

Mamedova-Braz v Benyaminov
2017 NY Slip Op 32536(U)
November 27, 2017
Supreme Court, New York County
Docket Number: 656418/2016
Judge: Arthur F. Engoron
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

-----X
YELENA MAMEDOVA-BRAZ, MD and MEDICAL
PRACTICE NY PC,

Plaintiffs,

Index Number: 656418/2016

Sequence Nos: 002, 003, 004

- against -

Decision and Order

ALBERT BENYAMINOV, RAISA MISHPATOVA,
UNIQMD INC., CLAUDIA IORDACHE, MD, and
CLAUDIA IORDACHE MD PSYCHIATRY P.C.,

Defendants.

-----X
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 10, were used on: (1) plaintiffs’ motion, pursuant to CPLR 3124, 3126, and 22 NYCRR 130-1.1, for discovery sanctions; the Iordache defendants’ cross-motion for discovery sanctions; and defendants Benyaminov, Mishpatova, and Uniqmd’s cross-motion for a protective order (Seq. No. 002); and (2) the motions by defendants Benyaminov, Mishpatova, and Uniqmd to adjourn the motion, cross-motion for discovery sanctions and cross-motion for a protective order (Seq. Nos. 003, 004):

Papers Numbered:

Motion Sequence No. 002

Notice of Motion for Discovery Sanctions - Affirmation - Exhibits	1
Notice of Cross-Motion for Discovery Sanctions - Affirmation - Exhibits	2
Notice of Cross-Motion for Protective Order - Affirmation - Exhibits	3
Plaintiffs’ Reply Affirmation in Further Support of Discovery Sanctions Motion and in Opposition to Cross-Motion for Protective Order - Exhibits	4
Reply Affirmation in Further Support of Cross-Motion for Discovery Sanctions and in Opposition to Cross-Motion for Protective Order - Exhibits	5
Reply Affirmation - Reply Affidavit in Further Support of Cross-Motion for Protective Order - Exhibits	6
Reply Affirmation in Further Support of Cross-Motion for Protective Order - Exhibits	7

Motion Sequence No. 003

Notice of Motion- Affirmation	8
-------------------------------------	---

Motion Sequence No. 004

Notice of Motion- Affirmation	9
Affirmation in Opposition - Affidavit in Opposition - Exhibits	10

Upon the foregoing papers, the motion and cross-motion for discovery sanctions are each granted to the extent set forth below. The cross-motion for a protective order, and the motions to adjourn, are denied in all respects.

Plaintiffs Yelena Mamedova-Braz, MD (“Braz”), a general psychiatrist, engaged defendant Uniqmd Inc. (“Uniqmd”) to perform billing, administrative, and office management services for her medical practice,

plaintiff Medical Practice NY PC (collectively, “plaintiffs”). Defendants Albert Benyaminov (“Benyaminov”) and Raisa Mishpatova (“Mishpatova”) are the principal shareholders, directors and officers of Uniqmd (collectively, “the Uniqmd defendants”). According to plaintiffs, the Uniqmd defendants allegedly failed to perform their duties and obligations to plaintiffs, improperly retained insurance payments due to plaintiffs, misappropriated plaintiffs’ patients, and ousted plaintiffs from their medical offices. Plaintiffs also allege that defendants Claudia Iordache MD and Claudia Iordache MD Psychiatry P.C. (“the Iordache defendants”), in concert with the Uniqmd defendants, misappropriated plaintiffs’ patients and ousted plaintiffs from their office space. On December 8, 2016, plaintiffs commenced this action: (1) to recover damages for, inter alia, defendants’ breach of fiduciary duties, misappropriation, unlawful eviction, tortious interference with contract and business relationships, conversion; (2) for an accounting; and (3) for a preliminary and permanent injunction.

By Order dated January 5, 2017, this Court granted plaintiffs’ motion for a preliminary injunction to the extent of directing defendants: (1) not to solicit plaintiffs’ patients or former patients without informing them that they can choose their own doctor and giving them plaintiffs’ phone number; and (2) “to turn over to plaintiff immediately but in no case less than a week, all checks, medical records, and other possessions which include patient lists that rightfully belong to plaintiffs.” Thereafter, defendants served their respective answers and the parties engaged in discovery proceedings.

On February 8, 2017, the Uniqmd defendants served their answer in which they asserted counterclaims for breach of contract, unjust enrichment, breach of fiduciary duty, reimbursement, and an accounting. The Uniqmd answer makes no mention of sexual harassment, harassment, or intimidation. On June 12, 2017, plaintiffs served a First Request for Production of Documents to which Benyaminov responded on July 14, 2017. Benyaminov’s responses included, among other things, one and one-half inches of paper consisting of Uniqmd’s checks and bank statements. On September 26, 2017, defendants Benyaminov and Mishpatova appeared for their depositions. Plaintiffs first deposed Mishpatova during which they learned that most of the checks and bank statements produced by Benyaminov do not relate to plaintiffs’ medical practice. The Uniqmd defendants did not provide a reasonable excuse for their deficient discovery responses; their attorney’s claim that the failure to produce documents relevant to the instant litigation was “inadvertent” is insufficient. Mishpatova’s deposition concluded at 4:30 p.m. on September 26 and the parties rescheduled Benyaminov’s deposition for October 18, 2017.

