

<b>Betman v Mount Sinai Hosp. Groups, Inc.</b>
2020 NY Slip Op 31702(U)
May 27, 2020
Supreme Court, New York County
Docket Number: 805461/2016
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*

**LUCIANO BETMAN AN INFANT BY HIS M/N/G  
ANTONIETTA BETMAN AND ANTONIETTA BETMAN,  
INDIVIDUALLY,**

**INDEX NO. 805461/2016  
MOTION DATE  
MOTION SEQ. NO. 2  
MOTION CAL. NO.**

**Plaintiffs,**

**- against-**

**MOUNT SINAI HOSPITAL GROUPS, INC., MOUNT  
SINAI HOSPITAL, MOUNT SINAI HEALTH SYSTEM,  
ABIGAIL K. ALLEN, M.D., JOHN DOE, M.D. AND JANE  
DOE, M.D.,**

**Defendants.**

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answer – Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits

**PAPERS NUMBERED**

█  
█  
█

**Cross-Motion:    Yes    X No**

Defendants Mount Sinai Hospital, s/h/a Mount Sinai Hospital Groups Inc., Mount Sinai Hospital, Mount Sinai Health System and Abigail K. Allen M.D. (“Dr. Allen”) (collectively “Defendants”) move for an Order pursuant to CPLR 3103(a), granting a protective order barring Plaintiff Luciano Betman and Infant by his M/N/G Antonietta Betman (“Luciano”) and Antonietta Betman, Individually (“Ms. Betman”) (collectively, “Plaintiffs”) from deposing Dr. Michael Hausman (“Dr. Hausman”) as a representative of Defendant Mount Sinai Hospital. Plaintiffs oppose the motion.

**Relevant Background**

Plaintiffs commenced this action by filing the summons and complaint on December 1, 2016. Plaintiff alleges claims of medical malpractice, lack of informed consent, and loss of consortium. On January 6, 2017, Defendants interposed their Verified Answer.

Plaintiffs allege that Defendants treated Luciano from April 23, 2013 through September 29, 2014. Plaintiffs allege that Defendants implanted plates called “8 plates” “on the growth plates on the medial sides of [Luciano] distal femurs and

proximal tibias to reverse what was essentially misdiagnosed by [Dr. Allen] (Mount Sinai defendants vicariously) as knock knees.” (Plaintiffs’ Affirmation in Opposition at 1). Plaintiffs contend that “[b]ecause the surgery was contraindicated and because Dr. Allen deviated from the standard of care in failing to advise plaintiffs that the ‘8 plates’ needed to be removed, Luciano developed a left bowlegged condition requiring an additional reconstructive surgery- osteotomy, plates and a Taylor spatial frame for slow correction of the deformity [ ] that occurred because of the initial contraindicated ‘8 plate’ surgery and failure to advise that the ‘8 plates’ needed to be removed which further caused the deformity.” (Plaintiffs’ Affirmation in Opposition at 1-2). Dr. Allen performed the surgery at issue on June 5, 2014.

### Pending Motion

In the pending motion, Defendants are seeking the Court to prohibit Plaintiffs from deposing Dr. Hausman. Defendants assert that Dr. Hausman attended a meeting after the occurrence of the alleged malpractice but Plaintiffs have not asserted any claims against Dr. Hausman and Dr. Hausman was not involved in treatment. Defendants further assert that Ms. Betman testified in her deposition that “Dr. Hausman never examined or laid his hands on Luciano” or “discuss[ed] the medical treatment provided to Luciano.” (Defendants’ Affirmation in Support at 5). Defendants argue that Dr. Hausman affirms that he was not involved in the treatment or care of Luciano. Defendants contend that Dr. Hausman does not perform hemiepiphysiodesis procedures on lower extremities, such as the surgery performed on Luciano, but specializes in surgery of hands and upper extremities.

Plaintiffs contend that on September 29, 2014, Plaintiffs attended a meeting with Dr. Allen and Dr. Hausman to discuss Ms. Betman’s issues with the hospital and Dr. Allen performed an examination of Luciano. Plaintiffs argue that Dr. Hausman “a fact witness” to what was said by Dr. Allen regarding “permanency of the 8-plates” and the reason a follow up appointment was not scheduled that day. Plaintiffs assert that Dr. Hausman “possesses knowledge as to post surgical follow-up protocol and quality control at Mount Sinai which bears on the issues as a hospital’s violation of its own rules and protocols would constitute evidence of negligence.” (Plaintiffs’ Affirmation in Opposition at 11). Plaintiffs argue that Dr. Hausman has knowledge of hospital protocol and rules for post surgical follow-up and quality assurance because he is “Interim Chairman of Orthopedic Surgery at Mount Sinai Hospital” in 2014.

In reply, Defendants argue that Plaintiffs provide no basis for Dr. Hausman's deposition, thus the Court should issue a protective order to "prevent unreasonable annoyance, expense, embarrassment and disadvantage by plaintiff's counsel." Defendants assert that according to the Bill of Particulars, Plaintiffs' sole claim is that the surgery performed on Luciano "was not indicated." Defendants contend that Plaintiffs have not pled any claims to the performance of the surgery on June 5, 2014 or the care and/or treatment to Luciano following the surgery. Therefore, Defendants argue that information Dr. Hausman might have regarding post-surgical protocol at Mount Sinai has no relevancy to Plaintiffs' claims.

### Legal Standard

"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).

"The phrase 'material and necessary' is 'to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason' (*Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430 [internal quotation marks omitted]; see *Tower Ins. Co. of N.Y. v. Murello*, 68 A.D.3d 977, 889 N.Y.S.2d 852). *Yoshida v. Hsueh-Chih Chin*, 111 AD3d 704, 705-06 [2d Dept 2013]. "However, unlimited disclosure is not mandated, and the rules provide that the court may issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *Id.* (citation omitted). "The moving party bears the burden of persuasion in seeking a protective order." *Kukla v. Bamberger*, No. 805273/2014, 2019 WL 2549584, at \*1 [N.Y. Sup Ct, New York County 2019].

### Discussion

Here, Plaintiffs are not entitled to take the deposition of Dr. Hausman. Plaintiffs allege in the Bill of Particulars that the surgery performed by Defendants "was not indicated," there are no allegations of malpractice in the performance of

the procedure or in the post care and/or treatment of Luciano following the surgery. Furthermore, Dr. Hausman was not involved in any care and/or treatment of Luciano. Any information Dr. Hausman might have regarding post-surgical protocol at Mount Sinai has no relevancy to Plaintiffs' claims. Plaintiffs cannot compel Dr. Hausman's opinion or expert testimony, but instead seek to have Dr. Hausman corroborate either Ms. Betman's or Dr. Allen's version of the events at the September 29, 2014 meeting. However, Plaintiffs have not demonstrated that Ms. Betman and Dr. Allen differ as to what occurred, if it is even relevant; and seeking Dr. Hausman's testimony to duplicate testimony is onerous and unnecessary. To the extent Plaintiffs seek information developed by Defendants internally in pursuit of quality assurance, it is "shield[ed] from disclosure". *see Logue v Velez*, 92 NY2d 13, 16-17 [1998]. Therefore, Plaintiffs are not entitled to depose Dr. Hausman.

Wherefore it is hereby

ORDERED that Defendants' motion is granted in its entirety; and it is further

ORDERED that a compliance conference will be held on June 30, 2020 at 9:30am.

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

**Dated: May 27, 2020**

ENTER:   
J.S.C.

**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION