

Goldstein v Berenbaum
2020 NY Slip Op 32903(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 805291/2018
Judge: George J. Silver
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

-----X
**JEFFREY MAURICE GOLDSTEIN and KELLIE
GOLDSTEIN,**

Index No. 805291/2018

Plaintiffs,

-vs-

**RACHEL MARIE BERENBAUM, D.C., SAADIA
AKHTAR, M.D., PADDEN GLOCKA, M.D., MOUNT
SINAI BETH ISRAEL MEDICAL CENTER and
MANHATTAN SPORTS THERAPY,**

Defendants.

-----X
HON. GEORGE J. SILVER:

There are two motions before the court here. In the first, plaintiff JEFFREY MAURICE GOLDSTEIN (“plaintiff”) seeks to (1) compel defendants to appear for remote, virtual depositions; and (2) compel defendant Mount Sinai Beth Israel Medical Center to provide a copy of the table of contents for its Emergency Department Policy and Procedure Manual that was in effect at the time of the alleged incident.

In the second motion, defendants Rachel Marie Berenbaum D.C (“Dr. Berenbaum”) and Madison Avenue Chiropractic (collectively hereinafter “Kaufman defendants”) seek to compel plaintiff to provide outstanding discovery in advance of any depositions of their clients.

For the reasons discussed below, plaintiff’s motion is granted to the extent that plaintiff may take the virtual deposition one of the Kaufman defendants, Dr. Berenbaum, and denied to the extent that the depositions of defendants Saadia Akhtar, M.D. (“Dr. Akhtar”) and Padden Glocka (“Dr. Glocka”) shall not proceed virtually at this time. In addition, the Kaufman defendants’ motion to compel discovery from plaintiff is granted.

BACKGROUND

This is an action to recover damages related to an alleged negligent evaluation and treatment of a stroke suffered by plaintiff. On December 2, 2017, plaintiff presented to the emergency department (“ED”) of Mount Sinai Beth Israel Medical Center (“MSBI”) with complaints of facial numbness and neck pain on plaintiff’s left side, and unsteadiness during a morning shower. During his time in the ED, plaintiff complained of some tightness around his left eye. Plaintiff subsequently left the ED, and later had a recommended MRI completed by his private neurologist. The next morning, plaintiff complained of new symptoms and returned to the ED, where he was diagnosed with a stroke.

DISCUSSION

1. Plaintiff's Motion to Compel Depositions of Remote Witnesses

Plaintiff seeks to compel defendants to appear for remote, virtual depositions. In seeking that relief, plaintiff argues that discovery must continue, without interruption, notwithstanding the challenges posed by the COVID-19 pandemic. Plaintiff also argues that requiring in-person depositions would create an undue hardship, and underscores that both the CLPR and case law from courts across New York endorse the utilization of virtual depositions.

In response, defendants argue that forcing defendants to sit for virtual depositions would create an undue hardship by elevating levels of stress and interfering with defendants' professional responsibilities. Defendants further argue that in view of the general preference for having attorneys present with their clients during depositions, imposing virtual depositions would force attorneys and their clients to compromise their safety as a way to ensure adequate representation.

CPLR §3103(a) dictates that a court may “regulat[e] the use of any disclosure device” to “prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” Whether or not a party may testify virtually by video “is left to the trial court’s discretion” (*Am. Bank Note Corp v. Daniele*, 81 AD3d 500, 501 [1st Dept 2011]). If a party seeks to conduct a deposition in a method other than in person, the party is required to demonstrate that appearing in person would create “undue hardship” (*LaRusso v. Brookstone, Inc.*, 52 AD3d 576,577 [2d Dept 2008]). Indeed, it is also the case that courts across the state have compelled parties to sit for virtual depositions (*see Johnson v. Time Warner Cable N.Y. City, LLC* [Kalish, J.][May 28, 2020][Sup. Ct. New York Cnty Index No.: 155531/2017] [“to delay discovery until a vaccine is available or the pandemic has otherwise abated would be unacceptable”]; *Arner v. Derf Cab Corp.* [Silvera, J.][May 14, 2020][Sup. Ct. New York Cnty Index No.: 151731/19] [defendants ordered to appear for virtual depositions]; *Stern as Executrix of Stern v. New York Presbyterian Hospital* [Edwards, J.][June 1, 2020][Sup. Ct. Kings Cnty Index No.: 510384/2018][virtual depositions ordered in a medical malpractice case]).

Here, it is undeniable that forcing a party to appear for an in-person deposition would create an undue hardship considering the circumstances surrounding the ongoing pandemic. Indeed, the present pandemic presents a perfect example of when virtual depositions should be utilized. The question then becomes whether forcing defendants to appear for virtual depositions is, in and of itself, also an undue hardship in light of the general preference to have attorneys present with their clients during depositions.

Here, the court finds that it would not be an undue hardship for Dr. Berenbaum to appear for a virtual deposition. Dr. Berenbaum is a chiropractor who does not directly treat COVID-19 patients. Her appearance for a remote deposition would not add to the stress of her professional responsibilities. Even so, to alleviate the fear of insufficient representation, the court proposes that defendants utilize a courtroom in the courthouse so that attorney and client can be present together in a socially distant, sanitized environment. If the parties elect to avail themselves of this option, the court will arrange for the deposition to be conducted in a courtroom, and the parties will have

Index No. 805291/2018

to inform the court of their preference to proceed as such at the next conference. Based on these considerations, and others, the court directs that Dr. Berenbaum's deposition proceed.

Dr. Akhtar and Dr. Glocka's situation, however, is entirely different. Both Dr. Akhtar and Dr. Glocka are directly treating COVID-19 patients and both currently reside out-of-state. Requiring these physicians to sit for virtual depositions at this juncture would only add to the stress of their professional responsibilities. In consideration of that challenge, the court has determined that requiring Dr. Akhtar and Dr. Glocka to sit for virtual depositions would create an undue hardship. As such, their depositions will not proceed virtually at this time.

Separately, defendant MSBI is directed to provide a copy of the table of contents for its Emergency Department Policy and Procedure Manual that was in effect at the time of the alleged incident within forty-five (45) days of this decision and order. Defendant MSBI has made no showing that the same is privileged pursuant to Public Health Law §2805-m(2) and Education Law §6527 (*see Logue v. Velez*, 92 NY2d 13, 17, 677 NYS2d 6 [1998]; *Rivera v. City of New York*, 3 AD3d 486 [2d Dept. 2004]). As such, plaintiff's application for a copy of the table of contents is granted.

2. Defendant KRB's Motion to Compel Discovery from Plaintiff

In support of their separate motion, the Kaufman defendants claim that plaintiff has failed to respond to many of the discovery requests that they have made. The list of discovery items that the Kaufman defendants claim plaintiff has not responded to is lengthy. Specifically, the Kaufman defendants wish to compel responses on the following discovery items: (1) Amended Bills of Particulars addressing the objections asserted in our letter dated February; (2) a response to the Demand for Authorizations dated August 30, 2019; (3) a complete response to the Demand for Authorizations dated November 8, 2019; (4) a response to the Demand for Authorizations dated December 27, 2019; (5) a response to Defendant's letter dated January 28, 2020; (6) a complete response to the Demand for Authorizations dated April 17, 2020; (7) unrestricted authorizations for Plaintiff's employers; and (8) a response to the good faith letter dated June 24, 2020, and all letters that preceded it.

In response to the Kaufman defendants' argument, plaintiff contends that plaintiff has not willfully withheld discovery from the Kaufman defendants. Rather, plaintiff submits that plaintiff simply has not received many of the Kaufman defendants' discovery demands, and therefore could not have responded to items that plaintiff never acquired.

CPLR §3101(a) dictates that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" have been applied liberally by courts in New York (*see Allen v Cromwell-Collier Pub. Co.*, 21 NY2d 403, 406 [1968]). Furthermore, CPLR §3124 allows a party seeking discovery to move to compel a nonperforming party to provide said discovery.

Here, there is no doubt that many of the discovery requests made by defendants are both material and necessary and that without them, the Kaufman defendants will be severely prejudiced. As such, the Kaufman defendants are entitled to responses from plaintiff with respect to the

aforementioned demands before any depositions can take place. Accordingly, the court directs that plaintiff provide responses to the Kaufman defendants' discovery demands within forty-five (45) days of this decision and order.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is granted to the extent that the deposition of Dr. Berenbaum shall proceed virtually; and it is further

ORDERED that plaintiff's motion is denied, with leave to renew, to the extent that the depositions of Dr. Akhtar and Dr. Glocka shall not proceed virtually at this time; and it is further

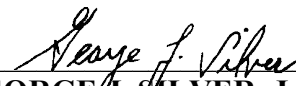
ORDERED that defendant MSBI is directed to provide a copy of the table of contents for its Emergency Department Policy and Procedure Manual that was in effect at the time of the alleged incident within forty-five (45) days of this decision and order; and it is further

ORDERED that the Kaufman defendants' motion is granted to the extent that plaintiff is directed to respond the abovementioned outstanding discovery demands within forty-five (45) days of this decision and order; and it is further

ORDERED that the parties are directed to appear for a compliance conference via a virtual conference on October 7, 2020 at 10:30 AM, at which time the date for the virtual deposition of Dr. Berenbaum will be scheduled.

This constitutes the decision and order of the court.

Dated: September 1, 2020



GEORGE J. SILVER, J.S.C.