

Gonzalez-Colon v Nitkin
2018 NY Slip Op 33543(U)
May 24, 2018
Supreme Court, Kings County
Docket Number: 501293/2016
Judge: Gloria M. Dabiri
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At IAS Part 2 of the Supreme Court of the State of New York, Kings County, on the 24th day of May, 2018.

PRESENT: Hon. Gloria M. Dabiri, JSC

LOURDES GONZALEZ-COLON,

Plaintiff,

- against -

**LEON NITKIN, M.D., LYUDMILA TRUBETSKY, RPA-C,
METROTECH MEDICAL SUPPORT PROGRAMS, INC.,
MARIANO MEDEROS, M.D., and COMPLETE CARE MEDICAL
OF NY, P.C.,**

Defendants.

LEON NITKIN, M.D.,

Third-Party Plaintiff,

- against -

GOLDY JAIN, M.D.,

Third-Party Defendant.

DECISION AND ORDER

Index No. 501293/2016

Motion Seq. 7

The following papers numbered 150-152, 154-164 read on this motion	NYSCEF Documents
Notice of Motion – Order to Show Cause and Affidavits (Affirmations) Annexed	150-152
Answering Affidavit (Affirmation)	154-163
Reply Affidavit (Affirmation)	164

Upon the foregoing papers plaintiff Lourdes Gonzalez-Colon seeks an order, pursuant to CPLR 3126, striking the answer of defendant Leon Nitkin, M.D. (MS #7). In the alternative, at oral argument, plaintiff's counsel, Harry Katz, also requested, pursuant to CPLR 3124 and CPLR 3104, an order compelling the further deposition of Dr. Nitkin, with Court supervision.

Plaintiff argues that Dr. Nitkin's counsel, Irene Ziegler, made improper speaking objections throughout Dr. Nitkin's deposition, which had the effect of preventing Dr. Nitkin from answering Mr. Katz's questions and of prompting Dr. Nitkin to adopt Ms. Ziegler's

suggested answers as his own. In opposition, Ms. Ziegler argues that she appropriately objected to the form of palpably improper questions.

Plaintiff's claims against Dr. Nitkin relate to medical treatment that plaintiff received from Dr. Nitkin's OB/GYN practice. Plaintiff was not treated by Dr. Nitkin personally, but rather by co-defendant Lyudmila Trubetsky, a Physician Assistant employed by Dr. Nitkin. Additionally, a key issue of fact is whether Dr. Nitkin's practice adequately followed up on a pap smear result which was reported as "unsatisfactory for evaluation" (*see* Nitkin tr at 172:23-24). Therefore, during Dr. Nitkin's deposition, Mr. Katz attempted to elicit information regarding, *inter alia*, how patient care was coordinated at Dr. Nitkin's practice, the level of supervision Dr. Nitkin exercised with respect to the care of patients who were treated by his staff and not seen by himself, and how test results are received, reviewed and acted upon by his practice.

A review of the entire transcript of Dr. Nitkin's deposition reveals that Ms. Ziegler made frequent objections to these lines of questioning. Her objections typically included commentary to the effect that Mr. Katz's questions had already been asked and answered, that Dr. Nitkin did not personally treat the plaintiff, and that Dr. Nitkin did not know the answer (*see, e.g.*, tr at 76:13-15; 134:10-137:3; 156:19-157:9; 169:18-171:8; 172:8-10; 177:11-178:2; 201:13-16; 204:9-13; 205:10-12; 211:15-212:14; 213:13-15; 215:9-217:7; 238:22-239:22; 242:4-5; 242:21-23; 244:17-21; 260:6-15; 263:21-23; 268:4-9). According to Mr. Katz, on a few occasions Ms. Ziegler made nonverbal gestures at Dr. Nitkin to cut off his responses (*see, e.g.*, tr at 18:12; 57:4-7; 67:17-68:5; 123:11-13; 244:9-14). In addition, she addressed Dr. Nitkin directly several times, curtailing his answers or suggesting how the answers should be phrased

(see, e.g., tr at 41:15-17; 155:15-16; 164:17-18; 174:11-13; 201:18; 206:4-7; 218:3-4; 218:10-12; 232:12-13; 244:2-3; 272:4-5), asking him her own questions during Mr. Katz's questioning (see, e.g., tr at 112:5-10; 187:3-7; 198:13-15; 210:2-3; 236:20-21; 259:21-24; 267:6), and advising him not to answer (see, e.g., tr at 109:7; 132:4; 179:7-8; 208:7-8).

The Uniform Rules for the Conduct of Depositions (22 NYCRR 221.1-221.3) strictly limit what objections can be made at a deposition (22 NYCRR 221.1[a]; CPLR 3115). The Uniform Rules prohibit "statements or comments that interfere with the questioning," also known as "speaking objections" (22 NYCRR 221.1[b]). Furthermore, "a deponent cannot refuse to answer a question on the grounds that the question was already asked and answered" (*Rodriguez v. Goodman*, 2015 N.Y. Slip Op. 31412(U) [Silver, J., New York County 2015]; see also 22 NYCRR 221.2). Additionally, counsel must not "interrupt the deposition for the purpose of communicating with the deponent" (22 NYCRR 221.3).

Striking a party's pleadings is "drastic relief" which is "not warranted as a sanction for obstreperous conduct at a single deposition session" (*O'Neill v Ho*, 28 AD3d 626, 627 [2d Dept 2006]). Furthermore, the movant must make "a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Pascarelli v City of New York*, 16 AD3d 472, 472-73 [2d Dept 2005]; see also *Bjorke v Rubenstein*, 38 AD3d 580, 581 [2d Dept 2007]). Where a party has acted improperly but the remedy of striking its pleadings would be "too drastic," it is appropriate to instead "compel the further deposition of the [offending party]" (*Parker v Ollivierre*, 60 AD3d 1023, 1023-24 [2d Dept 2009]; see also *O'Neill*, 28 AD3d at 627). Where the transcript of the original deposition "reveals a clear intention... to disrupt and

frustrate the orderly disclosure process and further to obscure or prevent discovery of the facts” (*Ferraro v New York Tel. Co.*, 94 AD2d 784, 785 [1983]), a further deposition is appropriate.

Here, the deposition transcript reveals that a substantial proportion of Ms. Ziegler’s interjections were improper speaking objections which interfered excessively with the deposition of Dr. Nitkin (*see Rodriguez*, 2015 N.Y. Slip Op. 31412[U]; *Parker*, 60 AD3d at 1023–24; *O’Neill*, 28 AD3d at 627). A review of the deposition transcript demonstrates that some of Mr. Katz’s questions and comments were argumentative (*see, e.g.*, 131:20-22 [“[You rented space in another doctor’s office] for your own self-aggrandizement to make money; isn’t that correct?”]; 193:22-24 [“Gee, I thought [Dr. Nitkin] said he read [the chart] and he knew it by heart.”]). However, the majority of the objections were to questions that were merely repetitious, or were reasonable attempts to elicit further details following a vague response. Ms. Ziegler insisted during the deposition that “asked and answered” was a valid objection (tr at 15:9-16:19). However, under the current Uniform Rules redundancy is not an appropriate justification for extensive objections which have the effect of disrupting a deposition (*see Rodriguez*, 2015 N.Y. Slip Op. 31412[U]). Ms. Ziegler’s speaking objections and other interjections also inappropriately suggested answers to her client (*see Rodriguez*, 2015 N.Y. Slip Op. 31412[U]; *Parker*, 60 AD3d at 1023–24).

The transcript reveals that Dr. Nitkin ultimately offered responsive answers to the majority of Mr. Katz’s questions, notwithstanding Ms. Ziegler’s speaking objections (*see, e.g.*, tr at 76:10-77:14 [question regarding the timing of a bill for medical treatment] & 159:8-161:14 [response proposing a possible reason for the timing of the billing, and identifying what

employee would have further knowledge]; 103:2-3 [question regarding the professional reputation of the physician assistant] & 104:20-107:3 [answer identifying specific employees and their working relationship with the physician assistant]; 169:22-24 [question: whether it was “important” for Dr. Nitkin to know what treatment the plaintiff received at her first appointment] & 170:13-171:14 [answer: treatment was “standard” but the witness could not identify specific procedures without consulting his billing agent]; 186:17 [question: when ultrasound report was received] & 188:10-23 [answer: witness had no record of the date, but it was probably “within a week or two”]; 204:6 [question: why pap smear was ordered] & 204:14-15 [answer: it was standard practice]). However, with respect to Mr. Katz’s questioning regarding how medical test results are received, reviewed and acted upon by Dr. Nitkin’s practice, and regarding how plaintiff’s pap smear results would, or should, have been handled by the practice, Ms. Ziegler’s objections were so extensive that they prevented Mr. Katz from completing an organized and thorough inquiry, and influenced many of Dr. Nitkin’s answers (tr at 207:12-270:8).

Although striking Dr. Nitkin’s answer would be excessive, a limited reexamination of Dr. Nitkin is warranted under these circumstances (*see O’Neill*, 28 AD3d 626; *Pascarelli*, 16 AD3d 472). Accordingly, it is

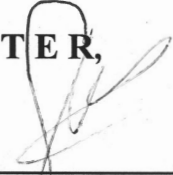
ORDERED, that plaintiff’s motion is granted to the extent that plaintiff is permitted to conduct a further deposition of defendant Leon Nitkin, M.D. The scope of this reexamination shall be limited to questioning regarding (1) how medical test results are received, reviewed and acted upon by Dr. Nitkin’s practice and (2) Dr. Nitkin’s knowledge of how the results of plaintiff’s medical testing were handled by his practice; and it is further

ORDERED, that Leon Nitkin, M.D., be and is hereby directed to appear for this reexamination at the office of his counsel, Amabile & Erman, P.C., 26 Court Street, Brooklyn, New York, on or before the 31st day of July, 2018; and is further

ORDERED, that notice of the time and place of the taking of the deposition upon oral questions of Leon Nitkin, M.D., be served upon all parties to this action by service of a copy of this order on or before the 11th day of July, 2018 (CPLR 3107); and it is further

ORDERED, that the Note of Issue filed on July 27, 2017 is hereby vacated, and plaintiff's Note of Issue is due on the 31st day of August, 2018 (CPLR 212.21[e]); and it is further

ORDERED, that plaintiff's motion is otherwise denied.

ENTER,


J.S.C.
HON. GLORIA M. DABIRI
J.S.C.

2018 MAY 29 AM 8:00
KINGS COUNTY CLERK
FILED
