

**Heisler v Advanced Dermatology of N.Y. P.C.**

2020 NY Slip Op 31701(U)

April 14, 2020

Supreme Court, New York County

Docket Number: 805326/2017

Judge: Eileen A. Rakower

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

**PRESENT: Hon. EILEEN A. RAKOWER**

**PART 6**

*Justice*

**DAVID HEISLER,**

**Plaintiff,**

**- against-**

**INDEX NO. 805326/2017**

**MOTION DATE**

**MOTION SEQ. NO. 1**

**MOTION CAL. NO.**

**ADVANCED DERMATOLOGY OF NEW YORK P.C.,  
RICHARD W. GREEN, M.D., LAWRENCE D.  
JAEGER, D.O. and DANIEL LBOVITS, RPA,**

**Defendants.**

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

**PAPERS NUMBERED**

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

**|**

Answer — Affidavits — Exhibits \_\_\_\_\_

**|**

Replying Affidavits

**|**

**Cross-Motion:    Yes    X No**

Defendants Advanced Dermatology of New York P.C. (“Advanced Dermatology”), Richard W. Green, M.D. (“Green”), Lawrence D. Jaeger, D.O. (“Jaeger”), and Daniel Lebovits, RPA (“Lebovits”) (collectively, “Defendants”) move for an Order pursuant to CPLR 3103(a), granting a protective order with respect to certain questions asked by Plaintiff’s attorney at Jaeger’s deposition. The questions related to photographs on Jaeger’s wife’s Instagram account, Jaeger’s vacation history, domain websites, and third party online reviews. Plaintiff opposes the motion. Plaintiff contends that the questioning is relevant to his claims concerning Jaeger’s supervision of Lebovits and Jaeger’s credentials.

**Relevant Background**

Plaintiff alleges that Defendants failed to diagnose and treat his basal cell carcinoma, which was diagnosed by a non-party physician in April 2015.

Plaintiff alleges that he made an appointment with Jaeger on January 28, 2013. Plaintiff contends that when he appeared at the appointment, Plaintiff was told that Jaeger was not available. Instead, Plaintiff contends that Lebovits was introduced as the doctor who would be treating him. From January 28, 2013 through March 4, 2015, Plaintiff received medical treatment from Lebovits. Lebovits' treatment notes were co-signed by Defendant Green with the exception of one note dated August 19, 2015 that Jaeger co-signed.

Plaintiff alleges *inter alia* that Defendants were negligent in failing to properly supervise Lebovits' treatment of Plaintiff. Plaintiff seeks "damages associated with more invasive surgery, medical expense, pain and suffering, emotion[al] distress, and additional later surgeries." Plaintiff also seeks punitive damages.

Jaeger was deposed on December 5, 2019 and December 12, 2019. His deposition must be continued.

#### Pending Motion

In the pending motion, Defendants challenge Plaintiff's counsel's questioning of Jaeger's wife's Instagram account, Jaeger's vacations, certain domain websites, and third party reviews at Jaeger's deposition.

Defendants first challenge Plaintiff's counsel's questioning of Jaeger about photographs from his wife's Instagram account that were posted on July 1, 2014 and May 6, 2019, respectively. Plaintiff's counsel asked whether Jaeger was on vacation in the photographs. Jaeger's counsel objected to the photographs being marked as exhibits and the relevancy of the questioning and instructed Jaeger not to answer the questions. Defendants point out that May 2019 was four years after Plaintiff's treatment at Advanced Dermatology ended. Plaintiff's counsel contends that she is entitled to ask about Jaeger's whereabouts for the entire period when Jaeger was supposed to be supervising non-doctors like Lebovits.

Defendants also challenge Plaintiff's counsel's questioning of Jaeger about various websites whose domain names used a variation of Jaeger's name and third party reviews posted on Healthgrades and Yelp regarding Jaeger's care of other patients. Plaintiff's counsel contends that this questioning is proper and seeks relevant information.

“A trial court is vested with broad discretion in its supervision of disclosure.” *MSCI Inc. v Jacob*, 120 AD3d 1072, 1075 (1st Dept 2014). In accordance with CPLR 3101(a), “[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” Further, “[i]t is well settled that the scope of examination permissible at deposition is broader than the scope of examination permissible at trial.” *Horowitz v. Upjohn Co.*, 149 AD2d 467, 468 (2d Dept 1989)(citations omitted).

CPLR 3113 provides that “[a]ll objections made at the time of the examination ... to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness and parties present otherwise agree.” However, “there is always the possibility of questions that infringe upon a privilege, or that are so improper that to answer them will substantially prejudice the parties; or questions that may be so palpably and grossly irrelevant or unduly burdensome that they should not be answered.” *White v Martins*, 100 AD2d 805 (1st Dept 1984). In those circumstances, the party may seek a protective order.

Here, Plaintiff is entitled to question Jaeger concerning his whereabouts on the date that Plaintiff made an appointment to see him on January 28, 2013, the date that Jaeger signed Lebovits’ treatment notes for Plaintiff on August 19, 2015, and on the days that Jaeger was supervising Lebovits’ care of Plaintiff. While Jaeger’s wife’s social media posts may provide a good faith basis to ask a question about Jaeger’s whereabouts on the day he was supervising Lebovits (i.e., can he supervise from a certain location), the question should not be about his wife’s posts. Jaeger’s vacation history for the entire period that Plaintiff received treatment at Advanced Dermatology is grossly irrelevant to Plaintiff’s claims. The same applies to Jaeger’s vacation history after the subject treatment of Plaintiff ended.

Plaintiff is also entitled to question Jaeger about domain websites that contain his name. As for the online reviews, Jaeger cannot speak for a third party but the review may provide a good faith basis for a question concerning Jaeger’s own representations (i.e. asking Jaeger whether a statement contained in the review regarding his credentials is true).

Wherefore it is hereby

ORDERED that Defendants' motion is granted only to the extent that: (1) the questioning of Defendant Lawrence D. Jaeger, D.O.'s whereabouts is limited to the dates that he was scheduled to treat Plaintiff, treated Plaintiff, or supervised Daniel Lebovits, RPA's treatment of Plaintiff; and (2) the questioning concerning third party reviews and posts are limited to Jaeger's own representations as opposed to the representation of others.

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

**Dated: APRIL 14, 2020**

**Check one:      FINAL DISPOSITION    X    NON-FINAL DISPOSITION**