| **Matthew v DeRose** |
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| 2020 NY Slip Op 34306(U) |
| November 6, 2020 |
| Supreme Court, Bronx County |
| Docket Number: 31141/2017E |
| Judge: John R. Higgitt |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, **PART 34**

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**MATTHEW, ALPHONSO**

- against -

**DEROSE, JOSEPH, M.D., et al**

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Index №. **31141/2017E**

Hon. **JOHN R. HIGGITT**, J.S.C.

The following papers in the NYSCEF System were read on this motion to **AMEND PLEADINGS**, duly submitted as No. ___ on the Motion Calendar of **July 24, 2020**

| | **NYSCEF Doc. Nos.** |
|---|---|
| Notice of Motion – Order to Show Cause - Exhibits and Affidavits Annexed | 25-34 |
| Notice of Cross Motion – Order to Show Cause - Exhibits and Affidavits Annexed | 53-60, 70-71 |
| Answering Affidavits and Exhibits | 36-52, 63-64 |
| Replying Affidavits and Exhibits | 61-62, 65-67 |

Upon the June 9, 2020 notice of motion of defendants Apinis and Montefiore Medical Center ("the Montefiore defendants) and the affirmation and exhibits submitted in support thereof; plaintiff's July 14, 2020 notice of cross motion and the affirmation and exhibits submitted in support thereof; the July 23, 2020 notice of cross motion of defendants DeRose and Chau and the affirmation submitted in support thereof; plaintiff's July 14, 2020 affirmation in opposition and the exhibits submitted therewith; the Montefiore defendants' July 23, 2020 affirmation in opposition to plaintiff's cross motion; the Montefiore defendants' July 23, 2020 affirmation in reply; plaintiff's July 23, 2020 affirmation in reply; and due deliberation; the Montefiore defendants' motion for an order permitting amendment of their answers to include the affirmative defense of comparative negligence, and the cross motion of defendants DeRose and Chau for the same relief, are granted, and plaintiff's cross motion for an order compelling the deposition of Dr. Cynthia Taub is granted in part.

**AMENDMENT**

This medical malpractice emanates from the performance of a surgical mitral valve repair. In support of their motion for leave to amend their answers to assert the affirmative defense of plaintiff's comparative fault, the Montefiore defendants assert that plaintiff's delay in committing to have the surgery performed led, at least in part, to the damages claimed to have been sustained. Plaintiff opposes, submitting the affidavit of an expert who asserts that it was a departure from the standard of care to discharge plaintiff after having been cleared for surgery without performing the surgery, and that the delay in surgery was not attributable to plaintiff.

"Leave [to amend a pleading] shall be freely given upon such terms as may be just including the granting of costs and continuances" (CPLR 3025[b]). Leave should not be granted where prejudice or surprise results from the delay in amending (*see Byrne v Fordham Univ.*, 118 AD2d 525 [1st Dept 1986]), but mere lateness does not necessarily bar amendment (*see Edenwald Contr. Co. v New York*, 60 NY2d 957 [1983]). "Prejudice may be found where a party has incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment" (*Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 [1998] [citations omitted]). Such prejudice, however, must be "significant" (*see Spitzer v Schussel*, 48 AD3d 233 [1st Dept 2008]).

The movant need not prove the merit of the proposed defense as on a motion for summary judgment, but only that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]). "Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied" (*Thomas Crimmins Contracting Co. v New York*, 74 NY2d 166, 170 [1989] [citation omitted]). Unless the "alleged insufficiency or lack of merit [of the proposed amendment] is clear and free from doubt," the proposed amendment should be permitted (*Miller v Staples the Off. Superstore E., Inc.*, 52 AD3d 309, 313 [1st Dept 2008]).

Plaintiff's delay in having surgery raises an issue of fact as to comparative fault and/or the failure to mitigate damages, and thus supports permitting the amendment (*see e.g. DeCesare v Kaminski*, 29 AD3d 379 [1st Dept 2006], *lv dism* 7 NY3d 844 [2006]). Because the collective proof does not demonstrate the patent insufficiency of the proposed defense, because plaintiff does not claim prejudice or surprise emanating from the proposed amendment (*see Caso v Miranda Sambursky Sloane Sklarin Ver Veniotis LLP*, 150 AD3d 422 [1st Dept 2017]), and given the questions of fact presented by the parties' differing versions of the events (*see Cenpark Realty LLC v Gurin*, 118 AD3d 553 [1st Dept 2014]), the amendment is permitted (*see Freder v Costello Indus., Inc.*, 162 AD3d 984, 986 [2d Dept 2018]). In granting the relief sought herein, the court does not pass on the strength of the proposed defense.

