

John Doe v Archdiocese of N.Y.
2020 NY Slip Op 31708(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 950065/2020
Judge: George J. Silver
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

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JOHN DOE XIII

Index No. 950065/2020

Plaintiff,

-against-

**ARCHDIOCESE OF NEW YORK, OUR LADY OF MOUNT
CARMEL CHURCH and OUR LADY OF MOUNT CARMEL
SCHOOL,**

Defendants
-----X

HON. GEORGE J. SILVER:

This motion presents a novel question: Whether a party’s susceptibility to imminent illness and death during a pandemic provides cause for that party’s emergency deposition under existing law.

Plaintiff JOHN DOE XIII (“plaintiff”) commenced this action pursuant to the New York Child Victims Act (“CVA”) (*see* CPLR §214[g]). In this lawsuit, plaintiff alleges that he was sexually abused by an individual associated with defendants between 1974 and 1977. To date, plaintiff has served a complaint, but defendants have not served answers. Initially, this court set forth deadlines for the service of answers in a Case Management Order disseminated to all parties who have filed lawsuits under the CVA. However, in early 2020, a highly contagious infectious disease (“COVID-19”) spread through much of the world, with particularly calamitous consequences in highly populated places like New York City. Most people infected with COVID-19 experience mild to moderate respiratory illness and recover without requiring special treatment. Older people, however, and those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer are more likely to develop serious illness. Due to COVID-19, the court has disallowed the service of pleadings in all but essential matters. Since no answers have been filed, typical initial discovery demands have not been filed either. For that reason, plaintiff has provided neither a verified bill of particulars nor responses to combined demands. As such, defendants presently have no information about plaintiff’s claims other than what is specified in the complaint.

Nevertheless, in support of this instant application, plaintiff highlights that he suffers from several severe chronic illnesses, including chronic obstructive pulmonary disease, an inflammatory lung disease that requires plaintiff to routinely use an oxygen machine, and diabetes. Plaintiff submits that these illnesses put plaintiff at a significantly heightened risk of death should he contract COVID-19. Moreover, plaintiff argues that the highly contagious nature of COVID-19 (the virus spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes) increases the risk that he will contract it. To circumvent the prejudice that stems from defendants having to conduct a deposition of plaintiff with little discovery, plaintiff has stated that plaintiff will provide defendants with as much discovery as plaintiff presently has in his possession. In addition, plaintiff states that plaintiff is willing to submit to another deposition at a later juncture should defendants request it. Also, counsel for plaintiff has requested that arrangements be made to conduct the deposition telephonically or via videoconferencing so that the deposition may safely take

place while maintaining the social distancing requirements imposed by the State of New York amidst the COVID-19 pandemic.

In opposition, defendants argue that plaintiff's request for an immediate deposition is highly speculative, and premised on the unfounded belief that plaintiff may at some point become afflicted with a highly deadly virus that plaintiff does not presently have. Indeed, defendants highlight that under existing precedent, depositions sought to preserve testimony and evidence where a party is ill are only granted where that party is "in extremis" or near death. Since plaintiff is not presently "in extremis," defendants submit that there is no reason for this court to invite his expedited deposition. While acquiring COVID-19 is a legitimate concern of all people, defendants argue that a concern that one might acquire the illness and having the illness are completely different scenarios. Should this application be granted, defendants state that the standard by which the court must decide whether a party is entitled to an expedited deposition would be eviscerated, and every litigant in this country concerned about getting COVID-19 would be entitled to a deposition.

In response to defendants' concern about expanding existing standards regarding expedited depositions, this court asked plaintiff to provide detailed medical records outlining the basis for plaintiff's request. Plaintiff's updated medical records contained evidence of plaintiff's current diagnoses of diabetes,¹ chronic respiratory failure,² chronic cor pulmonale,³ and very severe chronic obstructive pulmonary disease ("COPD").⁴ The records also indicate that plaintiff is currently required to use an oxygen tank continuously during the day as well as a nebulizer machine⁵ four times per day. Additionally, on December 6, 2019, plaintiff was hospitalized for pneumonia⁶ and bronchitis.⁷ Plaintiff submits that this hospital visit demonstrates the serious nature of plaintiff's

¹ Diabetes is a disease in which your blood glucose, or blood sugar, levels are too high. Glucose comes from the foods you eat. Insulin is a hormone that helps the glucose get into your cells to give them energy. With type 1 diabetes, your body does not make insulin.

² A condition in which your blood doesn't have enough oxygen or has too much carbon dioxide. Sometimes you can have both problems.

³ Cor pulmonale can be defined as pulmonary arterial hypertension resulting from diseases affecting the structure and/or function of the lungs. Pulmonary hypertension results in right ventricular enlargement and may lead with time to right heart failure.

