Lopata v Mamdani
2018 NY Slip Op 34100(U)
January 5, 2018
Supreme Court, Orange County
Docket Number: Index No. EF001858/17
Judge: Robert A. Onofry

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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ALLAN LOPATA and MARGARET LOPATA,

Plaintiffs,

- against -

SOHAIL MAMDANI, D.O., ST. ANTHONY COMMUNITY HOSPITAL, BON SECOURS CHARITY HEALTH SYSTEM, INC. and MIDDLETOWN MEDICAL, P.C.

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF001858/17

DECISION AND ORDER

Motion Dates: December 6, 2017

The following papers numbered 1 to 7 were read and considered on (1) a motion by the Defendant Sohail Mamdani, D.O., pursuant to CPLR 3101(a), for a protective order compelling the Plaintiffs to conduct the examination before trial of him by Skype or other electronic means; and (2) a cross motion by the Plaintiffs, pursuant to CPLR 3110 and CPLR 3124 to compel the Defendant Sohail Mamdani, D.O. to appear in New York for an examination before trial.

Notice of Motion- Milligram Affirmation- Exhibits A-D 1-3
Notice of Cross Motion- Novick Affirmation- Exhibits A-C 4-6
Affirmation in Opposition- Milligram 7

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is denied; and that the cross motion is denied as academic.

Introduction

The Plaintiffs commenced this action, *inter alia*, to recover damages allegedly arising from medical malpractice that occurred in December of 2014. The Plaintiffs allege, *inter alia*, that the Defendant Sohail Mamdani, D.O. negligently performed a laparoscopic cholecystectomy.

Plaintiffs seek to examine Mamdani. In response Mamdani moves for a protective order compelling the Plaintiffs to conduct his examination before trial by Skype or other electronic means. Mamdani notes that he currently lives and practices in California, and argues that appearing in New York will cause an undue hardship.

The Plaintiffs cross move to compel Mamdani to appear in New York for an examination before trial.

Factual/Procedural Background

In support of his motion for a protective order, Mamdani avers that he currently resides and practices medicine in the State of California, and has since September 2015. Further, he asserts, he is involved in a busy surgical practice and performs scheduled surgeries on Tuesdays and Fridays, and as needed on an emergency basis, in addition to his other duties, which include being on call 15 days per month. Mamdani avers that traveling to New York will, realistically, require him to cancel five days of surgeries, which will inconvenience his patients and partners. Further, he asserts, there will be significant expense in traveling to and staying in New York. Thus, he argues, the Court should allow him to testify by Skype or by some other electronic means.

In further support of Mamdani's motion, his attorney, Steven Milligram, notes that Mamdani was served with process in California, and has a small child there. However, he asserts, although examination of Mamdani in New York will cause unreasonable annoyance and expense, opposing counsel, without good reason, has refused to agree to an alternative to a personal appearance, such as allowing Mamdani to testify by Skype or some other electronic means. Accordingly, Milligram argues, the Court should issue a protective order directing the

same.

In addition, Milligram asserts, opposing counsel, in a series of emails, had made frivolous threats to seek sanctions against Mamdani, including striking his answer, if he failed to agree to be examined in New York. However, Milligram notes, he was not seeking the imposition of a sanction pursuant to 22 NYCRR 130-1.1 at this time.

In support of the cross motion to compel the examination of Mamdani in New York, the Plaintiffs submit an affirmation from counsel, Ted Novick.

Novick asserts that the issue of examining Mamdani by Skye or other electronic means was first raised at the end of a preliminary conference before the Court on October 24, 2017, and that he "vehemently" objected to the suggestion at that time. Thereafter, he avers, he made a good faith effort to resolve the issue through a series of emails with Milligram. Contrary to the characterizations of Milligram *supra*, Novick argues, the emails were not threats, but rather a clear statement of his position on the matter. Moreover, he asserts, instead of communicating with him, Milligram made the motion at bar for a protective order. Novick argues that, at a minimum, the motion should be denied because Milligram failed to demonstrate that he made a good faith effort to resolve the issue raised before making the motion.

