

Meckes v Choudhri
2020 NY Slip Op 32262(U)
May 4, 2020
Supreme Court, New York County
Docket Number: 805094/2018
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK —NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

DAVID MECKES and LISA MECKES,

Index No. 805094/2018
Motion Seq. No. 002

Plaintiffs,

- v -

DECISION & ORDER

**TANVIR CHOUDHRI, THE ICAHN SCHOOL
OF MEDICINE AT MOUNT SINAI and THE
MOUNT SINAI HOSPITAL,**

Defendants.

GEORGE J. SILVER, J.S.C.:

Defendants TANVIR CHOUDHRI, M.D. (“Dr. Choudhri”) THE ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI, and THE MOUNT SINAI HOSPITAL (“defendants”) move for an order, pursuant to CPLR § 3124, to compel plaintiffs to comply with outstanding discovery demands. Defendants also seek an order, pursuant to CPLR § 3126, striking plaintiffs’ pleadings. Plaintiffs DAVID MECKES (“plaintiff”) and LISA MECKES (“Mrs. Meckes” collectively “plaintiffs”) oppose the motion. For the reasons discussed below, the court grants the motion in part.

BACKGROUND

This action was commenced with the filing of plaintiffs’ summons and complaint on March 28, 2018. Thereafter, defendants filed an answer on or about May 14, 2018. Plaintiffs allege that defendants improperly performed a lumbar decompression spine surgery on plaintiff on March 15, 2016, causing a destabilization of plaintiff’s spine, and the need for an additional spinal fusion surgery.

On September 26, 2018, a preliminary conference was held, and on February 6, 2019, a compliance conference was held. On May 17, 2019, plaintiffs were deposed.

Defendants assert that plaintiffs withheld discovery, including films and medical records, and only provided those items months after plaintiffs were deposed. In response, defendants sent

plaintiffs a letter dated October 3, 2019 requesting a second deposition of plaintiffs. However, plaintiffs refused to appear for further depositions.

During a compliance conference on October 8, 2019, defendants reserved their right to a further deposition of plaintiffs, and an independent medical examination (“IME”) of plaintiff. Plaintiffs refused to appear for a further deposition, and plaintiff refused to appear for an IME.

Defendants argue that plaintiffs withheld material and necessary discovery prior to plaintiffs’ depositions, and only provided said discovery months after the depositions were held, including, *inter alia*, Visiting Nurse Services (“VNS”), Winthrop Hospital, and Zwanger-Psiri Radiology. Notably, defendants aver that while plaintiffs alleged that the negligence occurred on or about February 22, 2016 through April of 2016, and that plaintiff remained bedbound from March 15, 2016 to July of 2016, during which time plaintiff was referred to VNS, plaintiffs did not provide these records prior to plaintiffs’ depositions.

Similarly, defendants assert that while plaintiffs pleaded that a spinal fusion was necessary, plaintiffs did not provide plaintiff’s radiology films or the complete records for Winthrop Hospital where plaintiff underwent his spinal surgery until after the completion of plaintiffs’ depositions. Defendants also highlight that they required a supplemental expert review after plaintiffs’ depositions were held due to the significant amount of records and films that plaintiffs provided after the depositions.

Additionally, defendants argue that plaintiffs’ counsel improperly objected to a number of questions during the depositions.¹ Defendants also aver that financial sanctions are necessary to deter such frivolous conduct in the future.

In opposition, plaintiffs argue that court should deny defendants’ application for a further deposition of plaintiffs as defendants’ questions infringed on confidential and privileged information irrelevant to any legal issues in this case.²

Plaintiffs also argue that they provided numerous authorizations to defendants prior to plaintiffs’ depositions on May 27, 2019, including an authorization for a neurosurgeon, neurologist, internist, radiologist, ENT, and ophthalmologist. Plaintiffs also contend that defendants cannot explain how any “peripheral authorization” had an impact on their ability to depose plaintiffs.

¹ The court will address, and issue a ruling with respect to each objection, *infra*.

² The details of plaintiffs’ objections will be addressed, *infra*.

DISCUSSION

CPLR § 3101 mandates “full disclosure of all matters that are material and necessary.” Parties to an action are entitled to reasonable discovery “of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity” (*Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Med. Ctr.*, 98 A.D.2d 624, 625 [1st Dept. 1983]). CPLR § 3124 allows a party to compel disclosure when a person has failed to comply with a request, notice, interrogatory, demand, question or order.

CPLR § 3126 gives courts the discretion to impose penalties including dismissal, upon parties who willfully fail to disclose information which the court orders to be disclosed. “A court may, *inter alia*, issue an order ‘striking out pleadings or ... rendering a judgment by default’ as a sanction against a party who ‘refuses to obey an order for disclosure or wilfully [sic] fails to disclose information which the court finds ought to have been disclosed’” (*Argo v. Queens Surface Corp.*, 58 A.D.3d 656, 656 [2d Dept. 2009]; *see also*, *Schwartz v. Suebsanguan*, 15 A.D.3d 565, 566 [2d Dept. 2005]; *Rowell v. Joyce*, 10 A.D.3d 601 [2d Dept. 2004]).

I. Objections Raised at Plaintiffs’ Depositions

Question: Have you ever been a named defendant in any legal action or proceeding?

Defendants argue that plaintiffs’ counsel interrupted a question about a “prior deposition where [plaintiff] testified to confer off the record,” and only permitted plaintiff to state the name of the lawsuit in which he was deposed, and the verdict. Defendants also maintain that plaintiffs’ attorney did not permit plaintiff to state whether he was named in any legal action or proceeding.

In opposition, plaintiffs argue that defendants’ poorly worded question opens the door to unrelated matters. Plaintiffs contend that plaintiff testified that he had been deposed before, and identified the name of the case.

Plaintiffs’ objection to defendants’ question is appropriate. Defendants’ vague question amounts to an impermissible fishing expedition, and may reveal information irrelevant and immaterial to the case at bar (*see*, *State Farm Mut. Auto. Ins. Co. v. RLC Med., P.C.*, 150 A.D.3d 1034, 1035 [2d Dept. 2017]). Notably, as plaintiffs correctly point out, if plaintiff were a named defendant in a matrimonial, contract, or foreclosure action, for example, this would have no bearing on the medical malpractice action before the court in which plaintiff is the alleged aggrieved party.

Question: Who is employed at [Seaford Pediatrics, PLLC]?³

Defendants argue that while plaintiffs do not allege a claim for loss of earnings, defendants are entitled to “question about plaintiff’s employees” to understand how the allegations at issue affected plaintiff’s ability to work, and to discover and evaluate plaintiff’s alleged injuries.

In opposition, plaintiffs argue that the names of the nurses, administrators, janitors and other support staff at plaintiff’s private practice have no bearing on plaintiffs’ claims of negligence, causation, or damages, and would not lead to anything material or necessary.

The court agrees. Defendants’ argument that the names of the employees will somehow allow defendants to evaluate plaintiff’s alleged injuries, and determine plaintiff’s ability to work is far-reaching and unpersuasive. (*see, Foster v. Herbert Slepoy Corp.*, 74 A.D.3d 1139, 1140 [2d Dept. 2010]). Indeed, defendants have set forth no basis to show that the employees of Seaford Pediatrics, PLLC would have knowledge of plaintiff’s injuries, ability to perform housework, or “relationship between plaintiffs’ living conditions.”

Question: Do you currently own your home or rent it or something else?

Defendants argue that this question lays the foundation for “several discoverable questions,” including plaintiff’s capacity to conduct housework, his living structure and arrangement with his wife, and whether other people live in the house as “dependents or who could help plaintiff.”

In opposition, plaintiffs argue that defendants’ rationale for asking this question is nonsensical.

Defendants’ question is improper as defendants have set forth no basis, let alone a reasonable one, to establish any relationship between plaintiff’s ability to perform housework and whether plaintiff owns or rents his home. To be sure, defendants’ argument that their question serves to lay a foundation for “several discoverable questions” amounts to an impermissible fishing expedition (*Quinones v. 9 E. 69th St., LLC*, 132 A.D.3d 750, 750 [2d Dept. 2015] [“It is the burden of the party seeking disclosure ‘to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims’”]; *Geffner v. Mercy Med. Ctr.*, 83 A.D.3d 998, 998 [2d Dept. 2011] [“A party is not entitled to unlimited, uncontrolled, unfettered disclosure”]; *Crazytown*

³ Seaford Pediatrics, PLLC is plaintiff’s private practice.

Furniture, Inc. v. Brooklyn Union Gas Co., 150 A.D.2d 420, 421 [2d Dept. 1989]). Moreover, whether plaintiff owns or rents his home is wholly unrelated to plaintiff's capacity to perform housework, or plaintiff's living structure and arrangement with his wife.

Question [to Mrs. Meckes]: How long have you been seeing your primary care physician?⁴
Question [to Mrs. Meckes]: Have you ever attended an appointment on the same day as your husband to see his primary care physician?

Defendants argue that Mrs. Meckes saw the same primary care physician as her husband, and that defendants are entitled to discover what Mrs. Meckes observed with respect to her husband's primary care physician. Defendants also contend that they were blocked from discovering "foundational questions" as to why plaintiff was undergoing the surgery, and "what Mrs. Meckes observed his state of health, whether she observed that the procedure was necessary, and the relevant inquiries regarding the risks, benefits, and alternatives of the surgery." Defendants further assert that because plaintiffs pleaded that Mrs. Meckes needed to tend to her husband and assist him due to his injuries, the question of Mrs. Meckes' capacity to care for her husband in light of her own health was directly pleaded in this lawsuit.

In opposition, plaintiffs argue that they properly objected to an inquiry of Mrs. Meckes' medical history as her medical care is not at issue, and is strictly privileged.

The court agrees. As plaintiffs correctly argue, Mrs. Meckes' health and treatment with her primary care physician are privileged, and are not subject to disclosure because Mrs. Meckes' health is not at issue. Defendants' argument that Mrs. Meckes' health has some bearing on her ability to care for her husband is equally unpersuasive. There has been no basis or foundation to call Mrs. Meckes' health into question, or her capacity to care for her husband (*Crazytown Furniture, Inc.*, 150 A.D.2d at 421, *supra* ["It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims."]).

Moreover, defendants' question related to "what Mrs. Meckes observed with respect to her husband's primary care physician," is not only vague, ambiguous, and opened ended, but has also been asked and answered. To be sure, Mrs. Meckes stated that she has never accompanied her husband during his visits with his primary care physician.

⁴ Both plaintiffs have the same primary care physician.

Question [to Mrs. Meckes]: At that time what was your understanding of the procedure that your husband was about to undergo?

Defendants argue that they are entitled to discover if plaintiffs understood the risks, benefits, and alternatives of the procedure, whether plaintiffs thought this procedure was necessary or elective, and “what health issues plaintiffs observed were occurring prior to the surgery at issue.”

In opposition, plaintiffs assert that defendants may not inquire about Mrs. Meckes’ “understanding” of medical procedures.

Defendants’ argument is meritless. Mrs. Meckes’ understanding of plaintiff’s medical procedure does not have any bearing on the claims of negligence or damages in this matter (*see, e.g., Shapiro v. Levine*, 104 A.D.2d 800, 800–01 [2d Dept. 1984] [Disclosure of conversations that plaintiff had with her previous attending physicians regarding their diagnosis and prognosis for her injury for the purported purpose of establishing the extent to which plaintiff, a lay person, understood her previous physicians’ expert opinions regarding the nature of her injury and her prospects for recovery are not relevant to any issue in this malpractice action . . . “[T]he standard by which defendant’s treatment will be measured in a malpractice action is not predicated upon plaintiff’s expectations.”]). Moreover, Mrs. Meckes’ understanding of plaintiff’s procedure is irrelevant and non-germane as to whether *plaintiff* understood the risks, benefits, and alternatives of the procedure, and whether *plaintiff* thought this procedure was necessary or elective.

II. Authorizations

Due to the fact that plaintiffs served defendants with a number of authorizations post-deposition that implicate a significant portion of plaintiff’s alleged injuries and treatment, defendants are entitled to a second deposition of plaintiffs, limited in scope to the authorizations, medical records, and radiology films that were provided after plaintiffs’ depositions, and that are material and relevant to plaintiff’s medical condition and injuries at issue. The depositions shall be scheduled at the next compliance conference.

Consequently, it is hereby

ORDERED that defendants’ application to compel plaintiffs to comply with discovery is granted to the extent indicated above; and it is further

ORDERED that the issue of plaintiff's IME shall be raised at the next compliance conference; and it is further

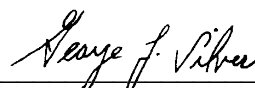
ORDERED that defendants' application for financial sanctions against plaintiffs' counsel is denied; and it is further

ORDERED that defendants' application to strike plaintiffs' pleadings is denied;

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 June 26, 2020 (time to be determined).

This constitutes the decision and order of the court.

Dated: May 4, 2020



HON. GEORGE J. SILVER