⁴ A chronic inflammatory lung disease that causes obstructed airflow from the lungs. Symptoms include breathing difficulty, cough, mucus (sputum) production and wheezing.

⁵ A nebulizer is a piece of medical equipment that a person with asthma or another respiratory condition can use to administer medication directly and quickly to the lungs. A nebulizer turns liquid medicine into a very fine mist that a person can inhale through a face mask or mouthpiece.

⁶ An infection in one or both lungs. Bacteria, viruses, and fungi cause it. The infection causes inflammation in the air sacs in your lungs, making it difficult to breathe.

⁷ An inflammation of the lining of your bronchial tubes, which carry air to and from your lungs. People who have bronchitis often cough up thickened mucus, which can be discolored.

current medical condition and how compromised his lungs are, even before considering the threat of COVID-19.

Furthermore, plaintiff's counsel states that plaintiff's home life puts him at a heightened risk of contracting COVID-19. Plaintiff's wife works full time as a plant manager for a Hershey's production facility in Hazleton, Pennsylvania. Due to plaintiff's health risks, plaintiff's counsel states that plaintiff's wife has been forced to take three weeks unpaid leave from work, but has since been required to return to work to keep her job and maintain the family's precarious financial stability. Plaintiff's counsel submits that the family is deeply concerned about the possibility that plaintiff's wife will contract COVID-19 at work and pass the disease to plaintiff, however, she has no choice but to return to work due to the family's financial reality. Plaintiff receives full Social Security disability and is unable to work as a result of his medical condition. While Hazleton, Pennsylvania is not as populous as New York City, plaintiff nonetheless argues that he has a very real risk of contracting COVID-19, especially given his wife's position working a crowded production facility.

In response to plaintiff's submission, defendants reiterate their position that plaintiff's medical records confirm that he is not "in extremis," thus crystalizing the reasons to deny the instant application. In addition, defendants submit that if plaintiff is prematurely deposed and subsequently passes away, defendants will be stuck with a record at trial that does not adequately reflect the informational disadvantage that they had when plaintiff was deposed. As such, defendants restate their position that plaintiff has not laid out an adequate foundation for his expedited deposition, and that conducting such a deposition would be highly prejudicial.

DISCUSSION

In general, material and necessary records, including medical records, must be disclosed before a party can be deposed (*see Napoleoni v. Union Hospital*, 207 AD2d 660, 662-663 [1st Dept. 1994]). It therefore follows that where no answer has been filed, a bill of particulars has not been furnished, and discovery has not commenced in earnest, courts generally do not order depositions to proceed (*id.*).

However, where a plaintiff is critically ill, his or her testimony may be compelled on an expedited basis to ensure that his or her rights are protected (*see Matter of Davis*, 178 Misc.2d 65 [Court of Claims 1998][deposition of prison inmate suffering from terminal cancer was warranted in order to preserve his testimony]). Indeed, even where mere unavailability is at issue and death is not imminent, the testimony of a party may take place in advance of the regular course of discovery for the protection of rights (*Matter of Ausnit (Malaxa)*, 191 Misc. 390 [Sup. Ct. New York Cnty, 1948], *mod* 273 AD 958 [1st Dept. 1948][ordering the deposition of a proposed defendant about to depart the country to protect the rights of his adversary]).

CPLR §3102(c), which is cited by defendants in opposition to the present application, concerns disclosure before an action is commenced. Under that statutory provision, pre-action disclosure may be obtained by order to (i) aid in bringing an action; (ii) preserve information; or (iii) aid in arbitration. (*see* CPLR §3102 [c]). When seeking discovery to aid in bringing an action, a prospective plaintiff must present facts that fairly indicate a cause of action exists. Without such a

showing, disclosure for that purpose is not available. (*Western Investment LLC, v. Georgeson Shareholder Securities Corporation*, 43 AD3d 333 [1st Dept. 2007]).

However CPLR §3102(c), and the limits that it imposes, are not applicable to the present situation, as this is an application to preserve testimony of an ailing plaintiff, not to aid in bringing an action or preserve evidence that may otherwise be destroyed. Likewise, the deposition of plaintiff sought is not to aid in arbitration. Notably, plaintiff has already filed a complaint (*contrast Tarter v State of New York*, 113 AD2d 587 [1st Dept. 1986]; *Matter of Banco de Concepcion v Manfra. Tordella & Brookes, Inc.*, 70 AD2d 840 [1st Dept. 1979]; *Matter of Simpson v Traum*, 63 AD2d 583 [1st Dept. 1978]). Considering this posture, there is no requirement that the existence of a meritorious cause of action be demonstrated with the certainty required when the application is intended to assist in framing a complaint or in identifying defendants. Rather, plaintiff, an alleged victim of childhood sex abuse, is ostensibly close to death, and his testimony is sought to ensure that his rights are protected.

Under such a scenario, the question of proceeding with plaintiff's deposition becomes one of serious import – for without the deposition, plaintiff may well be prevented from presenting, at trial, evidence supportive of his claims. Were that to occur, this action may fail in its entirety. The resulting prejudice would be tantamount to a dismissal, as plaintiff would have no other means of proving his case. In contrast, the prejudice likely to befall defendants if they are forced to take plaintiff's deposition with limited discovery is far less striking. For one, plaintiff's counsel can provide defendants with all discovery presently in his possession. Second, should plaintiff labor through his dire prognosis, plaintiff's counsel has already indicated that he would be willing to produce plaintiff for another deposition. Third, the prejudice that would befall defendants if plaintiff dies subsequent to his deposition but before trial (thus limiting defendants to a single, arguably incomplete deposition) would not deprive defendants of their opportunity to mount a defense against plaintiff's allegations. Balancing the need to preserve plaintiff's testimony against the inconvenience and expense to defendants if this application is granted, the scales tip in plaintiff's favor.

It can be said that the law is an unshakeable current, a steady and unrelenting force in even the most disastrous occasions. But that resolve does not equate to a rigid adherence to an existing orthodoxy when exceptional conditions arise. Instead, an existing orthodoxy at times must be adapted to the realities of the moment. Indeed, the need to apply a prevailing standard to a novel situation oftentimes does not serve notice of its arrival. And yet we must adapt to it, and respond to it, in a manner that is becoming of our charge.

Put simply, this is a unique case. In applying existing rules to plaintiff's circumstance, it is axiomatic that plaintiff faces a much more dire prognosis today than he did several months ago. Plaintiff's current diagnoses of diabetes, chronic respiratory failure, chronic cor pulmonale, and severe COPD place him directly within the ambit of individuals most at risk of contracting COVID-19. The records also indicate that plaintiff is currently required to use an oxygen tank continuously during the day, and a nebulizer machine four times per day. Additionally, on December 6, 2019, plaintiff was hospitalized for pneumonia and bronchitis, conditions that underscore his dire respiratory condition. Moreover, recently plaintiff's wife returned to work at a location where she will undoubtedly encounter co-workers who may have lingering exposure to COVID-19. As such, it

is within the realm of probable outcomes that plaintiff's wife may contract COVID-19 at work, and pass the disease to plaintiff.

Considering plaintiff's comorbidities, were he to contract COVID-19, the virus would have a great impact upon him. To defendants, plaintiff's invocation of the present pandemic as a method to expedite discovery may seem patently unfair. And yet, in the court's assessment, the fact that the spread of COVID-19 has made plaintiff's application stronger than it otherwise may have been is not a reason to reject it by viewing it merely as an opportunity to exploit an otherwise dire circumstance and fast-track litigation. Rather, the unique circumstance illustrates the degree to which the court must align existing legal precedent with the inimitable challenge before it. To be sure, oftentimes yesterday's reality must give way to a reasoned interpretation at the present juncture in time.

That said, a ruling in favor of plaintiff here must not be viewed as supporting the wholesale acceleration of all plaintiffs' depositions in cases where a plaintiff may have only a slight prospect of contracting COVID-19. To be sure, this case presents the rare circumstance where plaintiff's present ailments align impeccably with the risks associated with COVID-19.

Considering all the above, the court acknowledges here that a core precept of justice is that every litigant has his or her day in court. Applying that principle to the instant case, it is evident that a ruling preventing plaintiff's deposition under the unique circumstance presented runs athwart of that objective. Therefore, the application is granted. In view of plaintiff's condition, his telephonic or via videoconferenced deposition shall take place no later than 60 days from the date of this court's decision and order. Prior to that, plaintiff is directed to provide defendants, within 30 days of this court's decision and order, with all discovery responsive to defendants' demands that are presently in plaintiff's possession. Accordingly, it is hereby,

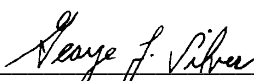
ORDERED that plaintiff's application is granted to the extent indicated; and it is further

ORDERED that the parties are directed to contact the court at hkingo@nycourts.gov and jsamuel@nycourts.gov regarding an agreed upon date for plaintiff's deposition; and it is further

ORDERED that the parties are directed to appear for a virtual or in-person conference before the court (the parties will be further notified of the conferencing approach in advance of the designated date) on July 17, 2020 (time to be determined).

This constitutes the decision and order of the court.

Date: May 14, 2020



GEORGE J. SILVER, J.S.C.