In any event, Novick asserts, it is not disputed that the Court obtained personal jurisdiction over Mamdani, and that the preferred location of an examination before trial is the forum county. Indeed, he asserts, the opponent bears the burden of demonstrating that attending an examination in the forum county will cause a undue hardship. Here, Novick argues, Mamdani fell far short of demonstrating such. In sum, he asserts, the motion should be denied and the cross motion granted.

In opposition to the cross motion, and in reply, Milligram argues that Novik's contention that he failed to make a good faith effort to resolve the issued raised by the motion is specious, as was demonstrated by Novick's own claims that they had discussed the issue and exchanged emails concerning the same.

On the merits, Milligram argues, the Plaintiffs failed to provide any reason for seeking to compel Mamdani to appear in New York when the means to conduct the examination by Skype or other electronic means is available. This is especially true here, he asserts, where Mamdani has a busy practice and is on call 15 days per month.

Discussion/Legal Analysis

As a threshold issue, 22 NYCRR 202.7(a)(2) requires that a motion relating to disclosure be supported by an affirmation stating that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion. The affirmation "shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." *22 NYCRR 202.7(c)*. A motion will be denied when the affirmation does not refer to any communications between the parties that would evince a diligent effort by the movant to resolve the disclosure dispute. *Greenfield v. Board of Assessment Review for Town of Babylon*, 106 A.D.3d 908 [2nd Dept. 2013]; *Mironer v City of New York,* 79 AD3d 1106 [2nd Dept. 2010].

Here, Milligram did not submit the required affirmation. This alone is sufficient to warrant denial of Mamdani's motion. *Greenfield v. Board of Assessment Review for Town of Babylon*, 106 A.D.3d 908 [2nd Dept. 2013].

On the merits, CPLR 3110(1) provides that the deposition of a party is to be taken in the

county in which he or she resides or has an office for the regular transaction of business in person, or where the action is pending. The general rule is that the deposition should take place within the county where the action is pending. *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974 [2nd Dep. 2015]; *Yu Hui Chen v. Chen Li Zhi*, 81 A.D.3d 818 [2nd Dept. 2011]; *Gartner v. Unified Windows, Doors and Siding, Inc.* (68 A.D.3d 815 [2nd Dept. 2009]; *LaRusso v. Brookstone, Inc.*, 52 A.D.3d 576 [2nd Dept. 2008].

An exception to this rule may occur where a party demonstrates that an examination in the county of venue would cause undue hardship. *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974 [2nd Dep. 2015]; *Yu Hui Chen v. Chen Li Zhi*, 81 A.D.3d 818 [2nd Dept. 2011]; *Gartner v. Unified Windows, Doors and Siding, Inc.* (68 A.D.3d 815 [2nd Dept. 2009]. In such a case, the Court may issue a protective order pursuant to CPLR 3103(a) directing the examination be held elsewhere, or by other means, such as remote electronic means. *Feng Wang v. A & W Travel, Inc.*, 130 A.D.3d 974 [2nd Dep. 2015]; *Yu Hui Chen v. Chen Li Zhi*, 81 A.D.3d 818 [2nd Dept. 2011]; *Gartner v. Unified Windows, Doors and Siding, Inc.* (68 A.D.3d 815 [2nd Dept. 2009].

For example, in *Feng Wang v. A & W Travel, Inc.* (130 A.D.3d 974 [2nd Dep. 2015]), the plaintiff's deposition was ordered to be conducted by remote electronic means after he demonstrated that his applications for a visa to return to the United States from China had been denied, and that he was ineligible to be admitted to the United States.

Similarly, in *Yu Hui Chen v. Chen Li Zhi*, (81 A.D.3d 818 [2nd Dept. 2011]), the plaintiff's deposition was ordered to be conducted by remote electronic means after he demonstrated that traveling from China to the United States would cause undue hardship.

In *Gabriel v. Johnston's L.P. Gas Service, Inc.*, 98 A.D.3d 168 [4th Dept. 2012]), undue

hardship was found due to the financial and legal impediments faced by the plaintiffs, who were impoverished laborers who had returned to Guatemala and Mexico, and were either absolutely or likely without means of obtaining a visa to reenter the country.

In *Gartner v. Unified Windows, Doors and Siding, Inc.* (68 A.D.3d 815 [2nd Dept. 2009], undue hardship was found where the parties to be deposed were unable to leave the country of Colombia and come to New York. The Second Department found that the Supreme Court had properly ordered the parties examined either by oral examination in Colombia, or by written questions. In addition, the Second Department noted, the Supreme Court had "proposed three viable, nonexclusive solutions" to conducting the outstanding depositions pursuant to CPLR 3108, to wit: (1) flying New York counsel to Bogota, Colombia, to conduct the depositions upon oral examination at the United States Embassy in that city; (2) retaining local counsel in Bogota to conduct the depositions upon oral examination at that location, and (3) conducting the depositions upon written questions. Further, the Second Department noted, the depositions could also be conducted via videoconferencing pursuant to CPLR 3113(d), with the deponents remaining at the United States Embassy in Bogota, Colombia.

In *Wygocki v. Milford Plaza Hotel* (38 A.D.3d 237 [1st Dept. 2007]), undue hardship was found where the plaintiff was 76 years old and a resident of Northern Ireland, and had submitted a sworn letter from her doctor identifying her many physical ailments, most preexisting the subject accident, and advising that traveling to New York could cause plaintiff "further serious problems."

In *Hoffman v. Kraus* (260 A.D.2d 435 [2nd Dept. 1999]), undue hardship was found when the defendant was a resident of Hungary, and was more than 70 years old and in failing health.

By contrast, in *LaRusso v. Brookstone, Inc.* (52 A.D.3d 576 [2nd Dept. 2008]), undue hardship was not found where the defendant was headquartered in Merrimack, New Hampshire, and venue was in Suffolk County. *See also, Cooper v. Met Merchandising,* 54 A.D.2d 859 [1st Dept. 1976][travel from Florida to New York did not constitute undue hardship].

In *Bristol-Myers Squibb Co. v Yen-Shang B. Chen* (186 A.D.2d 999 [4tht Dept. 1992]), the undue hardship was found to be "self imposed" where the defendant was served with an order to show cause for an expedited examination before trial when he appeared on another matter in Canada, but "nevertheless" chose to "compound his hardship by returning to Taiwan."

Here, it is noted, the allegations in this case are closely aligned with Orange County. That is, the Plaintiffs are residents of Orange County, and are suing based upon alleged negligence that occurred in Orange County at a time when Mamdani was a resident or at least practicing in Orange County.

Further, it is noted, there is no actual impediment to Mamdani returning to Orange County such as, for example, a health or other issue that would prevent or militate against travel.

Rather, it is merely a question of expense and inconvenience.

However, to the Court's reading, the case law *supra* requires a higher degree of expense and inconvenience than was demonstrated here to demonstrate undue hardship. That is, the distance here is qualitatively and quantitatively different that travel from, for example, China or Hungary. Thus, the motion for a protective order is denied.

Further, the cross motion to compel Mamdani to appear in New York is denied as academic. The Plaintiffs are entitled to notice his deposition in this county without order of the Court. Of course, the Court trusts that, before doing so, the Plaintiffs will have considered in

earnest, and have made a bona fide attempt to ameliorate any inconvenience regarding Dr. Mamdani's return to New York.

Indeed, the Court is compelled to observe that taking into consideration the Doctor's current surgery schedule of Tuesday and Friday, his claim that his return to New York will result in 5 lost surgical days is, at least in this Court's view, an extreme exaggeration. For example, a return to New York late Thursday, in anticipation of a Friday examination, and if warranted Saturday, with a return to California on Sunday, results in a loss of one day.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is denied; and it is further,

ORDERED, that the cross motion is denied as academic; and it is further,

ORDERED, that the parties are directed to appear, through respective counsel, for a conference on Wednesday, March 7, 2018, at 9:15 a.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: January 5, 2018
Goshen, New York

ENTER

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