Benyaminov’s deposition was confirmed; plaintiffs and the Iordache defendants prepared for the deposition and they appeared ready to proceed on the morning of October 18, 2017. At the beginning of Benyaminov’s deposition, just after he gave his address, his counsel made a statement on the record objecting to the “conduct of the deposition” and directing “Benyaminov not to answer any questions asked by any attorney during the deposition.” The reasons given for the purported objection was Braz’ presence, and – for the first time – “allegations of sexual harassment nature that exists in this case,” “issues of intimidation,” and “issues of harassment.” Counsel for plaintiffs vehemently objected to the “absurd, false, scurrilous” allegations of harassment, made for the first time that morning, and stated that the conduct of Benyaminov in refusing to proceed is “solely for the purposes of stalling and preventing his deposition.” Counsel for plaintiffs stated that they would seek sanctions for Benyaminov’s frivolous conduct. Counsel for the Iordache defendants joined in the application for sanctions, noting that Benyaminov had not made any allegations of harassment at any time prior to that morning.

Plaintiffs now move, pursuant to CPLR 3124 and 3126, for an order: striking Benyaminov’s answer and counterclaims for his willful refusal to proceed with his deposition; or in the alternative, compelling Benyaminov’s deposition by a date certain, subject to a conditional order striking his answer and counterclaims; directing Benyaminov to produce complete discovery responses, including all checks, bank statements, and other documents relating to plaintiffs’ medical practice; and for sanctions in the

form of legal fees and expenses in the sum of \$7,146.00 incurred with respect to Benjaminov's aborted deposition and the instant motion, plus an additional \$10,000 sanction. The Lordache defendants cross-move for, essentially, the same relief, seeking sanctions in the form of legal fees and expenses in the sum of \$3,515 incurred in connection with the instant cross-motion. Benjaminov opposes the motion and cross-motion, and separately cross-moves, pursuant to CPLR 3103, for a protective order with respect to his deposition.

Benjaminov's eleventh-hour refusal to proceed with his deposition, based solely upon his newly asserted, conclusory allegation of "sexual harassment," is without any basis in fact or law and appears to be alleged solely to delay this litigation. See 22 NYCRR 130-1.1. Indeed, even assuming arguendo that Benjaminov has a meritorious sexual harassment claim against Braz, Braz would still be entitled to attend Benjaminov's deposition in any action asserting such claim. See CPLR 3113(c) ("Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court ..."); see also Perez v Time Moving & Storage, 28 AD3d 326, 328 (1st Dept 2006) ("CPLR 3113(c) establishes a party's right to be present at an examination before trial" subject only to court ordered exclusion under CPLR 3103(a) in appropriate circumstances).

Benjaminov's conclusory allegation that Braz sexually harassed him and that she will seek to intimidate him during the deposition is woefully insufficient to establish the type of circumstances required to exclude Braz from the deposition. See Perez v Time Moving & Storage, 28 AD3d at 328 (pro se plaintiff's "conclusory assertion that [defendant] would intimidate his employees ... [is] an insufficient basis for barring a party from a deposition."). On this record, there is no competent, admissible proof, such as a psychologist or psychiatrist affirmation demonstrating that Benjaminov – a 64 year old man who appeared before this Court on January 5, 2017 with Braz and their respective attorneys – would be subject to "psychological pressure" by Braz and become "confuse[d]." Compare Troutman v Washburn, 197 AD2d 876, 876 (1993) (plaintiff excluded based on an affidavit by a psychiatric social worker stating that he would be "physically and psychologically intimidated by plaintiff"). To this Court's recollection, despite Braz's presence, Benjaminov did not appear intimidated or confused by Braz during the January 5, 2017 court appearance.

Finally, Benjaminov's attorney improperly directed Benjaminov not to answer any questions without first knowing what those questions would be. Neither Article 31 of the CPLR nor 22 NYCRR § 221.2 provide any basis for Benjaminov's attorney's blanket direction to Benjaminov, before the deposition even started, not to answer any questions. To the contrary, CPLR 3113(b) requires a deponent to answer all questions posed at a deposition, even where a valid basis for objection exists, "subject to the objections and to the right of a person to apply for a protective order." CPLR 3113(b); 22 NYCRR 221.1(a); see also White v Martins, 100 AD2d 805 (1st Dept 1984). The only grounds upon which a deponent may properly decline to answer a question during a deposition are those enumerated in 22 NYCRR § 222, to wit, "(a) to preserve a privilege or right of confidentiality; (b) to enforce a limitation set forth in an order of a court; or (c) when the question is plainly improper and would, if answered, cause significant prejudice to any person"; and any direction to not answer a question "shall be accompanied by a succinct and clear statement of the basis therefor." Here, while Benjaminov is entitled to seek a protective order – even during his deposition by way of call to this Court – as to questions that "infringe upon a privilege; or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered" (White v Martins, 100 AD2d at 805), Benjaminov has not identified a single question that Braz's attorney may possibly ask that may possibly infringe upon his "essential and important legal rights." Nor has Benjaminov specified which of his "essential and important legal rights" are in jeopardy. Moreover, Benjaminov's attorney's blanket statement that the deposition could not go forward if Braz remained in the room due to general, unspecified "allegations of sexual

