

O'Rourke v Stavropoulos

2019 NY Slip Op 31725(U)

February 1, 2019

Supreme Court, Nassau County

Docket Number: 005569/13

Judge: Jack L. Libert

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

BRIAN O'ROURKE and LINDA O'ROURKE,

TRIAL PART 23
NASSAU COUNTY

Plaintiffs,

-against-

MOTION # 01, 02, 03
INDEX # 005569/13
MOTION SUBMITTED:
JANUARY 10, 2019

STAVROS STAVROPOULOS, M.D., TEODOR PITEA, M.D., ROBERTO M. PEGEEN, R.N., GREGORY INCALCATERRA, M.D., GARY SHER, M.D., WINTHROP UNIVERSITY HOSPITAL, WINTHROP GASTROENTEROLOGY, P.C. (a/k/a WINTHROP GASTROENTEROLOGY ASSOCIATES, P.C.) AND NASSAU ANESTHESIA ASSOCIATES, P.C.,

Defendants.

The following papers having been read on this motion:

- Notice of Motion/Order to Show Cause.....1, 2**
- Cross Motion/Answering Affidavits.....3, 4**
- Reply Affidavits.....**

Trial of this matter is scheduled to begin before the undersigned on February 13, 2019. These motions were pending before the IAS judge, but are now being considered *in limine*.

Motion Sequence No.1

Defendants Roberto M. Pegeen, R.N. and Winthrop University Hospital move to preclude testimony of expert witnesses designated in plaintiffs' Expert Exchange dated March 20, 2018; or to preclude plaintiffs from offering proof concerning "the new theories of liability contained in plaintiffs' Supplemental Expert Exchange dated April 6, 2018".

On November 3, 2015 plaintiffs served a CPLR Section 3101(d) exchange which named experts in anesthesiology, gastroenterology and, an examining neurologist. On February 26, 2018 plaintiffs served a “Supplemental Expert Exchange” setting forth the nature of additional testimony to be offered by the neurologist. On March 20, 2018 plaintiffs served a 3101(d) exchange which designated additional experts in the fields of anesthesiology and gastroenterology. On April 6, 2018, plaintiffs served another supplemental exchange containing information to be presented by the anesthesiologist and gastroenterologist.

The information presented by plaintiffs in March and April of 2018 indicated that their experts will testify concerning failure of Winthrop to set forth appropriate policy for receiving surgical privileges; and that defendants failed to give sufficient informed consent by not disclosing that the procedure performed on plaintiff was fairly new. Moving defendants assert that this new (untimely disclosed) information raised theories of liability that were not contained in the pleadings and for that reason may not be offered at trial.

CPLR 3101(d)(1) states:

“[W]here a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph [which requires the identification of experts upon request]. In that instance ... the court may make whatever order may be just.”

CPLR 3101(d)(1)(i) requires each party to “identify each person whom the party expects to call as an expert witness at trial and [to] disclose in reasonable detail the subject matter on which each expert is expected to testify, ... the qualifications of each expert witness and a summary of the grounds for each expert's opinion.” Trial courts possess broad discretion in their supervision of expert disclosure under CPLR 3101(d)(1) (*see Bernardis v. Town of Islip*, 95 A.D.3d 1050, 1050, 944 N.Y.S.2d 626 [2d Dept.2012]). A determination regarding whether to preclude a party from introducing the testimony of an expert witness at trial based on the party's failure to comply with CPLR 3101(d)(1)(i) is left to the sound discretion of the court (*McGlaufflin v. Wadhwa*, 265 A.D.2d 534, 534, 696 N.Y.S.2d 880 [2d Dept.1999]; *see also Deandino v. New York City Tr. Auth.*, 105 A.D.3d 801, 803, 963 N.Y.S.2d 288 [2d Dept.2013]; *but see Saldivar v. I.J. White Corp.*, 46 A.D.3d 660, 661, 847 N.Y.S.2d 224 [2d Dept. 2007]). Preclusion for failure to comply with

CPLR 3101(d) is improper unless there is evidence of intentional or willful failure to disclose and a showing of prejudice (*Cruz v. Gustitos*, 51 A.D.3d 963, 964, 858 N.Y.S.2d 791, 792 [2008]).

Despite the lateness of the disclosures served in March and April of 2018, it can hardly be said that they were served on the eve of the trial, which is taking place ten months later. There is no evidence of willful or deliberate failure to timely disclose. Defendants had ample time to consider the material, albeit untimely submitted and to prepare to deal with that material at trial. To defendants' credit they retained their own experts for that purpose without waiting for a judicial determination.

The court does not agree with the claim of moving defendants that the disclosures contain new theories of liability. The alleged new theories are negligent credentialing and failure to give sufficient informed consent. The Bill of Particulars and the amended bills include (as departures from standards of care), "failing to employ those who follow the facility's rules and regulations regarding the conduct of its employees, technicians or independent contractors..." and "failing to follow the facility's rules and regulations regarding the conduct of its employees, technicians or independent contractors ...". This information was sufficient to put defendants on notice of the gravamen of the 3101 (d) material submitted by plaintiffs.

The motion to preclude is denied.

Motion Sequence Nos. 2 and 3

Plaintiffs move (Motion Seq. No. 2) pursuant to CPLR 3212 for an order compelling Winthrop to comply with the subpoena seeking credentialing documents. Winthrop cross moves (Motion Seq. No. 3) to quash the subpoena; and for a protective order to prevent the disclosure of confidential information.

Winthrop correctly contends that the material in the credentialing file of Dr. Stavropoulos is confidential under Public Health Law § 2805-m and Education Law § 6527. Plaintiffs argue that Winthrop waived confidentiality by submitting the credentialing documents to Winthrop's trial experts. The court agrees.

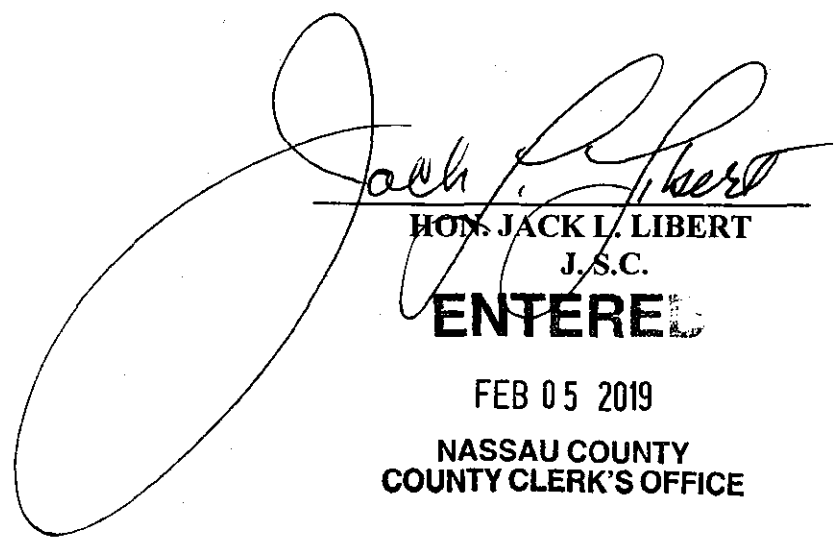
Winthrop cannot propose to use confidential information at trial and at the same time assert statutory confidentiality to shield that information from plaintiff. To the extent Winthrop's CPLR 3101(d) disclosure reveals the contents of otherwise confidential credentialing documents the disclosure acts as a waiver.

Winthrop shall turn over to plaintiffs the documents and information requested in the subpoena issued by plaintiff to the extent those documents were provided to defendant's expert witnesses.

The parties are directed to appear for a conference on February 7, 2019 at 2:30 PM to discuss any further pre-trial matters.

ENTER

DATED: February 1, 2019



HON. JACK L. LIBERT
J.S.C.
ENTERED
FEB 05 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE