

Leace v Kohlroser

2016 NY Slip Op 32752(U)

July 15, 2016

Supreme Court, Suffolk County

Docket Number: 27521-2011

Judge: Peter H. Mayer

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ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-16-15
ADJ. DATE 6-23-15
Mot. Seq. # 015 - MG

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MELISSA LEACE, :

Plaintiff(s), :

- against -

JAMES KOHLROSER, D.O., ISLAND
DIGESTIVE DISEASE CONSULTANTS, P.C.,
JEFFREY NAKHJAVAN, D.O., JEFFREY M.
NAHKHJAVAN, D.O., P.C., ELLIOTT
EISENBERGER, M.D. and GOOD SAMARITAN
HOSPITAL MEDICAL CENTER, :

Defendant(s). :

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Tantleff & Kreinces, Llp
Attorneys for Plaintiff
170 Old Country Road, Suite 316
Mineola, New York 11501

Gabriele & Marano, Llp
Attorneys for Defendants **Kohlroser, D.O.**
and Island Digestive Disease Consultants
100 Quentin Roosevelt Boulevard
P.O. Box 8022
Garden City, New York 11530

Helwig, Henderson, Ryan, Lamagna & Spinola Llp
Attorney for Defendants **Nakhjavan, D.O.**
One Old Country Road, Suite 428
Carle Place, New York 11514

Bartlett, McDonough, & Monaghan
Attorneys for Defendant **Eisenberger, M.D.**
670 Main Street
Islip, New York 11751

Lewis Johs Avallone Aviles, Llp
Attorneys for Defendant **Good Samaritan Hospital**
21 East Second Street
Riverhead, New York 11901

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause by the defendants Nakhjavan, signed May 5, 2015 (Mayer, J.), and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated June 12, 2015, and supporting papers; (3) Reply Affirmation by the defendants Nakhjavan, dated June 22, 2015, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. #015) by defendants Jeffrey M. Nakhjavan, D.O. and Jeffrey M. Nakhjavan, D.O., PC (hereinafter "Nakhjavan defendants"), which seeks an order quashing plaintiff's April 14, 2015 subpoena pursuant to CPLR §2304, and for a protective order pursuant to CPLR 3103, is hereby granted as set forth herein; and it is further

ORDERED that counsel for the movant shall promptly serve a copy of this Order upon counsel for all parties via First Class mail, and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk.

In this medical malpractice action, plaintiff alleges that the defendants failed to timely diagnose and treat a condition involving an endoscopic camera capsule that remained in the plaintiff's system following a capsule endoscopy performed in January of 2008. According to the plaintiff, this worsened her existing Crohn's Disease, necessitating surgery in 2011. The parties completed depositions of the plaintiff, defendant James Kohlroser, D.O. and Island Digestive Disease Consultants. Thereafter, defendants moved for summary dismissal of plaintiff's complaint as time-barred by the applicable statute of limitations. By Order dated March 20, 2015, the Court granted dismissal in favor of defendants Elliott Eisenberger, M.D., Good Samaritan Hospital Medical Center, and the Nakhjavan defendants. In granting summary dismissal to those defendants, the Court found, in part, that "plaintiff [had] not established that additional discovery would disclose facts essential to justify opposition to defendants' motions" (citations omitted).

On or about April 13, 2015, plaintiff's counsel served a notice of appeal upon counsel for the parties. Notwithstanding dismissal in favor of the Nakhjavan defendants, plaintiff's counsel also served a testimonial and information subpoena directly upon the Nakhjavan defendants. The subpoena included a caption that had been amended without a court order permitting such amendment, as required by CPLR 3025(b). After receipt of the subpoena, the Nakhjavan defendants filed the instant motion to quash pursuant to CPLR §2304, and for a protective order pursuant to CPLR 3103 precluding plaintiff from deposing Dr. Nakhjavan pending a disposition of the plaintiff's appeal.

Generally, CPLR §3101(a) entitles parties to full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof. What is "material and necessary" is left to the sound discretion of the lower courts and includes any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason (see *Andon v. 302-304 Mott St. Assocs.*, 94 NY2d 740, 709 NYS2d 873 [2000]; *Allen v. Crowell-Collier Publishing Co.*, 21 NY2d 403, 288 NYS2d 449 [1968]).

