

Youwanes v Steinbrech
2018 NY Slip Op 32926(U)
November 13, 2018
Supreme Court, New York County
Docket Number: 805038/2017
Judge: Eileen A. Rakower
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 6

----- X

Michael Youwanes,

Index No.
805038/2017

Plaintiff,

Decision and
Order

Douglas Steinbrech, M.D.,
Gotham Plastic Surgery, PLLC,

Mot. Seq. #1 and 2

Defendants.

-----X

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

This is an action sounding in medical malpractice which alleges that Defendants Douglas Steinbrech, M.D. (“Steinbrech”) and Gotham Plastic Surgery, PLLC (collectively, “Defendants”) departed from accepted standards of medical practice in negligently performing a body lift abdominoplasty procedure on Plaintiff, Michael Youwanes (“Plaintiff”) on December 3, 2015.

There are two motions before the Court. The first motion (Motion Sequence #1) is a motion to compel filed by Defendants. At a compliance conference held after Motion Sequence 1 was filed, the parties were able to resolve many discovery issues that were raised in the motion. The two issues that remain relate to Defendants’ demand for a further EBT of Plaintiff and Defendants’ demand for tax returns. The second motion (Motion Sequence #2) is a motion by Defendants to vacate the Note of Issue and Certificate of Readiness that was filed on August 6, 2018. Plaintiff opposes both motions.

Motion Sequence #1

Further Deposition of Plaintiff Regarding Changes to His Errata Sheet

Defendants seek to take a further deposition of Plaintiff based on the errata sheet that Plaintiff submitted after his deposition testimony. Defendants contend that

had Plaintiff answered the questions at his deposition as per his errata sheet, it would have resulted in additional questions (i.e., questions regarding the physical examination, questions regarding the review of certain photographs, questions regarding the conversation about the incision line, etc.) which Defendants should be permitted to inquire about in a further deposition. In opposition, Plaintiff contends that since he has offered reasons for the changes to his testimony, and has not made any significant changes, Defendants' motion should be denied.

Following are the changes that Plaintiff proposes as per his errata sheet:

(1) Original testimony (29:7-9)

Q. Did Dr. Steinbrech perform a physical examination of you?

A. I do not remember.

Plaintiff proposes that his answer should be changed to: "Yes." Plaintiff states that the reason for the correction is to "correct[] erroneous response."

(2) Original testimony (p. 29:18-20)

Q. Did he [Dr. Steinbrech] review any photographs with you?

A. No.

Plaintiff proposes that his answer should be changed to: "Yes." Plaintiff states that the reason for the correction is to "correct[] erroneous response."

(3) Original testimony (p. 58:20-22)

Q. Did you question Dr. Steinbrech about any of the lines that he drew?

A. I don't remember.

Plaintiff proposes that his answer should be changed to "No, we had already discussed incision line and we were on the same page that it would be near my belt line. Prior to surgery we never discussed a lower incision for speedo bathing suits which I did not wear." Plaintiff states that the reason for the correction is to "correct[] erroneous response."

(4) Original testimony (p. 88:24-25-89:2):

Q. And did anyone accompany you on that visit?

A. I don't think so.

Plaintiff proposes that his answer should be changed to: "Yes, my friend Doug." Plaintiff states that the reason for the correction is to "correct[] erroneous response."

(5) Original testimony (p.114:11-13):

Q. Was anyone else participating in that conversation?

A. I don't remember.

Plaintiff proposes that his answer should be changed to: "Joe Baiamonte was usually on the skype calls with Dr. Steinbrech." Plaintiff states that the reason for the correction is to "correct[] erroneous response."

Pursuant to CPLR §3116[a], "a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor." *Cillo v. Resjefal Corp.*, 295 A.D.2d 257, 257 [1st Dept 2002]. In *Cillo*, the First Department held "Defendant's motion to strike plaintiffs' amended errata sheets or for further depositions was properly denied since a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefor." *Id.* The First

Department wrote that the “[c]hanges raise issues of credibility that do not warrant further depositions but rather should be left for trial.” (*Id.*). Where the witness made a “magnitude ... of changes,” other courts have permitted further depositions of the witness. *See e.g., Lieblich v. Saint Peter's Hosp. of City of Albany*, 112 A.D.3d 1202, 1206 [3d Dept 2013].

Here, Defendants are entitled to a further deposition of Plaintiff based upon the changes he made to his testimony through his errata sheet. The changes do not solely go to Plaintiff's credibility, but to important areas such as whether anyone accompanied him on a visit to Defendants; whether anyone else participated in a conversation with Defendants; whether there was a discussion with Defendants about lines that were drawn prior to the surgery; and whether Defendants performed a physical examination during a visit.

Further Deposition of Plaintiff Concerning Alleged New Injuries

On April 11, 2018, Plaintiff served a Supplemental Bill of Particulars that added sexual dysfunction and post-traumatic stress disorder as injuries. Defendants allege that these injuries were not asserted until after Plaintiff's deposition, and as such, Defendants' counsel did not have an opportunity to question Plaintiff as to the extent of the injuries and the treatment he received for them. Defendants therefore seek a further EBT of Plaintiff to question him concerning these injuries. Plaintiff, in opposition, contends that the injuries of sexual dysfunction and post traumatic had previously been disclosed through referenced in Plaintiff's medical records.

