Bell v Baker
2019 NY Slip Op 30238(U)
January 30, 2019
Supreme Court, New York County
Docket Number: 153201/2015
Judge: Eileen A. Rakower

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

----------X

Ofra Bell,

Index No:
153201/2015

Plaintiff,

- against -

Decision/Order

Mot. Seq.: 3

Daniel C. Baker, M.D., P.C., Daniel C. Baker, M.D., Steven M. Levine, M.D.,

Defendants.

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

This is an action for medical malpractice arising from procedures that Defendants performed on Plaintiff's hands in December 2013. Plaintiff subsequently underwent hand surgery performed by Dr. Batya Yaffe ("Dr. Yaffe") to remove scar tissue that resulted from Defendants' alleged malpractice. Dr. Yaffe resides in Israel where she has a medical practice.

Plaintiff filed her Note of Issue on June 27, 2017. On December 5, 2017, Defendants' motion granting summary judgment as to Dr. Baker was denied. Trial is scheduled to commence on May 8, 2019.

Plaintiff moves for a Protective Order, pursuant to CPLR §3103 and §3117(a)(3), directing that the deposition of Plaintiff's treating physician Dr. Yaffe be conducted by remote means in Israel and for leave to employ a video transcription of her testimony at trial in lieu of appearing in person. Defendants oppose.

Relevant Background

On July 3, 2018, Plaintiff served Defendants with a Notice to Take Videotaped Deposition of Dr. Yaffe on August 2, 2018 at Diamond Reporting & Legal Video,

16 Court Street, Brooklyn, New York. The Notice indicated that the deposition would be recorded by stenographer and by means of simultaneous audio and visual electronic recording because Dr. Yaffe is not easily able to travel to New York. By letter dated July 5, 2018, Defendants objected to Plaintiff's Notice and refused to proceed with the videotaped deposition. The parties requested and appeared for a status conference with the Court on October 9, 2018, at which time Plaintiff was directed to make the instant motion. Plaintiff made the motion thereafter.

Plaintiff contends that the Court should permit the deposition of Dr. Yaffe by electronic means to avoid "undue hardship" to Dr. Yaffe. Defendants contend that Dr. Yaffe has a busy medical practice and traveling from Israel to New York to testify would result in her having to close her office. Defendants further contend that "[t]he cost to plaintiff of getting Dr. Yaffe to New York from Israel is also prohibitively expensive."

Defendants contend that Plaintiff should not be permitted to take the deposition of Dr. Yaffe post Note of Issue. Defendants further contend that they have not consented to a deposition by remote means as required under CPLR §3113. Defendants further argue that Plaintiff's allegations of "undue hardship" to Dr. Yaffe are conclusory and speculative. Additionally, Defendants contend that they would be unduly prejudiced should Dr. Yaffe's testimony be taken by remote means because it would deprive them of an opportunity examine and cross examine Dr. Yaffe.

Legal Standard

22 N.Y.C.R.R. 202.21(d) sets forth that post Note of Issue disclosure may be authorized "to prevent substantial prejudice" if "unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness." "Trial courts are authorized, as a matter of discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced." (*Cuprill v. Citywide Towing and Auto Repair Services,* 149 A.D.3d 442, 442 [1st Dept.2017]).

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.

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]).

"Depositions of parties to an action are generally held in the county where the action is pending; if a party demonstrates that conducting his deposition in that county would cause undue hardship, the Supreme Court in its exercise of discretion can order the deposition to be held elsewhere." (*Weinstein v. Gindi*, 92 AD3d 526, 526-27 [1st Dep't 2012] [citations omitted]).

Pursuant to CPLR §3113(d), "[t]he parties may stipulate that a deposition be taken by telephone or other remote electronic means and that a party may participate electronically." Once a deposition has been taken and recorded on video, it may be used at trial in accordance with "the provisions of the Civil Practice Law and rules and all other relevant statutes, court rules and decisional law relating to depositions and relating to the admissibility of evidence." 22 NYCRR 202.15(i). Additionally, CPLR §3117(a)(4) provides that "the deposition of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances, subject to the right of any party pursuant to section 3103 to prevent abuse."

Discussion

Preliminarily, Plaintiff's motion for a protective order is unfounded since Plaintiff does not seek to deny discovery but rather compel it. Plaintiff's proposed deposition of Dr. Yaffe is improper because it is being sought after the Note of Issue was filed. Furthermore, Plaintiff has not made the requisite showing that there should be a deviation from the presumption that a deposition should be live and take place where the action is pending or from the rule as set forth in CPLR §3113(d) that a deposition by remote means requires consent of the parties. Plaintiff has failed to demonstrate undue hardship warranting an order directing that Dr. Yaffe's deposition be held by video conference by remote means in Israel. Plaintiff's contention that a deposition of Dr. Yaffe in New York would result in undue hardship for both Dr. Yaffe and Plaintiff is unsupported by any evidence. Neither Dr. Yaffe nor Plaintiff submit any supporting affidavits to substantiate their claim of undue hardship.

Wherefore, it is hereby

ORDERED that Plaintiff's motion is denied.

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

Dated: January 30, 2019

Eileen A. Rakower, J.S.C.