Defendants DeRose and Chau did not submit a proposed amended answer with their cross motion, which would otherwise require its denial (*see* CPLR 3025[b]; *Sutton Animal Hosp. PLLC v D&D Dev., Inc.*, 177 AD3d 467 [1st Dept 2019]; *Anonymous v Anonymous*, 167 AD3d 527 [1st Dept 2018]). The court having had the opportunity to assess the Montefiore defendants' proposed amended answers, and defendants DeRose and Chau having adopted the Montefiore defendants' statements, exhibits and arguments in their entirety (*see* July 23, 2020 Papacostas affirmation at para. 2), defendants DeRose and Chau are permitted to amend their answer to assert the same defense as asserted by the Montefiore defendants in paragraph 10 of the third affirmative defense of their proposed amended answers, appended to their motion at Exhibit F.

**DR. TAUB'S DEPOSITION**

Dr. Taub, a cardiologist employed by defendant Montefiore, cleared plaintiff for surgery prior to his discharge. In the parties' December 16, 2019 so-ordered stipulation, plaintiff designated Dr. Taub as a witness, as permitted by prior discovery orders, and defendant Montefiore was to produce Dr. Taub for deposition if still employed by it. Plaintiff asserts that defendant Montefiore has failed to produce Dr. Taub for deposition despite good faith efforts.

The Montefiore defendants resist producing Dr. Taub for deposition because "proceeding with the deposition of Dr. Taub in person or remotely would be prejudicial to the interests of Dr. Taub and defense counsel" (July 23, 2020 Duchmann affirmation at para. 2). Specifically, the Montefiore defendants assert that the handling partners assigned to the defense of this action belong to a population at enhanced risk for contracting the coronavirus, that requiring travel for the purpose of the deposition poses an unnecessary risk of exposure to the virus, that a remote deposition poses auditory issues that would prejudice the defendants and the deponent, that social-distancing protocols prevent proper preparation of the deposition witness, and that an immediate deposition of Dr. Taub cannot be conducted without significantly interrupting her now-extensively-backlogged patient care schedule.

Both options – an in-person deposition to which the parties must travel and potentially come into contact with more people, and a video deposition requiring certain equipment, hardware, software and technological knowledge – continue to carry with them some attendant risk. While we have repeatedly

been reminded, and it remains true, that vigilance is required to prevent the spread of the coronavirus, we are no longer in the initial stages of the pandemic, and litigation must, at some point and in whichever fashion is suitable to meet prevailing health and safety directives, continue (*see* Administrative Order AO/71/20). Nevertheless, in light of the continuing public health crisis occasioned by the coronavirus pandemic, and given the present status of the pandemic in the metropolitan region, it remains the case that, generally, in-person depositions, which carry with them their own potential health and personal safety dangers, should be avoided (*Johnson v Time Warner Cable N.Y.C. LLC*, 2020 NY Slip Op 31592[U], at *3 [Sup Ct, N.Y. County 2020]; *see also Joffe v King & Spalding LLP*, 2020 US Dist LEXIS 111188 [S.D. NY 2020]).). Notably, the pandemic has not wholly abated in this region of New York State. In-person depositions may not be advisable for the foreseeable future (*see Patricof v Patricof*, 2020 NY Slip Op 31679[U] [Sup Ct, N.Y. County 2020]), and the bar should not assume that in-person depositions are the norm to which we will invariably return in the near future.

More recently, the court has reminded the parties that discovery should be conducted as cooperatively as possible, and "strongly encourage[s]" parties to "employ remote technology in discovery *whenever possible*" (Administrative Order AO/129/20, dated June 22, 2020 [emphasis added]; *see also City of Almaty v Sater*, 2020 US Dist LEXIS 93694 [S.D. NY 2020]; *Tuqui Tuqui Dominicana, S.R.L. v Castillo*, 2020 US Dist LEXIS 61090, at *16 [S.D. NY 2020] ["The Court trusts that the parties and counsel will work cooperatively under the circumstances and fulfill their legal responsibilities"]). Any preference for in-person depositions, while perhaps reasonable under other circumstances, is not tenable under the very real conditions that all litigants, and, indeed, all New Yorkers and all Americans, are currently confronting (*see Astor Chocolate Corp. v Elite Gold Ltd.*, 2020 US Dist LEXIS 78862, at *34 n 8 [S.D. NY 2020] ["The Court expects that, given the challenges presented by the current COVID-19 pandemic, such deposition likely will be conducted remotely; and that counsel will collegially agree on the mechanics of a deposition without the need for Court intervention"]; *Julian v Metro. Life Ins. Co.*, 2020 US Dist LEXIS 61809, at *4 [S.D. NY 2020] ["the ongoing COVID-19 national health emergency … *requires* that arrangements be made to conduct depositions remotely"] [emphasis added]). As the pandemic merges with the traditional influenza season and with wearying capacity for complying with mask-wearing and other infection-avoidance measures we have all been urged to employ in our daily lives, it is the unfortunate truth that the danger posed by the coronavirus pandemic may remain for the foreseeable future.