harassment” and “issues of intimidation” and “harassment” did not amount to a clear and succinct statement of the basis for his direction to Benyaminov not to answer any questions. Consequently, this Court is left to guess and surmise as to which questions, if any, it should preclude Braz’s attorney from asking and whether there is a valid basis to exclude Braz from the deposition in the first instance.

In view of the foregoing, Benyaminov’s attorney’s blanket instruction that Benyaminov not answer any deposition questions was made in violation of CPLR 3113, 3115 and 22 NYCRR §§ 221 and 222, and is therefore without merit in law and, on this record, cannot be supported by a reasonable argument for an extension, modification or reversal of existing law (nor does Benyaminov even argue for such extension, modification, or reversal). Consequently, Benyaminov’s refusal to proceed with his deposition is frivolous within the meaning of 22 NYCRR 130-1.1(c)(1). Indeed, this Court is hard-pressed to find any purpose for Benyaminov’s refusal to proceed with his deposition, coupled with his unexplained failure to provide documents relating to plaintiffs’ medical practice (despite this Court’s January 5, 2017 Order), other than to delay this litigation and to harass plaintiff within the meaning of 22 NYCRR 130-1.1 (c)(2). Accordingly, and in the exercise of its discretion, this Court awards to plaintiffs’ and the Iordache co-defendants “costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney’s fees,” resulting from Benyaminov’s frivolous conduct. See Levy v. Carol Mgmt. Corp., 260 AD2d 27 (1st Dept 1999) (sanctions award of \$8,000 for frivolous appeal). This Court finds that **plaintiffs substantiated their claim for attorneys’ fees and expenses in the sum of \$3,796**, calculated as follows: deposition preparation: \$1,200 (3 hours at \$400/hour); appearance at aborted deposition: \$400 (1 hour at \$400/hour); preparation and filing of discovery sanction motion: \$1,600 (4 hours at \$400/hour); court reporter fee: \$196; and interpreter fee: \$400. This Court finds that **the Iordache defendants substantiated their claim for attorneys’ fees and expenses in the sum of \$1,845**, calculated as follows: deposition preparation: \$600 (2 hours at \$300/hour); appearance at aborted deposition: \$300 (1 hour at \$300/hour); preparation and filing of discovery sanction cross-motion \$900 (3 hours at \$300/hour); and motion filing fee: \$45.

Accordingly, plaintiffs’ motion, and co-defendant Iordache’s cross-motion for discovery sanctions are granted as follows:

- (1) Benyaminov to produce complete responses to plaintiffs’ discovery demands, including but not limited to production of all documents (checks, bank statements, etc.) relating to plaintiffs’ medical practice and claims herein, **by December 14, 2017**;
- (2) Benyaminov to appear for his deposition on **January 12, 2018**, and to answer all questions posed by plaintiffs and co-defendants, subject only to any objections as to form and without prejudice to seek a protective order pursuant to CPLR 3113, 3115, and 22 NYCRR § 222;
- (3) Plaintiffs are awarded the sum of \$3,796, as and for attorneys’ fees, court reporter and interpreter costs, to be paid by Benyaminov on or before December 14, 2017;
- (4) Iordache are awarded the sum of \$1,845, as and for attorneys’ fees and motion filing fees, to be paid by Benyaminov on or before December 14, 2017; and
- (5) Benyaminov’s failure to comply with the foregoing directives will result in the striking of his answer and counterclaims upon further motion.

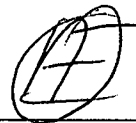
Benyaminov’s cross-motion for a protective order is denied in all respects.

Benyaminov's motions (Sequence Nos. 003 and 004) to adjourn the instant motion and cross-motions for discovery sanctions and a protective order, are hereby denied as moot. The parties have had a full and fair opportunity to brief the issues, and the motion and cross-motions have been marked fully submitted.

Conclusion

Motion and cross-motion for discovery sanctions are granted to the extent set forth above. Cross-motion for protective order, and motions to adjourn, are denied in all respects. This matter is hereby scheduled for a **Preliminary Conference in Part 37 (80 Centre Street, Room 328) on December 19, 2017 at 10:00 a.m.**

Dated: November 27, 2017



Arthur F. Engoron, J.S.C.