

Fineman v Qureshi
2020 NY Slip Op 32978(U)
August 25, 2020
Supreme Court, New York County
Docket Number: 805290/2019
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER
Justice

SAMUEL FINEMAN and NYLA CARLETON FINEMAN, Index No. 805290/2019

- v -

SHEERAZ QURESHI, M.D., HOSPITAL FOR SPECIAL SURGERY, RONALD MACKENZIE, M.D., DAVID LEFKOWITZ, M.D., ELAINE YANG, M.D., and BRANDON CARLSON, M.D.

Hon. GEORGE J. SILVER
Justice Supreme Court

The following papers numbered 1 to 4 were read on this motion (Seq. No. 001) to **COMPEL DEPOSITION** (see CPLR §2219 [a]):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Answering Affidavit and Exhibits	No(s). 2, 3
Replying Affidavit and Exhibits	No(s). 4

Upon the foregoing papers, it is hereby

ORDERED that plaintiff SAMUEL FINEMAN’s (“plaintiff”) motion is granted to the extent that plaintiff’s deposition shall proceed virtually on or before October 2, 2020, with additional sessions continuing thereafter, if necessary.

This is an action sounding in medical malpractice where plaintiff alleges that, collectively, defendants improperly cleared plaintiff for spine surgery at defendant Hospital for Special Surgery on May 14, 2018. As a result of defendants’ alleged malpractice, plaintiff claims that he sustained severe injuries and complications including, but not limited to, a “high-grade muscle tear of the obturator externus and adductor brevis,” an anoxic brain injury and the inability to perform activities of daily living. As is relevant to the instant application, plaintiff resides in Florida. Under a usual set of circumstances, plaintiff’s counsel advises that plaintiff would be amendable to being deposed in New York since this lawsuit was filed within the state of New York. Nevertheless, plaintiff submits that the novel coronavirus (“COVID-19”) pandemic has upset the regular course of discovery, creating an “undue hardship” that necessitates, and thereby requires, that plaintiff’s deposition be completed virtually. Defendants SHEERAZ QURESHI, M.D., HOSPITAL FOR SPECIAL SURGERY, RONALD MACKENZIE, M.D., ELAINE YANG, M.D., and BRANDON CARLSON, M.D. (hereinafter “defendants”) oppose the application, arguing that a virtual deposition in this case would invite numerous technological issues. In addition, defendants argue that plaintiff’s compromised cognitive condition would make a virtual deposition highly impractical. Rather than undergo a virtual deposition, defendants submit that plaintiff’s deposition should be conducted only after the challenges posed by COVID-19 have abated, and a vaccine has

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been procured. Separately, defendant DAVID LEFKOWITZ, M.D. (“Dr. Lefkowitz”) does not oppose the instant application.

Pursuant to CPLR §3103 (a), the trial court may regulate “any disclosure device” in order to “prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice.” “The decision to allow a party or witness to testify via video conference link is left to a trial court’s discretion” (*see Am. Bank Note Corp. v Daniele*, 81 AD3d 500, 501 [1st Dept 2011]). If a party that has filed suit within the state of New York wishes to appear for a deposition by means other than an in-person within the state, as required by CPLR §3110 (a), that party must demonstrate that appearing within the state would cause “undue hardship” (*LaRusso v Brookstone, Inc.*, 52 AD3d 576, 577 [2d Dept 2008]).

Since COVID-19 has disrupted the process of conducting in-person depositions safely within the state, numerous trial courts have found that virtual depositions are an acceptable alternative (*see Johnson v. Time Warner Cable N.Y. City, LLC* [Kalish, J.][May 28, 2020][N.Y. Cty. Sup. Ct. 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][N.Y. Cty. Sup. Ct. 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][Kings Cty. Sup. Ct. Index No.: 510384/2018][virtual depositions ordered in a medical malpractice case]).

Here, if the court were to insist that plaintiff’s deposition be conducted in-person, the inherent health risks associated with the pandemic would cause plaintiff, the appearing attorneys, and the court reporter “undue hardship.” Indeed, an in-person deposition would be impractical and would place the aforementioned individuals in danger. On the other hand, to place all discovery, including depositions, on hold indefinitely or until a vaccine is discovered, would greatly prejudice plaintiff. Indeed, it is oft-repeated legal maxim that “[j]ustice delayed is justice denied.” Here, withholding plaintiff’s ability to expeditiously pursue his claims is tantamount to plaintiff having no remedy at all. The most effective way for this court to address that hardship is to allow plaintiff’s deposition to occur virtually, as such a remedy is a safe, and legally permissible alternative to appearing in-person and complies with current social distancing requirements.

While defendants’ counsel insists that plaintiff’s deposition should be postponed indefinitely until pandemic restrictions are lifted, a prediction for when all of pandemic restrictions will be lifted remains elusive. Hence, it is the view of this court that plaintiff’s deposition should proceed virtually.

Above the aforementioned considerations, it is also notable here that plaintiff’s health condition is precarious, and that an indefinite postponement of plaintiff’s deposition may limit plaintiff’s future ability to be deposed. Plaintiff supports this position by furnishing medical proof of his perilous medical condition. In consideration of this factor, and the above-referenced observations, it is hereby

ORDERED that the instant motion by plaintiff to compel defendants to appear for plaintiff’s virtual deposition, is granted; and it is further

ORDERED that plaintiff's virtual deposition shall take on or before October 2, 2020; and it is further

ORDERED that plaintiff's counsel shall serve a copy of the instant decision and order with notice of entry within five (5) days of the NYSCEF filing date of the instant decision and order; and it is further

ORDERED that the parties are directed to appear for a virtual Skype conference on October 15, 2020 at 11:30 AM to ensure compliance with this court's directives.

This constitutes the decision and order of the court.

Dated: August 25, 2020

Hon. *George J. Silver*
GEORGE J. SILVER, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT