

Magno v Molina

2019 NY Slip Op 31333(U)

April 12, 2019

Supreme Court, New York County

Docket Number: 805661/2015

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

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

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NATIVIDAD MAGNO, as Administrator of the ESTATE
OF MARIETTA MAGNO, deceased,

Index No.
805661/2015

Plaintiff,

- v -

**DECISION
and ORDER**

MARITZA MOLINA, M.D., ARASHDEEP SINGH POONIA,
M.D., ANDREA LIN, M.D., PUTNAM NURSING AND
REHABILITATION CENTER and PUTNAM HOSPITAL
CENTER,

Mot. Seq. 006

Defendants.

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

On February 22, 2019, the case was transferred from the Honorable Joan A. Madden to the Honorable Eileen A. Rakower. Defendant Putnam Nursing and Rehabilitation Center (“Putnam Nursing and Rehabilitation”) submits this motion for an Order pursuant to CPLR § 3401 and the Uniform Rules for Trial Courts § 202.21(e) to vacate Plaintiff Natividad Magno, as Administrator of the Estate of Marietta Magno, deceased’s (“Plaintiff”) Note of Issue and Certificate of Trial Readiness, and pursuant to CPLR §§ 3124 and 3126 to compel Defendant Putnam Hospital Center (“Putnam Hospital) to provide Elvira Canieso-Mendoza (“Ms. Canieso-Mendoza”) or another mutually agreeable witness for deposition or alternatively, for an Order precluding Putnam Hospital from offering any evidence at trial. Putnam Nursing and Rehabilitation also seeks an Order staying the case until discovery is complete and extending Defendants’ time to file a motion for summary judgment until 120 days after discovery is completed.

Defendant Maritza Molina, M.D. (“Dr. Molina”) submits support to the motion on December 12, 2018. Defendants Andrea Lin, M.D. (“Dr. Lin”) and Putnam Hospital submit partial opposition to the motion on December 12, 2018. Plaintiff submits opposition to the motion on February 13, 2019.

Pending Motion

This is an action for medical malpractice and negligence. Plaintiff filed his Summons and Verified Complaint on October 5, 2015, against Defendants. Plaintiff alleges that the death of Decedent was the result of the development of pressure ulcers while under the care and treatment of Defendants. Defendants joined issue by service of their Verified Answers on November 4, 2015, November 25, 2015, and February 4, 2016. Dr. Arashdeep Singh Poonia, M.D. (Dr. Singh Poonia”) has been stipulated out of the action and is no longer a defendant.

On September 11, 2018, Putnam Nursing and Rehabilitation emailed Putnam Hospital’s attorney asking about the status of Ms. Canieso-Mendoza, under the belief that Ms. Canieso-Mendoza is a nurse at Putnam Hospital Center and the first person to indicate Decedent had a pressure ulcer. On September 18, 2018, Putnam Nursing and Rehabilitation served Putnam Hospital with a Notice to Take deposition Upon Oral Examination of Ms. Canieso-Mendoza for October 9, 2018. On September 20, 2018, Putnam Hospital informed Putnam Nursing and Rehabilitation that Ms. Canieso-Mendoza is still employed by the facility.

On October 18, 2018, the parties appeared for a Compliance Conference. Putnam Nursing and Rehabilitation contends that Putnam Hospital stated it was not sure it was going to produce Ms. Canieso-Mendoza because there was no cross-claim against her facility. Putnam Nursing and Rehabilitation contends that it stated it was entitled to depose Ms. Canieso-Mendoza because she is an employee of Putnam Hospital, a named defendant. Putnam Nursing and Rehabilitation contends that the Court declined to rule on the matter at the Conference and wrote on the Order “Defendants to resolve issue with Putnam Hospital Witness EBT” and file the Note of Issue by December 7, 2018. Putnam Nursing and Rehabilitation avers that it called and emailed counsel for Putnam Hospital about conducting the deposition of Ms. Canieso-Mendoza and that Putnam Hospital stated it needed to speak with her and that she was traveling the first week of November. Putnam Nursing and Rehabilitation contends that there has been no response since.

On November 16, 2018, Plaintiff filed the Note of Issue. Putnam Nursing and Rehabilitation avers that the Certificate of Readiness incorrectly states that there is no outstanding discovery and the case is ready for trial, that the Attorney’s Affirmation of Completion incorrectly states all depositions have been conducted, and that the Compliance Conference Order dated October 18, 2018 has been complied with. Putnam Nursing and Rehabilitation contends that Plaintiff still needs

to provide Arons authorization as stated in the October 18, 2018 Order and CPLR § 3101(d) expert information remains outstanding.

