

Crockett v Kalache

2017 NY Slip Op 33536(U)

June 12, 2017

Supreme Court, Westchester County

Docket Number: Index No. 55448/2015

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X
ANTOINETTE CROCKETT,

Plaintiff,

-against-

JEAN KALACHE, M.D.,

Defendant.
-----X

DECISION & ORDER

Index No. 55448/2015

Motion Date: June 12, 2017

Seq. No. 1

LEFKOWITZ, J.

The following papers were read on this motion by plaintiff for an order holding nonparty, Smith & Nephew, Inc. (“Smith & Nephew”), in contempt for its failure to fully comply with a judicial subpoena duces tecum. The motion is unopposed

- Order to Show Cause - Affirmation in Support - Exhibits 1-4
- Affirmation of Service of the Order to Show Cause - Exhibits A-C
- Affirmation of Service of the Judicial Subpoena Duces Tecum

Upon the foregoing papers and proceedings held on June 12, 2017, this motion is determined as follows:

In this action plaintiff claims defendant negligently used an incorrect device, improperly aligned that device, or used a defective implant during plaintiff’s total knee replacement surgery which occurred on August 24, 2012 at St. John’s Riverside Hospital in Yonkers, New York. Plaintiff advises the court that during the course of discovery, defendant testified that he used a Smith & Nephew knee replacement device during plaintiff’s surgery. However, defendant was unable to provide the name of the Smith & Nephew representative who was present during the surgery and who assisted defendant in the selection of the implanted device.

On March 9, 2017, plaintiff’s counsel served a judicial subpoena duces tecum on CT Corporation System, which is the registered agent in New York for service of process on Smith and Nephew (NYSCEF document 30). Plaintiff states that the subpoena sought certain documents, however the only documents which are the subject of this motion include: “[a]ny record or information regarding the name of the Smith & Nephew representative present in the operating room at St. John’s Riverside Hospital located in Yonkers, New York during the 8/24/12 knee replacement surgery performed on plaintiff by defendant Jean Kalache, M.D.”

Plaintiff's counsel avers that on March 14, 2017 he received a telephone call from Sally I. Gaden, Esq., ("Gaden") on behalf of Smith & Nephew during which counsel discussed the subpoena. Gaden reiterated their discussion in an email to plaintiff's counsel dated March 14, 2017. In that email Gaden stated, among other things, "We will inquire whether any representative for the company attended Ms. Crockett's implant or revisions surgeries, and, if so, we will provide the name of the rep(s). As I mentioned, the hospital operative records should identify if anyone from Smith & Nephew attended the surgeries" (Exhibit 2, NYSCEF document 24). Plaintiff contends that while Gaden provided some of the information sought by the subpoena, she did not provide the name of Smith & Nephew's representative who was present during plaintiff's surgery. Plaintiff includes an email exchange with Gaden from March 17, 2017 which further discusses counsels' respective positions with respect to Smith & Nephew's responses to the subpoena (Exhibit 4, NYSCEF document 26).

Plaintiff brings the instant motion arguing that Smith & Nephew should be held in contempt for failing to fully comply with the subpoena. Plaintiff argues that Smith & Nephew is attempting to avoid compliance with the subpoena by stating it has no records with respect to the representative who was present during plaintiff's surgery. Plaintiff states that Gaden also improperly avoided providing the information, claiming that it was "beyond the scope of the subpoena." Plaintiff contends that without this information she is unable to serve a subpoena to depose that witness regarding events which occurred during the surgery. Plaintiff argues that Smith & Nephew cannot deny that its sales representatives assist in operating rooms, selecting and providing the company's devices which are implanted in patients. Plaintiff's counsel states that his own computer research generated a LinkedIn profile for Henry Vera, Sales Representative at Smith & Nephew which indicates that Mr. Vera has assisted surgeons in numerous arthroscopic procedures in the greater New York area. Plaintiff's counsel states that he also located a LinkedIn profile for Rick Minero who is listed as a distributor for Smith & Nephew. Mr. Minero's name also appears on an invoice provided by Smith & Nephew in response to the subpoena. It is plaintiff's contention that given the highly specialized and proprietary nature of these medical devices, Smith & Nephew must have information or knowledge concerning the identity of the representative who was present during plaintiff's surgery. Plaintiff contends that Smith & Nephew's partial response to the subpoena is sufficient grounds for holding it in civil contempt.

Failure to comply with a judicial subpoena is punishable as a contempt of court (CPLR 2308[a]). Disobedience of a subpoena is punishable by fine or imprisonment (*see* Judiciary Law § 753[A][5]). In order to sustain a finding of civil contempt under this statute a movant must establish by clear and convincing evidence "(1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct" (*El-Dehdan v El-Dehdan* 114 AD3d 4, 5 [2Dept 2013]). A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court (*Vider v Vider*, 85 AD3d 906 [2Dept 2011]).

Plaintiff has demonstrated that the subpoena was properly served on Smith & Nephew. However, contrary to plaintiff's assertions it does not appear that Smith & Nephew is in violation of the subpoena sufficient to warrant a finding of contempt. A review of the April 17, 2017 email exchange between plaintiff's counsel and Gaden, reveals that the parties had exchanged numerous emails about the information sought by the subpoena and Smith & Nephew's responses thereto. Significantly, it appears that outside of the information which is the subject of this motion, Smith & Nephew has complied with the demands of the subpoena. Additionally, those emails raise the suggestion that at some point during communications between counsel, the demand for information concerning the identity of the Smith & Nephew representative present during plaintiff's surgery became broader than the demand as it appeared in the subpoena to include "the name, address and contact information for any device sales representative for the New York/Westchester area during 2012 including those responsible for providing knee replacement devices at St. John's Riverside Hospital in Yonkers, NY in 2012" (Email from Gaden to plaintiff's counsel, April 17, 2017, sent at 4:55 p.m., Exhibit 4, NYSCEF document 26). Gaden clearly objected to the production of these documents on the grounds that this was beyond the scope of the subpoena. However, at no point does the record before the Court reflect that Gaden refused to comply with the subpoena as it was served. In light of Smith & Nephew's demonstrated and substantial compliance with the subpoena, a finding of contempt is not warranted at this time. Notwithstanding the foregoing, the name of the Smith & Nephew representative who was present during plaintiff's surgery is clearly relevant and plaintiff is entitled to discovery concerning that person's identity. Accordingly, Smith & Nephew is directed to provide the name of the representative who was present during plaintiff's surgery as set forth below.

In view of the foregoing, it is

ORDERED that on or before July 21, 2017, Smith & Nephew, Inc. is directed to provide the name of its Representative for Orthopaedic Reconstruction Devices who was present during plaintiff's surgery on August 24, 2012. To the extent that Smith & Nephew states that it is not in possession of that information, it shall provide an affidavit or affirmation of an officer, director, member, or employee of Smith & Nephew with personal knowledge stating: whether Smith & Nephew routinely maintains the names of its representatives who are present during surgery involving their devices, and, if this information is not typically maintained by Smith & Nephew, it shall identify the party/ parties most likely to possess this information and their contact information. To the extent that this information is typically maintained by Smith & Nephew, it shall provide a detailed description of the search made for the identity of the representative present during plaintiff's surgery, including: the name and title of the person conducting the search and the date and location where the search occurred; and it is further

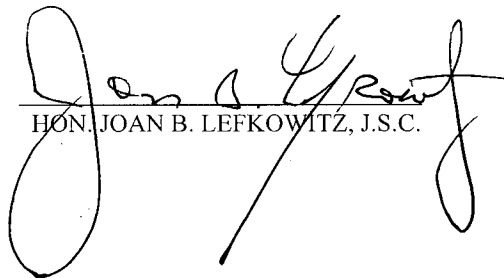
ORDERED that plaintiff's motion to hold Smith & Nephew in contempt is denied without prejudice; provided that upon proof by affidavit that Smith & Nephew has failed to timely comply with the preceding decretal paragraph, along with proof of service of a copy of this Decision & Order, plaintiff may renew its motion to hold Smith & Nephew in contempt for

such noncompliance; and it is further

ORDERED that all parties shall appear for a conference in the Compliance Part, Courtroom 800, on July 24, 2017 at 9:30 A.M.; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon defendant and nonparty Smith & Nephew, Inc. within 7 days of entry.

Dated: White Plains, NY
June 12, 2017



HON. JOAN B. LEFKOWITZ, J.S.C.

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cc: Compliance Part Clerk