences between defense counsel and Williams Bertram.

Although the general rule is that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101[a]; ***Auerbach v Klein***, 30 AD3d 451, 816 NYS2d 376 [2d Dept 2006]), "unlimited disclosure is not permitted" (***Silcox v City of New York***, 233 AD2d 494, 650 NYS2d 305 [2d Dept 1996]; *see* ***Kondratick v Orthodox Church in Am.***, 73 AD3d 708, 900 NYS2d 360 [2d Dept 2010]). A party seeking disclosure from a nonparty witness must demonstrate that the disclosure sought is material and necessary, and must set fort the "circumstances or reasons" why disclosure is "sought and required" from such nonparty (***Dicenso v Wallin***, 109 AD3d 508, 509, 970 NYS2d 457 [2d Dept 2013], *quoting* ***Kooper v Kooper***, 74 AD3d 6, 10, 901 NYS2d 312 [2d Dept 2010]; see CPLR 3101[a][4]).

Based upon the adduced evidence, defendants have demonstrated that, in light of the claims made by plaintiff and his deposition testimony, the subpoenas served upon nonparties Williams Bertram and Raymond were appropriate, since these individuals have knowledge and facts that are material to the circumstances surrounding the allegations in this action (*see* CPLR 3101(a)(4), CPLR 2303(a); ***Lloyd v YMCA of N.Y.***, 282 AD2d 269, 723 NYS2d 182 [1st Dept 2001]). In addition, the information sought in the subpoenas served upon Williams Bertram and Raymond is relevant, material and necessary, and unavailable through other avenues (*see* ***Quevedo v Eichner***, 29 AD3d 554, 813 NYS2d 310 [2d Dept 2006]; ***Thorson v New York City Tr. Auth.***, 305 AD2d 666, 759 NYS2d 880 [2d Dept 2003]). Specifically, plaintiff testified at his deposition that Raymond, who is his twin brother's first wife, served as a court-ordered supervisor during his visits with his minor children in 2011, and that she had temporary custody of the children while he was incarcerated in 2010. Additionally, plaintiff testified that Williams Bertram, who is the decedent's aunt, witnessed the decedent's condition prior to and during the time defendants' rendered medical treatment to the decedent; that Williams Bertram provided assistance to the decedent immediately after she underwent the laparoscopic cholecystectomy procedure; and that Williams Bertram provided care for his minor children after the decedent passed away. Moreover, in his opposition papers, plaintiff acknowledges that Williams Bertram and Raymond each have knowledge and facts that are material to the claims made by plaintiff in this matter. In fact, plaintiff asserts Williams Bertram and Raymond are willing and able to comply with the non-judicial subpoenas and notices of deposition served upon them on June 3, 2014.

Finally, defendants' application, pursuant to 22 NYCRR § 130.1.1(a), to hold plaintiff's attorney liable to defendants for costs associated with Williams Bertram's default in appearing at the scheduled nonparty deposition on July 3, 2014 is denied.

Accordingly, defendants' motion for an order compelling nonparties Vernicia Raymond and Stacey Williams Bertram to appear for nonparty depositions on a date certain is granted. Vernicia Raymond and Stacey Williams Bertram shall each give testimony upon an oral examination scheduled on or before June 1, 2015, at a time and place fixed by defendants, by written notice of not less than 10 days prior to such examination, to be served upon Vernicia Raymond, Stacey Williams Bertram and plaintiff's attorney, or at such prior time and place as the parties may agree. All parties shall cooperate in the scheduling of such depositions and all other disclosure proceedings in this action.

Dated: April 9, 2015

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION