

D'Alasi v Shavelson

2016 NY Slip Op 30397(U)

March 3, 2016

Supreme Court, New York County

Docket Number: 108185/2008

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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PATRICIA M. DEGRACE D'ALIASI & ANTHONY
P. D'ALIASI,

Plaintiffs,

Index No. 108185/2008

-against-

Decision and Order

DENNIS SHAVELSON, D.P.M. & LIFESTYLE
PODIATRY,

Defendants.

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JOAN B. LOBIS, J.S.C.:

In motion sequence number fourteen, defendants Dennis Shavelson, D.P.M. & Lifestyle Podiatry move for an order compelling plaintiffs to provide authorizations and Arons authorizations to obtain updated medical records and conduct ex parte communication with eleven of plaintiff Patricia DeGrace D'Aliasi's treating providers, compelling Ms. DeGrace D'Aliasi to appear for an independent medical examination (IME) and for a further deposition to discuss the medical treatment she has received since her last deposition. They state that plaintiff's last deposition, which took place over three separate sessions, ended on November 26, 2010, her IME took place on August 11, 2010, and she most recently provided authorizations dated September 9, 2010. Plaintiffs filed the note of issue on September 10, 2010, indicating that discovery was complete. Due to the lapse of time since then, defendants argue, all the discovery they seek is necessary. They note that plaintiff has included copies of numerous medical records in the course of motion practice, but argue that they have the right to obtain complete copies of the records directly from the providers. Moreover, they note that plaintiff claims she had a heart attack in April of 2012, and states she has been seen by fifty to seventy physicians since the alleged malpractice. They state, in particular, that plaintiff alleges she undergoes costly ketamine infusions to treat her

ongoing pain, but that they have not received authorizations for these records. Finally, in addition to the injured plaintiff, defendants seek to re-depose Mr. D'Alasi to provide supplemental information about her treatment. They state this is necessary in light of plaintiff's asserted blackouts.

Plaintiffs oppose the motion. They argue that only two incidents of malpractice are at issue: Dr. Shavelson's decision to place a closed cast on her foot on repeated occasions, even after plaintiff's diagnosis of nerve damage, constitutes malpractice and caused her continuing pain and physical limitations, including her RSD; and the doctor's failure to remove plaintiff's Haglund's Deformity. They point out that in a December 16, 2015 conference call, the parties scheduled a trial date of May 3, 2016, and they challenge defendants' decision to wait until January 19, 2016 – just four months before the trial – to bring this order to show cause, requesting a “prodigious amount of pre-trial discovery.” Defendants, they argue, have repeatedly refused to produce discovery on the basis that the Note of Issue has been filed and discovery is complete, and they cannot change their argument on the eve of trial simply because they, and not plaintiffs, are the parties seeking discovery.

Additionally, plaintiffs stress that they already have provided authorizations for all records prior to August 2011, and they state that “in the event that this court is willing to reopen discovery for defendants the documents to be produced should be limited to medical records from 2012 to present” and should be additionally limited to “treating physicians.” Pls' Aff. in Opp., at ¶ 28, 30-31 They state they have provided spreadsheets and medical records relating to the ketamine infusion treatments. As for the Arons' authorizations, they state that Drs. Kim, Zou,

Youngwirth, Weinfeld, Carron, Dellon, David and Gorevic all treated plaintiff prior to the filing of the note of issue; that Dr. Digiacinto fused a herniated disc in 2000, so is not relevant to this lawsuit; and that she saw Dr. Bronfin once, at the request of another physician, and thus he is not a treating physician. Currently, plaintiff states, she only treats with Drs. Brooks and Allen and with a therapist who helps her deal with the stress her condition and this litigation have caused.

Plaintiffs also object to further depositions and to an IME. The injured plaintiff's condition, they assert, is unchanged, and thus a further IME is not necessary. Plaintiffs also have been deposed – the injured plaintiff over the course of two full days – and there have been no significant changes. As for Mr. D'Aliasi, plaintiffs point out that the parties have been separated since 2013 and therefore he cannot fill in any gaps for much of the period at issue.

In reply, defendants state that plaintiff's updated medical records are necessary and proper objects of discovery. They point to plaintiffs' own statements that Ms. DeGrace D'Aliasi had 766 medical appointments between 2007 and 2013 and that she treated with seventeen doctors in 2015. They point out that plaintiff has alleged medical bills for 2014 of around \$40,000, and also claims she had a heart attack because of the alleged malpractice. They argue that they are entitled to authorizations relating to the medical records for these incidents.

The Court concludes that plaintiffs must provide authorizations for the medical records of all treating physicians that defendants requested, covering the period from August 2011 to the present. "Treating physicians" includes those physicians and hospitals who have provided treatment for plaintiff's injuries, and for which plaintiffs intend to claim monetary damages. These

medical providers are part of the damages portion of her case, and defendants have the right to obtain and evaluate copies of the records. For this reason, plaintiffs also must provide Arons authorizations for the requested doctors, for treatment from August 2011 to the present. See generally Arons v. Jutkowitz, 9 N.Y.3d 393 (2007).

The Court denies the request for further depositions and a further IME. As plaintiffs point out, there are no unusual circumstances in this case justifying a further physical examination or deposition. In many medical malpractice cases the problems do not resolve and the plaintiffs assert continuing pain, suffering and medical treatment. As plaintiff already has appeared for both an IME and a two-day deposition, therefore, additional examinations are not warranted.

Accordingly, it is

ORDERED that the motion is denied in part and granted in part, as described above; and it is further

ORDERED that the parties shall appear in Part 6, 60 Centre Street room 345 at 9:30 a.m. on April 19, 2016.

Dated: *Mar. 3*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.