Mella v Center for Alternative Sentencing & Employment Servs.
2019 NY Slip Op 31329(U)
May 9, 2019
Supreme Court, New York County
Docket Number: 805225/14
Judge: Joan A. Madden
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 11
---X
RAMON RAFAEL MELLA, as Administrator of the Estate of NEWTON MEJIA MELLA a/k/a NEWTON MELLA,

Index No.805225/14

Plaintiff,

-against-

CENTER FOR ALTERNATIVE SENTENCING AND EMPLOYMENT SERVICES, CHRISTIAN COLON, JONATHAN HERTZ, M.D., and ST. LUKE'S HOSPITAL,

Defendants.
---X
Joan A. Madden, J.:

Plaintiff moves for an order compelling the continued deposition of defendant Jonathan Hertz, M.D. ("Dr. Hertz") and directing Dr. Hertz to answer posed by plaintiff's counsel at the EBT as well as other questions that may arise therefrom. Dr. Hertz and defendant Center for Alternative Sentences and Employment Services ("CASES") and its employee Christian Colon separately oppose the motion.

Background

This action arises out of Newton Mejia Mella's suicide on July 2, 2013, when he was a patient of CASES and was receiving services from various professionals including Dr. Hertz, a psychiatrist assigned to work with Mr. Mella at the time of his death. At his deposition, Dr. Hertz described his services as "part time" and limited to three days a week (Hertz EBT at 15). He further testified that the professionals assigned by CASES to care for Mr. Mella consisted of approximately seven people: a team psychiatrist, a team nurse, several social workers, peer specialists and mental health workers, and that he was the only psychiatrist assigned who was responsible for his care (Id. at 20). As to his role in treating Mr. Mella, Dr. Hertz testified that he

was "mostly meeting [with Mr. Mella] on a monthly basis, evaluating his mental status and managing his psychopharmacologic medications to target his mental health disorders, so I would prescribe, I would assess and get input from the team" (Id at 37). Dr. Hertz also testified that he was not directing the therapy component of Mr. Mella's treatment and that his role was medication management, although he did have familiarity with the overall plan of care (Id at 34).

Dr. Hertz testified that his last contact with Mr. Mella before his death occurred on July 1, 2013, when Mr. Mella telephoned and left a voice mail message for Dr. Hertz telling him he was hearing voices. Dr. Hertz testified that he returned the call and spoke directly with Mr. Mella, and that Mr. Mella requested that someone from CASES see him that week, and that he told Mr. Mella he would relay his request and put him on the calendar to be seen the following week (Id. at 67-68).

At issue on this motion to compel are certain deposition questions posed by plaintiff's attorney regarding the events that took place involving CASES and Mr. Mella on July 2, 2013, which Dr. Hertz's attorney directed him not to answer.

The exchange was as follows:

Q: So, you have some idea of certain events that took place
on July 2nd?
A: On July 2nd, I am trying to get the date in my head, yes, yes.
Q: I am going to ask you a difficult question and if you're not able
to answer it, tell me and I will accept that but if you are able to
answer it, I would like you to do your best.
A: Okay.
Q: If you had been there on July 2nd, given what you know about
what took place then, do you know what steps you would have

taken?

Mr. Lee (i.e. defense counsel): No, don't answer the question.

Mr. Lee: He is not going to answer that question. He is not going to answer anything about what was done on July 2nd. He never treated the patient after July 1st.

(Id. at 88-89).

When plaintiff's counsel attempted to continue with this questioning of Dr. Hertz, the following exchange took place:

Mr. Silverstein (i.e. plaintiff's counsel): I understand that but he has knowledge about what the clinical presentation was.

Mr. Lee: You can take it up with the court and we can discuss it at the next court conference. He is not going to answer anything as far as the treatment after July 1.

Mr. Silverstein: I am allowed to ask a hypothetical question, that we know so.

Mr. Lee: You're not allowed to ask him a hypothetical question after he stopped treating the patient on July 1st

(Id., at 89)....

Mr. Silverstein: One of the issues and allegations in this case is that adequate measures weren't available on July 2nd when they were needed. What follows next from that is that had adequate measures been taken, that there would have been some beneficial effect, so I have the burden of proving those things and this is a deposition of the doctor who we say either he or an equivalent to he should have been available on July 2nd, so I would like to know, just hypothetically ask him, if he had been contacted or someone with his skill and knowledge and expertise had been contacted, could there have been meaningful action taken. That is the essence of it, so I think I am within my rights to ask that question of this witness....

(Id at 90)

Mr. Lee: ...I disagree with you because what you're trying to do is..to get expert

opinion against CASES through this doctor and based on Carvalho (referring to Carvalho v. New Rochelle Hospital, 53 AD2d 635 (2d Dept 1976)), as you know that is not appropriate. He never treated the patient since July 1st and he told you what his evaluation was on July 1st and anything after that hire your own expert....

Plaintiff now moves to compel Dr. Hertz's continued deposition to respond to the line of questioning halted by defense counsel, asserting that substantive questions asked of Dr. Hertz relating to his expert opinion were appropriate, and that under the rules relating to depositions, and in particular, Uniform Rule 221.2, there was no basis for defense counsel to direct Dr. Hertz not to answer the subject questions.

In opposition, Dr. Hertz argues that under the holding in Carvalho v. New Rochelle Hospital, 53 AD2d 635 (2d Dept 1976), the questioning at issue is not permissible as it relates solely to the negligence of a co-defendant since Dr. Hertz did not treat the decedent after July 1, 2013. Dr. Hertz also points to his testimony that he did not read the note of defendant Christian Colon[1], which documented the actions that took place after July 2, 2013, and argues that the questioning as to events on July 2, 2013 lacks a proper foundation. As for Uniform Rule 221.2, a deponent need not answer questions which are "plainly improper" and would cause significant prejudice," and that the questioning at issue falls into this category.

Discussion

"The proper procedure during the course of an examination before trial is to permit the witness to answer all questions posed, subject to objections pursuant to subdivisions (b), (c) and

---

[1]The complaint alleges that Mr. Colon is a social worker (Complaint ¶ 4). Dr. Hertz testified, however, that Mr. Colon was not a social worker and that he recalled that he was a "mental health worker" but that he was not certain (Dr. Hertz EBT at 77)..

(d) of CPLR 3115,[2] unless a question is clearly violative of the witness's constitutional rights or of some privilege recognized in law, or is palpably irrelevant." Mora v. Saint Vincent's Catholic Medical Center of New York, 8 Misc3d 868, 869 (Sup Ct NY Co. 2005); see also Orner v. Mount Sinai Hospital, 305 AD2d at 307. "The reason for this maxim is simple: only objections to form and the technical aspects of the deposition are waived if not timely raised at the deposition." Mora v. Saint Vincent's , 8 Misc3d at 870 (internal citations and quotations omitted).

Section 221.1(a) ("uniform rules"), "Objections at Depositions," provides in pertinent part:

> (a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b)(c) or (d) of [CPLR] 3115. . ., would be waived if not interposed. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the CPLR (emphasis added).

Section 221.2 requires a deponent to answer all questions except to preserve a privilege or right of confidentiality or when the question is plainly improper and would, if answered, cause significant prejudice to any person. That section further states:

> An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefore.

Under these rules, it would appear that the proper procedure in this case would have been

---

[2]CPLR 3115(b) concerns instantly avoidable errors that must be objected to; subdivision (c) concerns disqualification of the officer before whom the deposition is taken; subdivision (d) involves objections to competency of witness or admissibility of evidence. The objections under (b) and (c) are waived if not raised a deposition, while those under (d) are not waived by failure to make them during the deposition, unless it is an instantly curable matter falling within subdivision (b).

to raise the objection at issue and permit the witness to answer. See e.g. Spatz v. Wide World Travel Services, Inc., 70 AD2d 835 (1st Dept 1979)(counsel is without authority to direct witness not to answer questions at his deposition); Lewis v. Brunswick Hosp., 2001 Wl 856434, *1 (Sup Ct Queens Co. 2001)(objections to defendant doctor's testimony on Carvalho grounds did not provide an appropriate basis for instructing doctor not to answer deposition questions and the proper remedy was to raise the objection and seek a protective order from the court).

