

Montant v Gluck
2018 NY Slip Op 30820(U)
April 23, 2018
Supreme Court, Suffolk County
Docket Number: 05619/2011
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
JusticeTownsend Montant, individually and as
Administrator of the Estate of Teresa Montant,

Plaintiff,

-against-

Bradley Gluck, M.D., Hampton Radiology, P.C.,
East End Radiology, P.C., Southampton Radiology,
P.C., North Fork Radiology, P.C., John Hunt,
M.D., Beth Josephs, P.A.C., Hamptons
Gynecology & Obstetrics, P.C., Peconic Bay
Medical Primary Care, P.C., Peconic Bay Medical
Care, P.C., and Southampton Hospital,

Defendants.

Index No.: 05619/2011Attorneys [See Rider Annexed]Motion Sequence No.: 003; MOTDMotion Date: 10/3/17Submitted: 2/7/18Motion Sequence No.: 004; MGMotion Date: 12/18/17Submitted: 2/7/18Motion Sequence No.: 005; MOTDMotion Date: 1/10/18Submitted: 2/7/18

Upon the following papers numbered 1 to 402 read on the application for an order pursuant to CPLR 3124 compelling the continued deposition of defendant Beth Josephs, P.A.C. and pursuant to CPLR 3126 conditionally striking defendant's answer in the event defendant Beth Josephs, P.A.C. fails to appear for a complete deposition; Notice of Motion and supporting papers 1-24 (Motion Sequence 003); Notice of Cross-Motion and supporting papers 25-204 (Motion Sequence 004) for an order granting defendants Bradley Gluck, M.D., Hampton Radiology, P.C., East End Radiology, P.C., Southampton Radiology, P.C., North Fork Radiology, P.C., the opportunity to depose co-defendant Beth Josephs, P.A.C. or suppressing the transcript of the previous testimony of defendant Beth Josephs, P.A.C.; Notice of Cross-Motion and supporting papers 205-370 and two DVDs of deposition transcripts (Motion Sequence 005), for an order denying plaintiff's motion to compel the further deposition of Beth Josephs P.A.C. and the motion of co-defendants granting them the opportunity to question co-defendant Beth Josephs P.A.C.; Answering Affidavits and supporting papers 371-382 (Motion Sequences 003 and 005); Replying Affidavits and supporting papers 383-389 (Motion Sequence 004); Replying Affidavits and supporting papers 390-402 (Motion Sequences 003 and 005); it is

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ORDERED that the applications of the parties (Motion Sequences 003, 004 and 005) are consolidated for purposes of this determination; and it is further

ORDERED that the motion by plaintiff for an order compelling the continued deposition of defendant Beth Josephs, P.A.C. (Motion Sequence 003) is granted to the extent as set forth herein; and it is further

ORDERED that the motion by defendants Bradley Gluck, M.D., Hampton Radiology, P.C., East End Radiology, P.C., Southampton Radiology, P.C., North Fork Radiology, P.C. for an order granting them the opportunity to depose co-defendant Beth Josephs, P.A.C. (Motion Sequence 004) is granted as set forth herein; and it is further

ORDERED, that defendant Beth Josephs, P.A.C. shall appear for a deposition to be held at the Courthouse, located at One Court Street, Riverhead, New York at 10:00 a.m. on a date within forty-five (45) days from the date of this order or at a subsequent adjourn date as may be agreed upon by the parties, as soon as thereafter is practicable, and it is further

ORDERED that the motion by defendant Beth Josephs, P.A.C. for a protective order regarding the scope of questions posed at the continued deposition is granted to the extent as set forth herein; and it is further

ORDERED that all other relief requested by the parties is denied as set forth more fully herein.

This is an action sounding in medical malpractice and wrongful death, wherein plaintiff alleges a failure to diagnose breast cancer in the decedent Teresa Montant. The deposition of defendant Beth Josephs, P.A.C. ("Josephs") began on April 28, 2017 but was halted when a disagreement arose between counsel for plaintiff and counsel for Josephs regarding the questions being posed by counsel for plaintiff. As a result, the deposition transcript was marked for a ruling and the deposition was adjourned. Plaintiff moves for an order compelling the continuation of the deposition of defendant Josephs and defendant Josephs cross-moves for a protective order. Defendants Bradley Gluck, M.D., Hampton Radiology, P.C., East End Radiology, P.C., Southampton Radiology, P.C., North Fork Radiology, P.C., (the "radiology defendants") move for an order granting them the opportunity to question defendant Josephs, as the deposition was aborted prior to any questions being posed by counsel for the radiology defendants.

CPLR 3101(a) directs that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action" (*Kooper v Kooper*, 74 AD3d 6, 10, 901 NYS2d 312 [2d Dept 2010]). The Court of Appeals has stated the words "material and necessary" are to be interpreted to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for

cross-examination, it should be considered ‘evidence material in the prosecution or defense’” (*Allen v Crowell-Collier Publ. Co.*, *id.*, at 407, 288 NYS2d 449, *quoting* CPLR 3101). However, a court has discretion to limit disclosure and issue a protective order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts” (CPLR 3103[a]; *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; *see also Conte v County of Nassau*, 87 AD3d 558, 559, 929 NYS2d 741 [2d Dept 2011]). The burden is on the moving party to establish the need for a protective order (*Koump v Smith*, 25 NY2d 297 [1969]; *Bombard v Amica Mut. Ins. Co.*, 11 AD3d 647, 783 NYS2d 85 [2d Dept 2004]). A motion for a protective order should not be granted when supported “solely by an attorney’s affirmation containing only conclusory allegations of hardship” (*Boylin v. Eagle Tel.*, 130 AD2d 538, 538 [2d Dept. 1987]). “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed” (*Mattocks v. White Motor Corp.*, 258 A.D.2d 628, 629, 685 N.Y.S.2d 764 [2d Dept. 1999]).

While CPLR 3101 (a) is liberally construed, nonetheless, a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see Ural v Encompass Ins. Co. of Am.*, 97 AD3d 562, 948 NYS2d 621 [2d Dept 2012]; *Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; *Gonzalez v International Bus. Machs. Corp.*, 236 AD2d 363, 654 NYS2d 327 [2d Dept 1997]; *Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420 [2d Dept 1989]).

More specifically, the Second Department has determined that “[i]n an action for malpractice brought against more than one physician, one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness” (*Carvalho v. New Rochelle Hosp.*, 53 AD2d 635, 384 NYS2d 508 [2d Dept. 1976]; *see also Claudino v. Mastellone*, 286 AD2d 697, 730 NYS2d 255 [2d Dept. 2001]). “The reason for this rule is obvious: To prevent the incongruous result of a plaintiff eliciting expert opinion of the quality of one defendant physician from another defendant physician, and, depending on the response, adopting as one’s own expert, the very physician whom the plaintiff has already sued for malpractice” (*Devine v. Pinapati*, 19 Misc.3d 1135, 862 NYS2d 814 [Albany Cty. 2008]). The principles set forth in *Carvalho*, *supra*, are not modified by 22 NYCRR 221.2, as that section provides that a deponent need not answer questions posed at a deposition that are plainly improper and would cause significant prejudice to any person.

Here, plaintiff’s line of questioning to defendant Josephs sought her opinion regarding the radiology reports of the co-defendant radiologist. For example, defendant Josephs was questioned as follows:

Knowing now, that when a radiologist says there is a negative mammogram in a patient with dense breasts, that there are not referring to the entire breast, would you

agree that, that is an indication to offer the patient breast sonography, to try to detect cancer in the areas of the breast that mammography can't see?

Would you agree that if it were true that when a radiologist writes that the patient has a negative mammogram, but has dense breasts, if it were true what the radiologist is saying is that only that there's no evidence of cancer in the area of the breast that's not dense but they don't know what's in the area of the breast that's dense. Would you agree that in that situation that the patient has an absolute right to know that information?