Parties' Contentions

Putnam Nursing and Rehabilitation argues that Putnam Hospital's conduct has been willful because it ignored Putnam Nursing and Rehabilitation's requests to schedule the deposition of Ms. Canieso-Mendoza and has led to a standstill in the case. Putnam Nursing and Rehabilitation contends that if Putnam Hospital fails to comply with the discovery request, then the Court should preclude Putnam Hospital from offering evidence in support during trial. Additionally, Putnam Nursing and Rehabilitation contends that the Note of Issue should be stricken because significant discovery is outstanding. Putnam Nursing and Rehabilitation contends that the discovery it seeks is relevant and essential. Putnam Nursing and Rehabilitation asserts that Putnam Hospital has not designated a witness to be deposed and Dr. Singh Poonia and Dr. Lin were deposed in their individual capacities and not as employees of Putnam Hospital.

In support, Defendant Dr. Molina contends that the time to file summary judgment should be extended until after all discovery is completed. Dr. Molina states that she takes no position to Putnam Nursing and Rehabilitation's substantive arguments.

Defendants Dr. Lin and Putnam Hospital oppose Putnam Nursing and Rehabilitation's request to compel Putnam Hospital to produce Ms. Canieso-Mendoza or another mutually agreeable witness or to preclude Putnam Hospital from offering evidence in support during trial. Defendants Dr. Lin and Putnam Hospital concur with Plaintiff's opposition that there are no further depositions from Putnam Hospital outstanding because two physicians who treated Decedent at Putnam Hospital were already deposed. Defendants Dr. Lin and Putnam Hospital contend that Ms. Canieso-Mendoza, like Dr. Singh Poonia, who was one of the individuals deposed from Putnam Hospital, saw the decedent in the emergency department for approximately three to four hours and memorialized any assessments performed by Decedent. Defendants Dr. Lin and Putnam Hospital further contend that Plaintiff deemed that further depositions from Putnam Hospital are unnecessary. Defendants Dr. Lin and Putnam Hospital contend that the time to file motions for summary judgment should be extended because valuable time has been lost since Plaintiff's filed their Note of Issue on November 16, 2018. Dr. Lin and Putnam Hospital state that they take no position to the portion of Putnam Nursing and

Rehabilitation's motion which seeks to vacate Plaintiff's Note of Issue and stay the matter until all discovery is completed.

In opposition, Plaintiff contends that he has complied with all outstanding discovery demands prior to filing the Note of Issue on November 16, 2018. Plaintiff contends that on October 23, 2018, he provided the Defendants with a Supplemental Bill of Particulars, Arons authorizations and an Expert Witness Disclosure. Plaintiff asserts that the only outstanding discovery is the deposition of Mr. Greenfield, a nurse from Putnam Hospital and Plaintiff is not seeking Mr. Greenfield's deposition because there were already two separate physicians' depositions from Putnam Hospital. Plaintiff contends that if the Court compels the deposition of Ms. Canieso-Mendoza, that the matter remains on the calendar and Defendants' time to move for summary judgment be extended.

Legal Standard

CPLR § 3101[a] 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]. Pursuant to CPLR § 3124, a party may move to compel compliance or a response if the opposing party "fails to respond to or comply with any request, notice, interrogatory, demand, question or order".

In *Cromer v. Yellen*, 268 AD2d 381, 381 [1st Dept 2000], the First Department of the Appellate Division stated, "[w]e have repeatedly held that a note of issue should be vacated when it is based upon a certificate of readiness that contains erroneous facts." The First Department added, "[h]ere, plaintiff's certificate of readiness wrongly indicated that . . . all necessary discovery proceedings had been completed. Since it was clear that discovery was neither completed nor waived, plaintiff's certificate of readiness violated 22 NYCRR 202.21." *Id.*

Under 22 N.Y.C.R.R. § 202.21(e), the court may vacate a note of issue if, within twenty (20) days of the filing of note of issue, a party demonstrates that the case is not ready for trial because "a material fact in the certificate of readiness is incorrect, or... the certificate of readiness fails to comply with the requirements of this section in some material respect."

Discussion

Putnam Nursing and Rehabilitation has satisfied its burden of showing that the deposition of Ms. Canieso-Mendoza, a nurse who is currently employed by Putnam Hospital, and was the first to assess the pressure ulcer is “material and necessary”. See CPLR § 3101[a]. Putnam Hospital has failed to produce Ms. Canieso-Mendoza or any other witness. The certificate of readiness incorrectly states that discovery is complete. *Cromer*, 268 AD2d at 381.

Wherefore, it is hereby

ORDERED that Defendant Putnam Hospital Center is directed to produce Elvira Canieso-Mendoza for a deposition within ten days of this Order; and it is further

ORDERED the Note of Issue is vacated; and it is further

ORDERED that all parties are directed to appear for a compliance conference on May 7, 2019, at 9:30 AM in Part 6, 71 Thomas Street, Room 205; and it is further

ORDERED that Note of Issue will be filed by May 31, 2019. There shall be no further extensions. Motions for summary judgment, if any, shall be made no later than sixty days after the filing of the Note of Issue (the case has been reassigned to Part 6 and therefore, the Part 6 rules will apply moving forward).

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: April 12, 2019



Eileen A. Rakower, J.S.C.