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.” 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]. “[O]nce the patient has voluntarily presented a picture of his or her medical condition to the court in a particular court proceeding, it is only fair and in keeping with the liberal discovery provisions of the CPLR to permit the opposing party to obtain whatever information is necessary to present a full and fair picture of that condition.” *Matter of Farrow v. Allen*, 194 A.D.2d 40, 45-46 [1st Dept 1993].

Defendants are entitled to a further deposition of Plaintiff concerning his newly alleged injuries in his Supplemental Bill of Particulars.

Tax Returns

Defendants seek Plaintiff's tax returns from 2010 to the present. Pursuant to the April 17, 2018 Compliance Conference Order, Plaintiff was directed to produce "tax returns to the extent not already produced on any claims for lost earnings." Plaintiff objects to the request for tax returns. Plaintiff contends that he has already provided copies of IRS Form W-2s and/or 1099s, from 2010 to the present. Plaintiff argues that those documents reflect his earned income for that period of time. In reply, Defendants contend that the tax returns are the only documents that will allow them to ascertain Plaintiff's full financial picture and are necessary to the defense. Defendants further state that Plaintiff was ordered to produce these documents on April 17, 2018.

With respect to tax returns, "a party seeking to compel their production must make a strong showing of overriding necessity ... demonstrat[ing] that the information in plaintiff's tax returns is indispensable to the instant litigation and unavailable from other sources." *Matthews Industrial Piping Co., Inc. v Mobil Oil Corp.*, 495 N.Y.S. 2d 35, 36 [1st Dept 1985]. Where a plaintiff claims past and future lost earnings, tax returns and other documents related to the plaintiff's earnings are generally discoverable. *see Thomas v James Wu & Sons*, 197 A.D.2d 422, 422 [1st Dept 1993].

Plaintiff is directed to produce tax returns from 2010 to the present, as the Court previously directed in its April 17, 2018 Order, in order to substantiate his claim for lost earnings.

Motion Sequence #2

Defendants move for an Order vacating the Note of Issue and Certificate of Readiness, permitting the continuation of pre-trial discovery including but not limited to overdue responses to written discovery and a further deposition of Plaintiff, and extending Defendants' time to move for summary judgment.

Defendants contend that the Note of Issue should be vacated in light of the outstanding discovery, which includes those items that are the subject of Mot. Seq. 1 as well as other items such as authorizations that contain impermissible restrictions. Defendants contend that on August 6, 2018, the date that Plaintiff filed the Note of Issue, Plaintiff provided authorizations for records of certain medical

providers which included “impermissible date restrictions” and failed to initial section 9(a) where indicated. Defendants further contend that they have discovered that Plaintiff never initialized section 9(a) on any authorizations provided in this litigation. Plaintiff’s initialing of section 9(a) would have permitted the medical providers to disclose information as to: “alcohol/drug treatment,” “mental health information,” and “HIV-related information.” Defendants contend that because Plaintiff has alleged psychological injuries, he is required to turn over all information relating to the same and must initialize section 9(a). Defendants further contend that on the date Plaintiff filed the Note of Issue, Plaintiff for the first time identified that he had been treated with Lee Zhao, M.D., a urologist, for the injuries that are at issue in this matter. Defendants object to this late inclusion and request a further deposition of Plaintiff to question him regarding his treatment with Dr. Zhao.

In opposition, Plaintiff contends that the authorizations provided are consistent with the time restrictions set forth in the Court’s July Order. Plaintiff contends that to the extent that Defendants contend that Plaintiff did not initialize section 9(a) of the authorizations, Defendants did not confer with Plaintiff regarding this issue prior to bringing their motion. Plaintiff further contends that Defendants may proceed to take Dr. Zhao’s deposition post Note of Issue.

Here, in light of need for additional discovery including a further deposition of Plaintiff and a deposition of Dr. Zhao as consented to by Plaintiff, Defendants’ motion to vacate the Note of Issue dated August 6, 2018 is granted.

Wherefore it is hereby

ORDERED that Defendants’ motion to vacate the Note of Issue dated August 6, 2019 is granted and the case is stricken from the trial calendar; and it is further

ORDERED that Plaintiff shall appear for a further EBT on the issues of changes to his errata sheet and added injuries of sexual dysfunction and post-traumatic stress disorder as injuries within 30 days from the date of this Order; and it is further

ORDERED that Plaintiff shall produce tax returns from 2010 to the present within 30 days from the date of this Order; and it is further

ORDERED that Plaintiff shall produce authorizations with section 9(a) initialized within 30 days from the date of this Order; and it is further

ORDERED that Plaintiff shall provide an Arons authorization for Dr. Zhao within 7 days and Defendant shall notice a deposition of Dr. Zhao within 30 days from the date of this Order; and it is further

ORDERED that the parties shall appear for a compliance conference in Room 205, 71 Thomas Street, on Tuesday, December 18, 2018, at 9:30 AM; and it is further

ORDERED that, within 15 days from the entry of this order, Defendants' counsel shall serve a copy of this Order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is directed to strike the case from the trial calendar and make all required notations thereof in the records of the court.

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

DATED: November 13, 2018


EILEEN A. RAKOWER, J.S.C.