Do patients have the right to know that when a radiologist says there's a negative mammogram in a dense breast, that what they mean is only that there's no evidence of cancer in the area of the breast that's not dense?

Do you also agree that patients have the right to know when the radiologist puts in a report that it's a negative mammogram and they have dense breasts, that what the radiologist is really saying is that there's no evidence of cancer, only in the area of the breast that's not dense?

Even though defendant Josephs did not provide an affidavit in order to be entitled to a protective order, the Court will treat the plaintiff's motion and defendant Josephs' cross-motion as a request for a ruling on the above and similar questions posed by plaintiff's counsel to defendant Josephs.

These questions are improper in that defendant Josephs is a physician's assistant and cannot comment on the care and treatment rendered by any one of the defendant radiologists. Defendant Josephs cannot respond to questions regarding a radiologist's function, how a radiologist interprets imaging, the limitations of imaging studies, the process of taking imaging studies nor the thought process of the radiologist who interpreted the imaging studies (*see LaMarque v. North Shore University Hosp.*, 227 AD2d 594, 643 NYS2d 221 [2d Dept. 1996]; *Harley v. Catholic Med. Ctr.*, 88 Misc.2d 126, 386 NYS2d 955 [Nassau Cty. 1976] *aff'd* 57 AD2d 827, 394 NYS2d 62 [2d Dept. 1977]; 22 NYCRR §221.2). The questions, moreover, assume medical facts and opinions without a proper foundation having been laid. Inasmuch as defendant Josephs is not a radiologist, she cannot give an opinion as to what a radiologist report should contain. Simply stated, defendant Josephs is not qualified to provide opinions regarding the care and treatment rendered by any of the radiology defendants or offer her own personal feelings or beliefs in an area where she has no formal training, education, or qualifications. A party who is not qualified in a particular medical discipline cannot be compelled to offer testimony to establish the proper medical standard of care or if there were any departures from the standard of care committed by any of the co-defendant doctors (*see Taormina v. Goodman*, 63 AD2d 1018, 406 NYS2d 350 [2d Dept. 1978]; *McDonnell v. County of Nassau*, 129 Misc.2d 228, 492 NYS2d 699 [Nassau Cty. 1985]).

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The deposition of defendants Joseph should continue not only so that plaintiff can conclude questioning the witness, as limited by the above, but further, in order to afford the co-defendants an opportunity to inquire of the witness. In that regard, the motion brought by the radiology defendants for the opportunity to question defendant Josephs at the continued deposition is granted (*see Owens v. Sokol*, 65 AD 2d 569, 409 NYS2d 25 [2d Dept. 1978]). Moreover, the depositions shall be held at the Suffolk County Courthouse in the event a ruling on questions posed to defendant Josephs becomes necessary.

Accordingly, the motion by plaintiff for an order compelling a continued deposition of defendant Beth Josephs, P.A.C. and the motion by defendant Beth Josephs, P.A.C. for a protective order are being treated as a request for a ruling on the questions posed by plaintiff's counsel during defendant Josephs examination before trial, and such ruling is as set forth herein. The motion for an order granting defendants Bradley Gluck, M.D., Hampton Radiology, P.C., East End Radiology, P.C., Southampton Radiology, P.C., North Fork Radiology, P.C., the opportunity to depose co-defendant Beth Josephs, P.A.C. is granted. The defendant Beth Josephs, P.A.C. shall appear for a deposition to be held at the Courthouse located at One Court Street, Riverhead, New York at 10:00 a.m. on a date within forty-five (45) days from the date of this order or at a subsequent adjourn date as may be agreed upon by the parties. The Court has considered the remaining contentions of the parties and finds them to be without merit.

A compliance conference on this matter has been scheduled for **Wednesday, May 16, 2018.**

Dated:

4/23/2018


 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ X _____ NON-FINAL DISPOSITION

RIDER

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