That said, on this motion to compel, the court shall consider the appropriateness of the questioning at issue. It is well established that "the substantive questions relating to the expert opinions of the witnesses and the status of generally accepted community standards of medical practice were appropriate. " Orner v. Mount Sinai Hosp, 305 AD2d 307, 309 (1st Dept 2003); See also, Sagiv v. Gamache, 26 AD3d 368, 369 (2d Dept 2006). Specifically, a defendant witness may be questioned as an expert for the purposes of eliciting his "knowledge of" the facts of plaintiff's case and "establishing the generally accepted medical practice in the community" McDermott v. Manhattan Eye, Ear and Throat Hosp., 15 NY2d 20, 29–30 (1964).

In Carvalho, however, the Appellate Division, Second Department held that "one defendant physician may not be examined before trial about the professional quality of the services rendered by a codefendant physician if the questions bear solely on the alleged negligence of the codefendant and not on the practice of the witness." 53 AD2d at 635. The court also held that, "[w]here ... the opinion sought refers to the treatment rendered by the witness, the fact that it may also refer to the services of a codefendant does not excuse the defendant witness from [being deposed] as an expert." Id.

In general, the holding in Carvalho has been narrowly interpreted to preclude testimony

only when the questions relate solely to the alleged negligence co-defendant. See Harley v. Medical Center of Brooklyn, 57 AD2d 827 (2d Dept 1977)(holding that pediatrician could be asked questions as to the medicines given to mother by co-defendant obstetrician since such questions "may be relevant to the determination as to whether pediatrician reasonably diagnosed the child's condition [and thus] did not appear to bear solely on the alleged negligence of the codefendant physician"); see also McGuire v. Zarlengo, 250 AD2d 823 (2d Dept 1998)(holding that defendant cardiologist was required to answer deposition questions as to whether certain cardiac conditions presented a surgical risk where such questions were relevant to whether the defendant doctor "failed to properly caution his codefendant physicians concerning the risks involved in the surgery"); Grisanti v. Kurss, 28 Misc3d 1233 (A) (Sup Ct. Erie Co. 2010)(although defendant doctor being questioned was not in delivery room at the time of alleged malpractice, the questions posed to him "primarily asked [that he] recount his own knowledge or assessments concerning what had transpired in plaintiff's case"and thus did not run afoul of Carvalho); but see Dare v. Byram, 284 AD2d 990 (4th Dept 2001)(trial court correctly denied plaintiff's motion to the extent it sought to compel defendants physicians to answer questions regarding the standard of care applicable to the other defendant physician).

In this case, the court finds that the motion to compel should be granted on condition that the questioning is framed hypothetically in the context of the standard of care with respect to Dr. Hertz's psychiatric speciality in medication management. In this connection, while such questions may implicate the co-defendants it cannot be said on this record, that they would bear solely on negligence of the co-defendants. In addition, while Carvalho refers to the prohibition against a defendant physician testifying as to the negligence of another defendant physician, it is

unclear from the submissions whether any of the co-defendants allegedly implicated by Dr. Hertz's testimony are physicians, or medical providers. Furthermore, the questions concern the issues raised in this action as to whether adequate measures were available to Mr. Mella on July 2, 2013, and if additional measures would have been beneficial to Mr. Mella under the circumstances.

Finally, to the extent defense counsel objects to Dr. Hertz's questioning based on the alleged lack of adequate foundation, the proper procedure would be to state such objection on the record, and not to instruct Dr. Hertz not to answer the questions at issue. See also Connors, Practice Commentaries, Book 7B, McKinney's Consold Laws of NY, CPLR 3115(b), C3115:2 (2018).

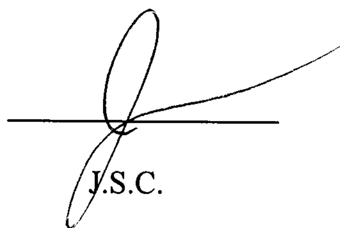
Conclusion

In view of the above, it is

ORDERED that the motion is granted to the extent that Dr. Hertz shall appear for a continued deposition on or before June 28, 2019 conditioned on the questioning being limited in accordance this decision and order; and it is further

ORDERED that any objection raised to the questioning of Dr. Hertz shall be consistent with this decision and order

DATED: May 9, 2019



J.S.C.

HON. JOAN A. MADDEN
J.S.C.