Pursuant to CPLR §3103(a), the "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 denying, limiting, conditioning or regulating the use of any disclosure device." The purpose of the court issuing a protective order is to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR §3103[a]). Where, as here, a party serves a discovery subpoena, CPLR §2304 grants the court broad discretionary power to impose reasonable conditions when

deciding a motion to quash (see *Montesano v North Fork Bank*, 282 AD2d 537, 722 NYS2d 767 [2d Dept 2001]). In exercising that discretionary power, the Court finds that an order quashing the plaintiff's April 14, 2015 subpoena and granting a protective order is warranted, precluding as premature the plaintiff from proceeding with the deposition of the Nakhjavan defendants pending the plaintiff's appeal of the Court's March 20, 2015 Order.

In granting dismissal in favor of the defendants, the Court's found that "[t]he defendants [had] made a prima facie showing of entitlement to judgment as a matter of law by demonstrating, through the submission of, inter alia, the plaintiff's testimony *and medical records*, that the action was not commenced until after the expiration of the two-year-and-six-month statute of limitations applicable to medical malpractice actions" (emphasis added). The Court also found that "plaintiff [had] not established that additional discovery would disclose facts essential to justify opposition to defendants' motions" (citations omitted). Notwithstanding the Court's findings and dismissal in favor of the Nakhjavan defendants, the plaintiff's subpoena demands from the Nakhjavan defendants testimony and production of the following records:

Complete ORIGINAL insurance claims, medical records, hospital records, billing, etc., records of all care and treatment rendered to plaintiff, Melissa Leace, including all insurance claims records, medical records, notes, charts, and reports, certified bills, x-rays, radiological films and studies, diagnostic testing, etc. concerning plaintiff, Melissa Leace. This shall include video/computer hard drive/disks and/or other storage medium containing the records relative to this plaintiff (emphasis in original).

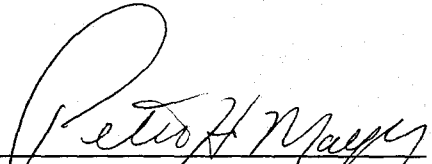
It is not an improvident exercise of discretion for the Supreme Court to quash a testimonial subpoena where the party issuing the subpoena fails to show that the information sought is material or necessary to the prosecution or defense of the subject action (see CPLR 3101[a][4]; *New Hyde Park Ophthalmology Assocs., P.C. v Weiss*, 190 AD2d 842, 594 NYS2d 649 [2d Dept 1993]; *Blittner v Berg and Dorf*, 138 AD2d 439, 525 NYS2d 858 [2d Dept 1988]). This is particularly true where the discovery sought would focus undue attention to collateral matters to the detriment of the main issue, rather than sharpen the issues and reduce delay and prolixity (*id.*; *European American Bank v Competition Motors, Ltd.*, 186 AD2d 784, 589 NYS2d 82 [2d Dept 1992]).

The motion papers reveal (and plaintiff's counsel does not dispute) that during the discovery process, plaintiff's counsel was served with a copy of Dr. Nakhjavan's office chart for the plaintiff as long ago as November 30, 2011. In addition, another copy of the plaintiff's chart was annexed as an exhibit to the Nakhjavan defendants' motion to dismiss. Given the Court's findings in its March 20, 2015 Order, the timing of the subject subpoena, and the records demanded by the plaintiff in the subpoena, the Court concludes that plaintiff's issuance of the subpoena served only to add unreasonable annoyance and expense to the Nakhjavan defendants, which is precisely what CPLR §3103[a] is designed to prevent. Furthermore, plaintiff's opposition fails to show that the information sought in the subpoena is material or necessary to the prosecution of the action (CPLR §3101[a]; *Blittner v Berg and Dorf*, 138 AD2d 439, 525 NYS2d 858 [2d Dept 1988]).

Based upon the foregoing, the motion by the Nakhjavan defendants is granted.

This constitutes the Decision and Order of the Court.

Dated: July 15, 2016


PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION