

**Pinilla v New York Hotel Trades Council**

2018 NY Slip Op 32197(U)

September 4, 2018

Supreme Court, New York County

Docket Number: 805150/2014

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

-----X  
Constanza Pinilla, as Executrix of the Estate of  
Lidija Glusica,

Index No.  
805150/2014

Plaintiff,

**DECISION  
and ORDER**

- v -

Mot. Seq. 005

New York Hotel Trades Council and Hotel  
Association of New York City Health  
Center, Inc. and Mohammed S. Nizam, M.D.,

Defendants.

-----X

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

This is a medical malpractice action concerning defendant Mohammed S. Nizam, M.D.'s ("Nizam") alleged failure to timely diagnose and treat decedent, Lidija Glusica, for endometrial cancer.

Defendant New York Trades Council & Hotel Association of New York City Health Center, Inc. ("NYHTC") moves by way of order to show cause to strike Nizam's answer or alternatively, to compel Nizam to comply with this Court's prior order dated May 8, 2018. The Court's May 8, 2018 Order had directed that Nizam provide certain information regarding his insurance policies.

Factual Allegations/Background

On November 7, 2016, Nizam disclosed he was insured by J.M. Woodworth Risk Retention Group, Inc. (hereinafter "J.M. Woodworth"), with policy limits of \$2.3 million per claim and \$6.9 million individual policy limit. (Goldsmith Affirmation at ¶ 14; Exhibit N). On November 19, 2016, NYHTC's counsel

“demanded clarification [from Nizam] regarding whether the \$2.3 million was from a primary policy or combination of primary and excess, (2) demanded complete copies of the policies, and (3) inquired whether any monies had been paid out under this policy and whether there were any pending claims or lawsuits related to this policy.” (*Id.* at ¶15, Exhibit O)

On December 14, 2016, Nizam’s counsel advised the parties that the State of Nevada had issued an Order approving voluntary suspension of J.M. Woodworth’s Certificate of Authority on March 13, 2015. (Goldsmith Affirmation at ¶16).

On January 10, 2017, all parties appeared for a Compliance Conference. The Compliance Conference Order required Nizam to provide updated insurance information within forty-five (45) days of the Order. (Goldsmith Affirmation at 17, Exhibit P).

NYHTC stated, “To date, co-defendant has repeatedly neglected to provide his insurance policies or any documentation regarding the remaining amount of insurance. The only information provided by co-defendant's counsel, claiming there is \$37,108.99 left on the policy, was not supported by documentation or explanation of the steps taken to determine the accuracy of this figure. As counsel for Dr. Nizam claims, J.M. Woodworth is not yet in liquidation, documentation is needed to confirm that \$37,108.99 is the true extent of his available primary and excess insurance coverage.” (Goldsmith Affirmation at ¶ 34).

Similarly, Plaintiff requested that Nizam produce supporting documentation concerning what remains on his J.M. Woodworth policy, and if no such supporting documentation exists, an affidavit regarding the existence and scope of the insurance coverage. (Pennisi’s Affirmation at ¶ 5). Plaintiff also requested that Nizam “be compelled to apprise the parties of any changes with respect to his insurance coverage that occur between now and the resolution of this matter.” (*Id.*).

On May 8, 2018, the Court entered an Order, directing Nizam to produce (1) all applicable primary and excess insurance policies (including those from J.M. Woodworth, Coverys and all available policies); and (2) documentation regarding the existence and amount of available insurance, funds, capital and/or surplus from J.M. Woodworth. Nizam was also directed to apprise all parties of any changes in the existence and amount of available insurance from J.M. Woodworth on a regular basis to be determined by this Court until the resolution of this action.

The parties conferenced the matter before Justice Rakower on September 4, 2018.

### Pending Motion

On May 21, 2018, Nizam provided a response to the May 8, 2018 Order. Nizam produced the following: his insurance policies from J.M. Woodworth and documentation from Michael J. Schroeder, Vice President of and General Counsel for Allied Professionals' Insurance Services regarding J.M. Woodworth's surplus and reserves available to resolve this matter. As Nizam responded to the May 8, 2018 Order, there is no basis to warrant the sanction of striking Nizam's pleading. To the extent that NYHTC seeks a determination as to whether Coverys will cover Plaintiff's claim under Nizam's excess insurance policy, that is a matter that is distinct from the medical malpractice action presently before this Court.

### Expert Disclosures

CPLR § 3101(d)(i) states, "upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." "In medical malpractice actions, expert medical testimony is the *sine qua non* for demonstrating either the absence or presence of material issues of fact pertaining to departure from accepted medical practice or proximate cause." *Mercedes v Farrelly*, No. 104824/08, 2012 WL 1576437, 2012 N.Y. Slip Op. 31141(U) (Sup Ct, New York County Apr. 27, 2012).

Plaintiff filed a note of issue on January 31, 2018. With respect to CPLR 3101(d) expert exchanges, Part 6 Rules direct plaintiffs to serve their 3101(d) expert exchange no later than 60 days after the filing of the note of issue. Defendants are to serve their 3101(d) expert exchange no later than 30 days from the service of plaintiffs' expert exchange. During the parties' conference before the Court on September 4, 2018, Plaintiff's counsel advised that while Plaintiff had filed an expert exchange, Nizam had failed to do so. Nizam is directed to provide his 3101(d) expert exchange by September 7, 2018, or may be precluded from having an expert testify on his behalf at trial.

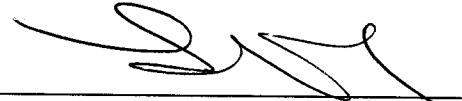
Wherefore, it is hereby

ORDERED that the Order to Show Cause is denied; and it is further

ORDERED that defendant Mohammed S. Nizam, M.D., is directed to provide his 3101(d) expert exchange by September 7, 2018, or may be precluded from having an expert testify on his behalf at trial.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: September 4, 2018



Eileen A. Rakower, J.S.C.