

Vlachos v Thomas

2020 NY Slip Op 30748(U)

March 12, 2020

Supreme Court, New York County

Docket Number: 152087/2017

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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JOHN VLACHOS by PETER ATHINEOS, his AGENT
PURSUANT to POWER OF ATTORNEY

Plaintiff,

INDEX NO. 152087/2017

MOTION DATE 01/24/2020

MOTION SEQ. NO. 008

- v -

BRADLEY THOMAS, AKILI CLUB INCORPORATED,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222

were read on this motion to/for PRECLUDE

In this action concerning unjust enrichment, defendants Bradley Thomas and Akili Club Incorporated move to preclude plaintiff John Vlachos' medical expert, Dr. Michael Serby, from testifying. Plaintiff proffers Dr. Michael Serby's testimony to establish that Vlachos, an elderly man diagnosed with Alzheimer's disease, did not have the mental capacity to give Thomas monetary gifts. Vlachos is represented in this matter by his Power of Attorney, Peter Athineos ("plaintiff's agent"). Plaintiff opposes the motion. The Decision and Order is as follows:

BACKGROUND

John Vlachos employed Bradley Thomas as a personal trainer in 2010. Plaintiff's agent alleges that in 2015 and 2016, Thomas pressured Vlachos, and Vlachos acceded, to loan Thomas money to fund Thomas' athletic training company, Akili Club Incorporated. Thomas instead used the money to buy a one-bedroom apartment for himself. Plaintiff's agent disputes Thomas' assertions that the money from Vlachos to Thomas were gifts and contends that Vlachos lacked the mental capacity to make such financial decisions. Thus, plaintiff seeks to have Thomas return the money to plaintiff. Defendants dispute the allegations.

Defendants object to Dr. Serby's inclusion in this matter contending that the admissible evidence shows that Vlachos had no mental comprehension difficulties until October 2017. Defendants point to the April 2016 sworn statement of Vlachos' attorney, Glenn Greenfader, who attested that Vlachos was of "sound mind,

memory, and understanding” at the time Vlachos revised his will (Defs’ Exhibit B – Excerpts from April 2016 Last Will and Testament of John Vlachos).

Plaintiff rebuts defendant’s evidence with a report of Vlachos’ psychiatrist, Dr. Robert M. Greenberg, who evaluated Vlachos on May 4, 2016, and found Vlachos’s memory loss “strongly suggestive of an early primary degenerative dementia of the Alzheimer’s type” (Pl’s Exhibit 13 – Greenberg Evaluation). The report further stated that Vlachos “had the most severe problems with the memory component [of the cognitive evaluation], but also difficulty in tasks of executive function and visuospatial tasks” and referred Vlachos for further evaluation (*id.*).

Thus, on May 17, 2016, Dr. Philip Uy conducted a neuropsychological evaluation of Vlachos that found Vlachos’ performance in the standard range for verbal comprehension, perceptual reasoning, concept formation, fluid reasoning, and academic knowledge (Defs’ Exhibit D – May 2016 Neuropsychological Evaluation). The report further stated that Vlachos “still [has] the capacity to express his thoughts, preferences, and typical decision-making practices. However, he is encouraged to consult with close family/friends when making significant/major decisions” (*id.* at 3). Nevertheless, Dr. Uy’s report stated that Vlachos was in the “early stages of a neurodegenerative disorder consistent with Alzheimer’s disease” and detailed that the “[r]esults of the neuropsychological evaluation suggest that the patient has significant problems with memory and executive dysfunction” (*id.*).

In June 2016, Vlachos again revised his will and Greenfader again attested to Vlachos’ sound mind (Defs’ Exhibit E – Excerpts of June 2016 Last Will and Testament).

In December 2016, Vlachos was examined by his psychiatrist, Dr. Robert M. Greenberg, who reported that Vlachos’s “thought process was logical, goal directed” but also reported that Vlachos’s short-term memory was degraded (Defs’ Exhibit F – December 2016 Psychiatric Evaluation at 2). Dr. Greenberg’s diagnosis stated that Vlachos had a “[m]ajor neurocognitive disorder due to Alzheimer’s disease, probable” (*id.* at 1).

Vlachos again altered his will in June 2017. Greenfader again attested to Vlachos’s soundness of mind (Defs’ Exhibit G – June 2017 Last Will and Testament at 8-10). That same month, Dr. Greenberg again evaluated Vlachos and reported that Vlachos’s “thought process was logical, goal directed” but also stated that Vlachos was experiencing a “[m]ajor neurocognitive disorder due to probable [Alzheimer’s disease] – early stage, late onset” (Defs’ Exhibit H – June 2017 Psychiatric Evaluation at 2).

In October 2017, Vlachos’s mental capabilities took a turn for the worse. Dr. Alexander Chervinsky, a psychologist, administered another neuropsychological

assessment on Vlachos and noted that “[c]ompared to the cognitive evaluation in 2016, cognitive capacities appear to be diminished” and that Vlachos had “pronounced and severe cognitive difficulties” (Defs’ Exhibit I – October 2017 Neuropsychological Evaluation at 3).

There has been much contest over the procurement of the above medical records. In defendants’ initial document demand, they sought “all medical records reflecting the health condition of [Vlachos] from 2015 to the present” (Defs’ Exhibit J – December 11, 2017 Document Demands, ¶ 4). However, plaintiff’s agent alleged that many of Vlachos’s medical records were irrelevant to this matter (Defs’ Exhibit K, ¶ 4). Defendants claim that plaintiff’s agent only produced limited medical records during discovery.

However, on December 4, 2019 (after the close of fact discovery on October 31, 2019, but before the filing of the Note of Issue), plaintiff’s agent produced over 146 pages of health records, including the above reports of Drs. Uy, Greenberg, and Chervinsky (Defs’ Exhibit M – December 14, 2019 Letter from Pl’s Counsel to Defs’ Counsel). Defendants claim that plaintiff’s failure to produce the documents in a timely manner prevented them from pursuing discovery inquiries regarding the missing medical records.

On the other hand, plaintiff’s counsel represents that the medical records from 2016 and 2017 (including the Drs. Uy, Greenberg, and Chervinsky reports) were provided to defendants in September 2018 (Pl’s Affirmation of Kretz, ¶ 16). Plaintiff’s counsel further represents that medical records from 2018 and 2019 were provided late as NYU Brooklyn Associates did not respond to a January 2019 authorization (*id.*, ¶ 17). Plaintiff’s counsel represents that Vlachos’s godson, Christopher Athineos, obtained the records via direct contact with NYU Brooklyn Associates by July 2019 (*id.*). The NYU Brooklyn Associates’ records were provided to Dr. Michael Serby that same month, prior to his evaluation of Vlachos (*id.*). It was only after speaking to Dr. Serby in November 2019 that plaintiff’s counsel realize that Dr. Serby had reviewed medical records that were not provided to defendants (*id.*, ¶ 18). Plaintiff’s counsel represents that he immediately pressed NYU Brooklyn Associates to produce a complete set of records, which were turned over to defendants in December 2019 (*id.*).

In any event, plaintiff produced on December 3, 2019, an Amended Expert Disclosure with the opinions of Dr. Michael Serby (Defs’ Exhibit P – Amended Expert Disclosure). Dr. Serby expressed the following opinions regarding Vlachos’ mental comprehension in the period between 2015 and 2016:

- 1) Vlachos’ “lack of capacity to comprehend [and] respond to... the request of Bradley Thomas for money” (*id.* at 1).

- 2) "There is a substantial likelihood [Vlachos] did not appreciate the significance or even the nature of the three transfers of funds to Mr. Thomas" (*id.* at 2).
- 3) "There certainly is no doubt that Mr. Vlachos would have had great difficulty comprehending... any of the salient facts and events relating to the first two payments" (*id.*).
- 4) "When Mr. Vlachos gave the \$325,000 to Mr. Thomas, he most likely had no... appreciation of the significant amount he was giving, and no idea if he would ever be paid back" (*id.*).
- 5) "Mr. Vlachos was clinically unable to understand the terms of his financial dealings with Mr. Thomas during the period from mid-2015 to mid-2016" (*id.*).

Dr. Serby also offered the following opinions that seemingly broach upon questions of fact:

- 1) The "undue influence exerted by Bradley Thomas on John Vlachos" (*id.* at 1).
- 2) "[T]he idea that [Vlachos] would agree to give Mr. Thomas \$325,000... suggests either undue influence, including deceit, or markedly impaired judgment by Vlachos, or both" (*id.* at 2).
- 3) "Mr. Thomas also may very well have purposefully exerted undue influence for financial gain at the expense of Mr. Vlachos" (*id.*).
- 4) "To whatever extent Mr. Vlachos may have considered Mr. Thomas his friend, Mr. Thomas took undue advantage of Mr. Vlachos" (*id.*).

DISCUSSION

Defendants' motion to preclude is denied. Defendants make three arguments as to why Dr. Serby's testimony should be precluded: (1) Dr. Serby's opinions are conclusory and unsupported by the contemporaneous evidence; (2) Dr. Serby's opinions attempt to usurp the role of the factfinder; and (3) plaintiff's agent's conduct in failing to turn over medical records precludes plaintiff from offering Dr. Serby's opinions.

Defendants point to *Wong v Goldbaum* (23 AD3d 277, 279 [1st Dept 2005]) for the proposition that "[t]he opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards has no probative force where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation." Here, however, there is contemporaneous evidentiary support for Dr. Serby's opinions. Both Dr. Greenberg and Dr. Uy found that Vlachos was in the early stages of a neurodegenerative disorder in May 2016, around the same time Vlachos "gifted" money to Thomas. Drs. Uy and Greenberg spoke specifically to Vlachos' issues with executive function. Their reports are not unduly speculative, and Dr. Serby's opinion is based upon those reports. As such, the expert

testimony of Dr. Serby will be beneficial to a factfinder as the doctor will be able to opine on the effects of the loss of executive function in relation to financial decision making. Accordingly, defendants' first argument fails.


Next, defendants' argument that Dr. Serby will invade the province of the factfinder is insufficient to sustain their motion. While it is true that an expert must be precluded from drawing "factual conclusions from the evidence, a function within the province of the jury", in these circumstances it is better to address this issue prior to trial via motions in limine (*Cadwalader, Wickersham & Taft v Spinale*, 197 AD2d 403 [1st Dept 1993]). The trial court can circumscribe Dr. Serby's testimony to prevent him from: (1) testifying as to Thomas's intentions; (2) whether it would be against equity and good conscience to allow Thomas to retain money obtained from Vlachos; and (3) any other questions that pertain to factual findings. There is no reason to preclude wholesale Dr. Serby's testimony on the basis that he invades the factfinder's province.

Finally, there is no reason to preclude Dr. Serby on the basis that defendants received some documents after the close of discovery. Plaintiff's agent turned over the medical records before the Note of Issue was filed. As such, defendants were not prejudiced as they had access to the pertinent 2016-2017 medical records as early as September 2018 and were able to depose Christopher Athineos and Peter Athineos regarding Vlachos's medical appointments but chose not to do so. Thus, there is no basis to preclude Dr. Serby's testimony.

Accordingly, it is ORDERED that defendants' motion to preclude plaintiff's expert Dr. Michael Serby from testifying is denied.

This constitutes the Decision and Order of the court.

3/12/2020
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: