

**Ljuldjuraj v Suri**

2018 NY Slip Op 31421(U)

June 29, 2018

Supreme Court, New York County

Docket Number: 805069/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK  
 PART 6

-----X  
 Paljoka Ljuldjuraj,

Plaintiff,

- v -

Index No.  
 805069/2015

**DECISION  
 and ORDER**

Mot. Seq. 002

Rajnit Suri, MD, John Ho, MD, Seth  
 Keller MD, Stavros Mountantonakis, MD,  
 Robert Munoz, MD, Neil Sanghvi, MD,  
 Lenox Hill Healthcare Network L.L.C.,  
 Lenox Hill Hospital, Lenox Hill Hospital  
 d/b/a Lenox Hill Heart and Vascular  
 Institute of New York and Heart Rhythm  
 Associates of New York, P.L.L.C.,

Defendants.

-----X  
 HON. EILEEN A. RAKOWER, J.S.C.

**Factual Allegations**

On February 19, 2015, Plaintiff, Paljoka Ljuldjuraj (“Plaintiff”), a former patient of Stavros Mountantonakis, M.D. at Lenox Hill Hospital and Lenox Hill Hospital d/b/a Lenox Hill Heart and Vascular Institute of New York (collectively, “Defendants”), filed a summon and complaint, alleging that Defendants “departed from good, approved and accepted medical standards and practices in the treatment of the Plaintiff, committed malpractice and were negligent all without any culpable conduct on behalf of Plaintiff.” (Complaint ¶ 33). There is no claim for defective equipment.

On April 1, 2015, issue was duly joined by service of Defendants' verified answer and separate demands for bills of particulars.

On September 14, 2015, Plaintiff served a verified bill of particulars as to Defendants wherein they alleged that Defendants failed to properly position Plaintiff before and during a nerve ablation surgery.

On February 16, 2018, Plaintiff served a demand for discovery and inspection which sought "photographs of the subject electrophysiology lab, including all appurtenances, attachments, coverings, paddings, straps, belts, or other devices used for the placement, positioning and securing of patients, at Lenox hill hospital used for the performance of Plaintiff's ablation procedure on February 4, 2014," pursuant CPLR § 3101 (Exhibit E; Demand for Discovery and Inspection). Plaintiff had previously sought a site inspection of the electrophysiology laboratory on February 3, 2017, which Defendants objected to.

On March 6, 2018, Defendants served their response to Plaintiff's demand. Defendants objected to Plaintiff's demand as "unduly burdensome, overly broad, irrelevant, and not reasonably calculated to lead to discoverable or admissible evidence." (Exhibit F; Response to Demand for Discovery and Inspection).

By Notice of Motion filed on March 29, 2018, Defendants moved for a protective order as to Plaintiff's demand for discovery and inspection of "the particular electrophysiology lab, procedure table (hereinafter 'subject table'), and all devices used for the placement, positioning and securing of patients, at Lenox Hill Hospital for the performance of Plaintiff's ablation procedure." (Affirmation in Support at para. 2). Plaintiff opposes Defendants' motion and cross moves pursuant to CPLR § 3101 (a) to compel Defendants to provide the photographs as demanded in Plaintiff's February 16, 2018 demand.

### **Arguments**

In support of Defendants' motion for a protective order, Defendants' attorney Frederick C. Sung submits an affirmation.

Defendants argue that plaintiff's demand for photographs of the subject table and the electrophysiology laboratory is overbroad and seeks irrelevant information. Defendants argue, "As the First Department held in *Bustos*, inspection and photography of a room in which the procedure Plaintiff alleges departed from the

standard of care occurred is simply irrelevant and improper when the central issue is whether Defendant committed malpractice in the performance of said procedure.” (Sung Aff. ¶16). Defendants contend that Plaintiffs’ theory of liability has been that “Defendants failed to properly and timely position Plaintiff during the subject ablation procedure on February 4, 2014,” and “has made absolutely no mention of supposedly defective equipment until now, three (3) years into litigation, and mere months before the end date of disclosure.” (*Id.*). As such, Defendants contend that the demand is both not relevant and improper. (*Id.*). Defendants further argue that “Lenox Hill Hospital is a healthcare facility, not in the business of manufacturing equipment for healthcare facilities,” and therefore any claim of defective equipment “is not properly asserted against movants and is likewise not relevant to the principal allegations in the instant action.” (*Id.* at ¶17).

Defendants further argue that the request for photographs “would result in irreparable, prejudicial damage to Defendants ... because ‘the electrophysiology laboratory, the subject table, and the accompanying equipment are clearly not preserved in the same, or even similar, form as they existed on February 4, 2014.’” (*Id.* at ¶18). Defendants further argue that “Plaintiff intentionally waived his opportunity to obtain meaningful photographs of the subject table, the electrophysiology laboratory, and the equipment, to the extent that such an opportunity would be otherwise proper, long ago.” (*Id.* at ¶20). Defendants claim that they are entitled to a protective order to prevent the unnecessary disruption of health care operations at Lenox Hill Hospital. (*See Id.* at ¶22).

In support of Plaintiff’s cross-motion and in opposition of Defendants’ motion, Daniel C. Murphy, Plaintiff’s attorney, submits an affirmation. Plaintiff argues that the photographs demanded are “relevant to this action” and “tailored to be minimally invasive to the hospital.” (Murphy Aff. ¶6). Plaintiff contends that unlike *Bustos* case, “the photographs of what the Plaintiff was placed on during procedure is not an irrelevant ancillary issue but is a demand for discovery concerning the very crux of this action.” (*Id.* at ¶7). Plaintiff argues that “the demand is not untimely as discovery is still ongoing and the demand was made a mere 8 days after the Defendants deposition and does not amount to a new claim for defective equipment as it directly relates to the ‘intraoperative malpositioning of Plaintiff.’” (*Id.* at ¶10). Plaintiff contends that contrary to Defendants’ claim, “the procedure table and equipment have not been replaced and continue to exist as they did on the date of incident.” (*Id.* at ¶9). Plaintiffs point to Dr. Mountontanakis’ deposition where he testified as follows:

Q: Could you describe the room for me as it was back in February of 2014?

A: It is the same room we have now. In terms of size, what exactly? It's a typical looking electrophysiology room.

(See Exhibit "H" (18: 4-8)).

In further support of Defendant's motion for protective order and in opposition of Plaintiff's cross-motion, Frederick C. Sung, Esq., Defendants' attorney, submits a reply affirmation. Defendants add that "Plaintiff has fully availed himself of other discovery methods to obtain information regarding plaintiff's positioning during the February 2, 2014 ablation procedure." (Sung Reply Aff. ¶8). Specifically, Defendants state, "Plaintiff's counsel has deposed four (4) witnesses from Lenox Hill Hospital and, as such, has had ample opportunity to delve into all aspects of Plaintiff's positioning, including what role, if any, the procedure table and the accompanying devices played during the procedure." (*Id.*). Defendants further contend that "Plaintiff's demand is fundamentally flawed in that Plaintiff fails to specifically identify what devices or equipment he is seeking to have photographed." (*Id.* at ¶9). Defendants further claim that "Dr. Mountantonakis did not testify that all the equipment in the sought-after facilities is the same; he simply stated that it is the same room." (*Id.* at ¶13). Defendants add:

"Dr. Mountantonakis was deposed on May 8, 2017, approximately one (1) year ago. Plaintiff has provided no evidence since then demonstrating that the electrophysiology lab has remained the same, or even in a similar fashion, as it did then. Moreover, at no point during Dr. Mountantonakis' deposition did Plaintiff's counsel elicit testimony that the specific procedure table and accompanying equipment were the same as in February 2014." (*Id.* at ¶14).

### **Legal Standards**

CPLR §3101(a) generally provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "of 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.” (*Bustos v Lenox Hill Hosp.*, 29 AD3d 424, 425 [1st Dept 2006]). The Court of Appeals has held that the term “material and necessary” is to be given a liberal interpretation in favor of the disclosure of “any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity,” and that “[t]he test is one of usefulness and reason” (*Allen v. Cromwell-Collier Publishing Co.*, 21 N.Y.2d 403, 406 [1968]).

CPLR § 3103 provides, in relevant part:

The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(CPLR 3103[a]). The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dept 1998]).

### Analysis

Plaintiff seeks photographs of the electrophysiology lab, subject table, and devices used for the placement, positioning and securing of patients, at Lenox Hill for the performance of Plaintiff’s ablation procedure. Preliminarily, Plaintiff has not made a claim for defective equipment or sought to amend to add such a claim. Nevertheless, even assuming the lab, subject table and accompanying equipment that exist today are the same ones that existed on February 4, 2014, there has now been four additional years of use. As such, the production of photographs that Plaintiff seeks would not be an accurate depiction of the lab, subject table, and equipment as they existed in February 2014.

While Defendant’s motion for a protective order with respect to the requested photographs is granted, Defendant is directed to produce the make and model of the

table and equipment used during Plaintiff's ablation procedure in February 2014. Plaintiff can then proceed to obtain photographs of the same from the manufacturer.

Wherefore, it is hereby

ORDERED that Defendant's motion for a protective order is granted with respect to the photographs requested by Plaintiff; and it is further

ORDERED Plaintiff's cross motion to compel Defendant to produce the demanded photographs is denied; and it is further

ORDERED that Defendant is directed to produce the make and model table of the table and equipment used during Plaintiff's ablation procedure in February 2014 within 45 days of the date of this Order.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 29 2018

  
EILEEN A. RAKOWER, J.S.C.