

Miller v Ford

2016 NY Slip Op 30752(U)

April 22, 2016

Supreme Court, New York County

Docket Number: 805263/2014

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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GRACE MILLER, individually and as Executrix of the
ESTATE OF ROBERT MILLER, and as natural guardian
of the infant children,

Index No. 805263/2014

DECISION AND ORDER

Plaintiffs,

— against —

MICHAEL E. FORD, M.D., NEW YORK-PRESBYTERIAN
HOSPITAL/WEILL CORNELL MEDICAL CENTER, JOHN
DOES 1-10,

Defendants.
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PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff Grace Miller, individually and as executrix of the Estate of Robert Miller, commenced this action alleging causes of action for *inter alia* medical malpractice and wrongful death on August 5, 2014. Urging this court to exercise its equitable powers, plaintiff now moves for an order pursuant to CPLR §3103 requiring that defendants Michael E. Ford, M.D. and New York Presbyterian Hospital/Weil Cornell Medical Center (the "NY defendants") depose her jointly with counsel for the defendants in a New Jersey action filed on July 2, 2014, which also alleges causes of action for *inter alia* wrongful death action and medical malpractice (*Grace Miller v. Teresa Notari, M.D. and Summit Dermatology Group, LLC, et al.*, ESX-L-4682-14 [N.J. Super. Ct., Essex Cty]) (the "NJ action"). The defendants in the NJ action have agreed to jointly depose plaintiff in New York County.

Plaintiff lost her husband, decedent Robert Miller, to melanoma cancer on March 10, 2014. Prior to his death, Mr. Miller had been treated in both New York and New

Jersey. Plaintiff brought separate actions in both states because the NY defendants did not consent to jurisdiction in New Jersey and vice versa. In her pleadings, plaintiff alleged that the NY defendants failed to properly and timely diagnose Mr. Miller's melanoma, and that the NJ defendants failed to provide Mr. Miller with proper treatment for melanoma, both of which contributed to the cancer's metastasis and Mr. Miller's ultimate death. Both actions concern the same disease, both actions are in the discovery phase, and all of the defendants seek to depose plaintiff.

DISCUSSION

CPLR §3103(a) provides that "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order ... conditioning or regulating the use of any disclosure device." Further, "[s]uch order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."

Plaintiff argues that jointly deposing her is preferable for three reasons. First, given that both actions concern Mr. Miller's alleged misdiagnosis, inadequate treatment and resulting death from melanoma, both depositions would cover the same information, including Mr. Miller's entire medical history, treatment, family background, and details concerning plaintiff's alleged damages. Second, since Mr. Miller's death took an extreme emotional toll on plaintiff, she urges the court to direct a single deposition in order to limit her anxiety, stress and emotional trauma. Finally, plaintiff notes that defense counsel in both actions have sought discovery from the other case and would be provided with the deposition transcripts from the other action.

Characterizing plaintiff's request as "highly unorthodox", defense counsel notes that the CPLR makes no provision for plaintiff's request. The NY defendants dispute plaintiff's claim that the two actions involve identical factual backgrounds, citing the fact that the NJ defendants treated Mr. Miller commencing in April 2008, while the NY defendants began treating him in February 2012. They further argue that they have the right to depose plaintiff as to the allegations in "the **instant** case without the possible hindrance of counsel for parties in a different action who treated the decedent at a different time, and whose interests may very well be adverse to" their own, and free of any objections from the NJ defendants' counsel (emphasis in original). *Lundquist Aff. in Opp.* At ¶7. The NY defendants also object to being "forced to incur the expense of a much longer deposition". *Id.* Finally, defense counsel claims to be unable to depose plaintiff because plaintiff has not provided certain authorizations for Mr. Miller's medical records.

This court finds that plaintiff has established that she will be disadvantaged absent the entry of a protective order pursuant to CPLR §3103. Conducting a joint deposition will avoid duplicative testimony and unreasonable emotional turmoil to plaintiff from rehashing the details of her husband's death during two separate but similar depositions. Although the NY and NJ actions are not factually identical, defense counsel in both cases will be asking plaintiff similar questions regarding Mr. Miller's entire course of treatment for melanoma. As plaintiff's counsel notes in reply, a joint deposition here will not differ in any significant way from a deposition where multiple party defendants depose a plaintiff. Under the circumstances, the NY defendants will not be hindered from meaningfully deposing plaintiff. While the deposition will take longer to complete, the

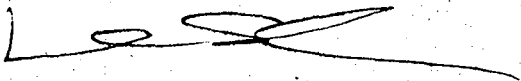
costs will be shared by the two sets of defendants, and counsel for both sets of defendants will ultimately expend time reviewing plaintiff's deposition transcript from the other action.

As to the allegedly outstanding medical authorizations, plaintiff's counsel maintains that plaintiff complied with the demands approximately one year ago. As the NY defendants have failed to move to compel plaintiff's compliance with their demands, this argument does not warrant denial of plaintiff's motion. Even assuming that defendants did not receive said discovery, the record indicates that defense counsel was ready to proceed with plaintiff's deposition as early as December 11, 2015 notwithstanding plaintiff's purported failure to furnish authorizations demanded in February 2015. See Kohn Aff. of Good Faith, at Exh. A, p. 2. For all of the foregoing reasons it is

ORDERED that plaintiff's motion is granted and defendants are directed to appear for plaintiff's deposition in New York County by no later than June 3, 2016, to be conducted jointly with counsel for defendants in the New Jersey action provided that they continue to be amenable to deposing plaintiff jointly.

The foregoing is this court's decision and order.

Dated: New York, New York
April 22, 2016



Martin Shulman, J.S.C.