

Lazzari v Qualcon Constr., LLC
2019 NY Slip Op 33889(U)
June 10, 2019
Supreme Court, Bronx County
Docket Number: 305450/2011
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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PAUL LAZZARI,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 305450/2011

QUALCON CONSTRUCTION, LLC, TOMCON
INDUSTRIES, JAMES SASSO and CONSOLIDATED
EDISON COMPANY OF NEW YORK,

Defendants.

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John R. Higgitt, J.

Upon the order to show cause signed March 28, 2019 and the affirmation and exhibits submitted in support thereof; the April 8, 2019 affirmation in opposition submitted by defendants Qualcon Construction, LLC, James Sasso and Consolidated Edison Company of New York¹ and the exhibits submitted therewith; plaintiff's April 15, 2019 affirmation in reply being considered for good cause as "necessary to the consideration of the questions involved" (*see* CPLR 2214[c]), although it bears no proof of being served upon any other party; and due deliberation; plaintiff's application to quash a subpoena ad testificandum served upon Dr. Frank Moore and for a protective order with respect to Dr. Moore's deposition is granted in part.

Plaintiff filed a note of issue on June 22, 2015, and, on or about May 9, 2016, served a CPLR 3101(d)(1)(i) notice designating Dr. Moore, one of plaintiff's treating physicians,² as an expert.

On or about March 7, 2019, defendants served a subpoena ad testificandum upon Dr. Moore and a notice of Dr. Moore's deposition upon plaintiff. Defendants had not previously

¹ The action as against the remaining defendant, Tomcon Industries, has been discontinued; the court therefore refers to the defendants opposing the application as "the defendants."

² Dr. Moore treated plaintiff's lumbar condition prior to the subject accident, and performed the surgery precipitating plaintiff's recent motion to amend the bill of particulars to allege the exacerbation of a preexisting lumbar condition.

sought an order directing Dr. Moore to appear for deposition. Plaintiff asserts that the subpoena must be quashed because it was served in contravention of CPLR 3101(d)(1)(iii), which states, “disclosure concerning the expected testimony of any expert [beyond the disclosure required by CPLR 3101(d)(1)(i)] may be obtained only by court order upon a showing of special circumstances.”

Defendants assert that Dr. Moore is no longer an expert whose deposition requires a showing of special circumstances, and, in any event, special circumstances exist that warrant the taking of Dr. Moore’s deposition.

Defendants assert that (1) on August 20, 2018 plaintiff informed defendants, in writing, that Dr. Moore was unable to appear at the time of trial, (2) at that time, plaintiff informed defendants, in writing, of his intention to take a video deposition of Dr. Moore, explicitly because of his unavailability at the time of trial, and (3) on or about September 27, 2018, plaintiff designated as a trial expert another doctor in Dr. Moore’s practice who had not previously examined plaintiff.

Defendants rejected plaintiff’s notice of Dr. Moore’s deposition as untimely and not served in conformity with the CPLR, but indicated their intention to work with plaintiff’s counsel to pursue Dr. Moore’s deposition. A September 2018 email exchange submitted by defendants indicates that the parties attempted, unsuccessfully, to schedule Dr. Moore’s deposition. A later email exchange indicates that plaintiff withdrew his notice of deposition and, upon being notified of defendants’ service of the subpoena, directed Dr. Moore not to appear.

Normally, the general “material and necessary” standard of CPLR 3101 applies to discovery, even where sought from non-parties. There is no requirement that a party seeking discovery, whether from a party or a non-party, demonstrate “special circumstances” (*see Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]; *Schroder v Consolidated Edison Co.*, 249 AD2d 69

[1st Dept 1998]). There is no requirement that the material not be available from any other source. “[S]o long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty” (*Matter of Kapon*, 23 NY3d at 38), and “[a]n application to quash a subpoena should be granted [only] where the futility of the process to uncover anything legitimate is inevitable or obvious” (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 331-32 [1988] [citations omitted]) or where the material sought is “utterly irrelevant” to any “proper” inquiry (*Ledonne v Orsid Realty Corp.*, 83 AD3d 598 [1st Dept 2011]).

CPLR 3101(d)(1)(iii) narrows the scope of discovery available from a designated expert, requiring a demonstration of special circumstances. Plaintiff asserts that there are no special circumstances warranting Dr. Moore’s deposition, because, given plaintiff’s CPLR 3101(d)(1)(i) disclosure together with Dr. Moore’s affirmation submitted in opposition to defendants’ summary judgment motion, defendants are in possession of sufficient information as to the nature of Dr. Moore’s expected testimony, including his opinions as to the nature and extent of the injuries attributable to the subject accident (*see Melendez v Food Emporium*, 243 AD2d 264 [1st Dept 1997]), regardless of plaintiff’s failure to serve a formal CPLR 3101(d) exchange explicitly containing such information (*see Anderson v Kamalian*, 231 AD2d 659 [2d Dept 1996]; *Spano v Geller*, 145 AD2d 623 [2d Dept 1988]).

Thus, plaintiff essentially asserts that because Dr. Moore is a designated expert, defendants’ service of the subpoena constitutes an inquiry that is “improper” under *Ledonne*. Notably, plaintiff’s motion is not premised upon defendants’ delay, if any, in seeking the discovery or the lack of materiality or relevance, if any, of Dr. Moore’s deposition. Plaintiff’s motion is also not premised on the lack of unusual or unanticipated circumstances required to permit post-note of issue discovery (*see* 22 NYCRR § 202.21[d]), or the lack of prejudice to defendants if the discovery is not permitted.

“[A]n expert may always be deposed upon a showing of special circumstances” (*Clemons v Glicksman*, 25 AD3d 468, 468 [1st Dept 2006] [citation and quotation marks omitted]).³ In the absence of a demonstration of special circumstances, however, a subpoena seeking the deposition of a party’s expert is properly quashed (*see Fekete v GA Ins. Co.*, 279 AD2d 300 [1st Dept 2001]; *Hawksby v N.Y. Hosp.*, 162 AD2d 179 [1st Dept 1990]), particularly when the expert disclosure “is sufficient to meet the requisites of CPLR 3101(d)(1) by providing a clear idea of the nature of the testimony, as well as some basis for the diagnosis” (*Weinberger v Lensclean, Inc.*, 198 AD2d 58, 59 [1st Dept 1993]). The fact that, as here, a treating physician has been designated as an expert does not excuse the party seeking the additional discovery from making the requisite showing of special circumstances warranting the production of the discovery (*see Melendez v Roman Catholic Archdiocese of N.Y.*, 277 AD2d 64 [1st Dept 2000]; *Russo v Quincy Mut. Fire Ins. Co.*, 256 AD2d 1164 [4th Dept 1998]).

A party seeking discovery from a medical provider who has not been designated as an expert need not show special circumstances (*see Schroder, supra*). Here, however, plaintiff has not formally withdrawn the CPLR 3101(d) notice with respect to Dr. Moore, despite his various representations to defendants. Given the ambiguity of plaintiff’s representations regarding Dr. Moore, however, the record is inconclusive as to whether Dr. Moore should still be treated as an “expert” (*see e.g. Lau v Margaret E. Pescatore Parking, Inc.*, 105 AD3d 594 [1st Dept 2013]). The court notes that plaintiff sought Dr. Moore’s deposition specifically because of Dr. Moore’s inability to give live testimony at trial (*see CPLR 3117*). The court, however, cannot say that the history of the parties’ interactions evinces plaintiff’s “clear intention” of withdrawing Dr.

³ “[A] conclusory allegation that such discovery is necessary to fully prepare for litigation is insufficient to [demonstrate special circumstances]” (*232 Broadway Corp. v N.Y. Prop. Ins. Underwriting Assn.*, 171 AD2d 861, 861 [2d Dept 1991]).

Moore's designation as an expert (*see Gendell v 42 W. 17th St. Hous. Corp.*, 2018 NY Slip Op 31313[U] [Sup Ct, N.Y. County 2018]), despite plaintiff's subsequent designation of another physician in Dr. Moore's practice.⁴

Defendants assert, in the alternative, that if Dr. Moore may still be properly considered an expert whose deposition by defendants requires a showing of special circumstances, such circumstances are present here.

One such circumstance identified by defendants is that the undersigned recently granted plaintiff's motion to amend his bill of particulars, made over two years after the filing of the note of issue, to allege exacerbation of lumbar injuries. Plaintiff's CPLR 3101(d) disclosure of Dr. Moore made no mention of a prior lumbar history; however, Dr. Moore's January 21, 2016 affirmation, submitted in opposition to defendants' motion for summary judgment on the issue of "serious injury," offered an opinion as to why the subject accident, and not a prior accident, necessitated emergency fusion surgery (*see Lazzari v Qualcon Constr., LLC*, 162 AD3d 440 [1st Dept 2018]). On the record during oral argument before the court on plaintiff's motion to amend, plaintiff agreed to provide defendants with any discovery defendants needed in relation to the amendment (*see* transcript at p. 10 ["Your Honor, if [defendants] need additional discovery, [the parties] have been in discovery for so long, [plaintiff has] no problem giving [defendants] the discovery they need, that they would feel they need to present this case to the jury. So [plaintiff] would have no problem with that."]). Plaintiff asserts that he had no intention of extending such invitation to the taking of Dr. Moore's deposition; however, this assertion is somewhat disingenuous in light of the parties' email exchange, only one month before oral argument, regarding the scheduling of Dr. Moore's deposition, regardless of plaintiff's motivation for

⁴ Defendants, however, should not be required to demonstrate special circumstances to take the deposition of an expert who will not be called at trial (*see Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]).

wanting to preserve Dr. Moore's testimony.

Dr. Moore treated plaintiff's lumbar condition prior to the subject accident, and performed the surgery precipitating the recent amendment to the bill of particulars. Dr. Moore's deposition is thus material and relevant to the issues raised by the amendment to the bill of particulars (*cf. Goldsmith v Howmedica, Inc.*, 158 AD2d 335 [1st Dept 1990]). Notably, defendants assert that they seek a deposition of Dr. Moore solely as to facts, and not as to his medical conclusions (*see Taft Partners Dev. Group v Drizin*, 277 AD2d 163 [1st Dept 2000]; *The Hartford v Black & Decker*, 221 AD2d 986 [4th Dept 1995]). Defendants, however, must still establish that the information they seek is not available from other sources, or identify some other set of "unique circumstances" requiring Dr. Moore's production for deposition (*see Brooklyn Floor Maint. Co. v Providence Wash. Ins. Co.*, 296 AD2d 520 [2d Dept 2002]).

Defendants assert that they should be entitled to question Dr. Moore about, among other things, pre-incident treatment not reduced to writing, prior medical records that Dr. Moore (to defendants' knowledge) never reviewed that could impact his opinion on causation, and the affidavit he prepared in opposition to defendants' motion for summary judgment. Defendants assert that this information cannot be obtained from any other source.

The loss or absence of Dr. Moore's treatment records may constitute a special circumstance warranting additional discovery regarding his expected testimony (*see Angeli v Mass*, 2010 NY Slip Op 30408[U] [Sup Ct, N.Y. County 2010]; *cf. Tuzzolino v Consolidated Edison Co. of N.Y.*, 135 AD3d 447 [1st Dept 2016]). That fact that Dr. Moore may have failed to review all available records, however, goes to the foundation of his opinion, and neither the purported inadequacy of an expert's report (*see King Elecs. of Graham Ave. v American Natl. Fire Ins. Co.*, 232 AD2d 273 [1st Dept 1996]), nor purported flaws underlying an expert's opinion (*see Padro v Pfizer, Inc.*, 269 AD2d 129 [1st Dept 2000]) constitutes a "special

circumstance” warranting further discovery.

Contrary to plaintiff’s interpretation, “special circumstances” are not limited to instances in which evidence was lost, destroyed, or otherwise rendered unavailable (*see 232 Broadway Corp., supra*), but whenever required by the appropriately “unique” factual situation (*Brooklyn Floor Maint. Co., supra, citing Hallahan v Ashland Chem. Co., 237 AD2d 697 [3rd Dept 1997]*). However, “more than mere relevance and materiality is necessary to warrant disclosure from a nonparty [expert]” (*Ruthman, Mercadante & Hadjis, P.C. v Nardiello, 288 AD2d 593, 594-95 [3rd Dept 2001]* [citation and quotation marks omitted]). Under the circumstances presented, defendants are entitled to a deposition of Dr. Moore limited to his treatment, the records of which have not been reduced to writing.

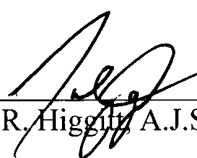
Accordingly, it is

ORDERED, that plaintiff’s application to quash a subpoena ad testificandum served upon Dr. Frank Moore and for a protective order with respect to Dr. Moore’s deposition is granted, except as to a deposition of Dr. Moore limited to his treatment, the records of which have not been reduced to writing.

The parties are reminded of the June 24, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: June 10, 2019



John R. Higgin, A.J.S.C.