

<b>Lichy v Mount Sinai Med. Ctr.</b>
2016 NY Slip Op 32747(U)
June 17, 2016
Supreme Court, New York County
Docket Number: 110038/2009
Judge: Joan B. Lobis
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

JACOB LICHY and REGLA LICHY,

Plaintiffs,

-against-

THE MOUNT SINAI MEDICAL CENTER, THE MOUNT  
SINAI HOSPITAL LAPAROSCOPIC SURGICAL CENTER  
OF NEW YORK LLP, ANTHONY JAMES VINE, LESTER  
BRIAN KATZ, ERIC S. GOLDSTEIN, M.D., PLLC and  
ERIC SIMON GOLDSTEIN,

Defendants.

Index No. 110038/2009

Decision and Order

**FILED**

**JUN 22 2016**

COUNTY CLERK'S OFFICE  
NEW YORK

-----X

This medical malpractice action alleges that plaintiff Dr. Jacob Lichy underwent unnecessary and invasive surgery due to defendants' incorrect belief that he was suffering from cancer rather than other gastrointestinal problems. The surgery removed part of Dr. Lichy's stomach and digestive tract, and this in turn allegedly has caused bloating, distention, nausea, chronic gastritis, and indigestion, along with other problems. Plaintiffs allege that the malpractice additionally caused "exposure to increased risk of mortality," and "anxiety and mental anguish" which have "substantially prevented [Dr. Lichy] from enjoying the normal fruits of his social, educational, sexual, and economic activities." Verified BP to Eric Simon Goldstein, at ¶ 19. Plaintiff Regla Lichy, Dr. Lichy's spouse, asserts a claim for loss of consortium.

Plaintiffs filed the Note of Issue on December 2, 2013, and the parties attempted mediation through the court on May 8, 2014, July 15, 2014, October 29, 2015, and November 30, 2015. Between July 15, 2014, and October 29, 2015, the parties resolved outstanding discovery

issues. The case was marked trial ready with a trial date of May 16, 2016, but on that date the matter was adjourned to June 20, 2016. Defendants submitted this order to show cause – the sixth discovery-related motion in this action – around March 24, 2016, and it was fully submitted around April 12, 2016.

In the current motion, defendants seek dismissal, an order of preclusion, or compliance with its latest discovery demands. Defendants allege, in support of their demand, that in the summer of 2015 they “became aware of the fact” that Dr. Lichy recently underwent brain surgery. Consequently, On June 15, 2015 they served a demand for medical records for any treating neurosurgeons, any doctor currently treating Dr. Lichy for any reason, any hospitalizations, any recent rehabilitation records, and all home health records. On October 30, 2015, defendants demanded an Arons authorization for Dr. Saber Ghiassi. Although it is not stated in the demand, defendants now explain that Dr. Ghiassi assisted defendant Dr. Anthony James Vine during the surgery at the heart of this lawsuit.

Plaintiffs rejected both demands on several grounds including that they were overbroad and not reasonably focused in order to obtain relevant documents and that they sought the records of doctors who did not treat Dr. Lichy for the treatment at issue in the litigation. Defendants argue that this refusal is willful and contumacious. They bring up the subject of an earlier discovery motion they brought involving alleged misconduct by plaintiffs, a motion which was denied by Justice Milton Tingling, who at the time presided over the case, in support of their argument that the plaintiffs have a history of misconduct. They also allege that the discovery they seek is necessary in order to determine whether and to what extent Dr. Lichy’s alleged

psychological, social, sexual, educational, professional, and emotional injuries are related to the brain surgery. Because plaintiffs have placed these things in issue, defendants argue, they essentially have opened the door to the breadth of discovery they seek. Defendants' good faith affirmation states, in full, "upon information and belief, that I telephoned and e-mailed plaintiff's counsel, in a good faith effort to resolve by agreement the issues raised by the within motion. . . ."

Plaintiffs oppose the motion. They point out that the June 2015 demand, which sought "any" neurological and medical records without limitation, is overbroad. They state that "the physical injuries Dr. Lichy is claiming . . . are gastrointestinal in nature," Aff. in Opp., at ¶ 8, and plaintiff's alleged brain surgery is irrelevant to his gastrointestinal problems. They note that defendants raised the issue of Dr. Lichy's brain surgery during a mediation before Justice George Silver but refused to explain the basis of their belief that there had been brain surgery. As for the Arons authorization, they assert that defendants do not need an authorization to speak with Dr. Ghiassi, as she was not Dr. Lichy's treating physician. They finally challenge defendants' position that they made a good faith effort to resolve this dispute prior to motion practice.

In reply, defendants state that records of Dr. Lichy's neurological surgery and treatment are relevant to the claims for digestive maladies, exposure to the risk of mortality, anxiety, mental anguish, and loss of enjoyment of activities. They state that, to the extent Dr. Lichy claims his life expectancy has been reduced, there is a broad waiver of physician-patient privilege concerning serious physical conditions. As the bases of their belief, they state that at a medical convention one of the defendants overheard a conversation in which an individual stated that Dr.

Lichy recently had brain surgery, and that plaintiffs did not respond (by April 14, 2016) to their notice to admit mailed on March 23, 2016 with a statement denying the surgery had occurred.

The Court first concludes that defendants' good faith affirmation is insufficient to show a good faith effort to resolve the dispute. Under NYCRR 202.7, an affirmation of good faith must accompany all discovery motions. Subsection (c) provides that this affirmation must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." In the absence of a good faith affirmation, the court must deny the motion. See Fulton v. Allstate Ins. Co., 14 A.D.3d 380, 382 (1st Dep't 2005). Denial of the motion is also appropriate where the motion is insufficiently detailed, does not show that the movant tried to obtain ordered discovery prior to initiating the motion or is otherwise inadequate. See, e.g., Chervin v. Mercura, 28 A.D.3d 600, 602 (2nd Dep't 2006). Defendants' statement that on information and belief counsel phoned and emailed plaintiffs' counsel on unspecified dates and an unspecified number of times does not satisfy this standard.

Regardless, defendants have not shown the type of willful or contumacious behavior necessary to warrant dismissal or preclusion. Their attempt to reargue the merits of a prior discovery motion that they lost, which purportedly shows plaintiffs' history of misconduct, is unavailing. Justice Tingling denied that motion. Additionally, their belief that Dr. Lichy had brain surgery is speculative, and defendants' reliance on plaintiffs' failure to respond to a notice to admit before their answer to that notice was due is unpersuasive. The broad language of the first demand – seeking all records of any neurological and medical treatment and rehabilitation – would

not be warranted even if the doctor has had brain surgery. Defendants' contention that a brain surgery conducted seven years after the treatment at issue may have affected Dr. Lichy's ability to enjoy life during those seven years is speculative, especially as the loss of enjoyment stems from the loss of functions related to the doctor's stomach and not to problems with headaches or mental acuity. To the extent that plaintiffs seek to argue that the procedure shortened Dr. Lichy's life, however, and upon a sufficient showing of proof that Dr. Lichy underwent the procedure in question, information strictly limited in scope to the surgery and its outcome may be relevant. To date, however, defendants have not made such a showing. Finally, plaintiffs' refusal to provide an Arons authorization for a doctor of whom they had no knowledge is not sanctionable.

Dated: *June 17*, 2016

ENTER:

**FILED**  
 JUN 22 2016  
 COUNTY CLERK'S OFFICE  
 NEW YORK

*JBL*  
 \_\_\_\_\_  
 JOAN B. LOBIS, J.S.C.