As to witness preparation during a pandemic:

> "Defendants and their counsel … can choose how they want to prepare witnesses for depositions and whether or not they want to be with the witness in person when the witness gives a deposition by remote means. While it may be more difficult for a lawyer to prepare a witness for a deposition without sitting in the same room with her or him, it is not impossible to do so. Similarly, while it may be more difficult to defend a witness who is testifying remotely without being in the same room with the witness, there undoubtedly are ways to reduce the risks and challenges in that situation as well."
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> "The Court's informed guess is that a witness can be well-prepared to give a deposition, even a deposition that may involve a large number of documents and a relevant time period of many years, without being in the same room with her or his counsel. If the witness and counsel have the same universe of documents in front of them, either in hard or electronic copy, those documents are identifiable by a Bates number or other unique identifier, and they utilize a video system that allows them to see each other and even to see a document together on their computer screens at the same time, the preparation

session(s) should proceed without too much trouble even if the process takes a bit longer than in person" (*In re Broiler Chicken Antitrust Litig.*, 2020 US Dist Lexis 111420, at *85-*86 [N.D. Ill., June 25, 2020]).

As to auditory issues that might hamper a remote deposition, the Civil Practice Law and Rules (e.g. CPLR 3113, 3115) and the Uniform Rules for the Conduct of depositions (*see* 22 NYCRR § 221.1, *et seq*) provide remedies, should such issues arise. To ensure that technological issues do not derail a deposition, the parties should agree on a meeting platform, ensure the functionality and compatibility of their hardware and software well in advance of the deposition, and conduct trial runs among themselves to anticipate and remedy functional glitches, to the extent possible. A flawless deposition, whether remote or in-person, is never guaranteed, but the parties may take steps to reduce the likelihood of the occurrence of the problems that the Montefiore defendants anticipate.

As to Dr. Taub's availability, the importance and value of our medical professionals cannot be overstated. That her deposition remains outstanding should not interfere with the quality of care Dr. Taub provides to her patients. Discovery, however, may not be avoided indefinitely, even in a pandemic. The court agrees with defendants that the deposition need not occur "immediately," and assumes that the parties will be flexible and collaborative in their approach to scheduling and conducting the deposition.

"[A]ccommodation is the answer here rather than a complete cessation of discovery activity until the COVID-19 pandemic abates" (*In re Broiler Chicken Antitrust Litig.*, 2020 US Dist Lexis 111420, at *82-*83). "[T]he parties and their counsel are going to have to have to adapt, make some choices, be creative, and compromise in this and every other case in which they are involved during this time without modern precedent" (*id.*, at *87-*88 [N.D. Ill., June 25, 2020])

On balance, the appropriate exercise of the court's "wide, inherent discretion to manage discovery" (*Hamilton v Miller*, 23 NY3d 592, 602 [2014]), under CPLR 3103(a), is to compel the taking of the depositions by remote means (*see e.g. Joint Stock Co. "Channel One Russ. Worldwide" v Russian TV Co.*, 2020 US Dist LEXIS 7766 [S.D. NY 2020]), subject to any application for a protective order, and subject to any stipulations the parties may enter into regarding the circumstances of the conduct of the depositions, unless all parties agree to in-person depositions.[1]

Defendants are reminded that, in the absence of a demonstration that the known health concerns of any involved party, attorney or other person involved in the taking of the deposition (*cf. Doe v Archdiocese of N.Y.*, 2020 NY Slip Op 31708[U] [Sup Ct, N.Y. County 2020]), or some other explanation requiring pause before the ordering of a court-compelled remote deposition, defendants' resistance to the relief sought is insufficient (*see Duggan v City of Carlsbad*, 2020 US Dist LEXIS 121958 [S.D. Cal 2020]).

Accordingly, it is

ORDERED, that the Montefiore defendants' motion for an order permitting amendment of their answers to include the affirmative defense of comparative negligence, and the cross motion of defendants DeRose and Chau for the same relief, are granted; and it is further

ORDERED, that the amended answers appended to the Montefiore defendants' motion at Exhibit F (NYSCEF Doc. No. 33) are deemed served; and it is further

ORDERED, that within 30 days after service of a copy of this order with written notice of its entry, defendant DeRose and Chau shall serve and file an amended answer containing the same defense of comparative fault as alleged in paragraph 10 of the third affirmative defense of the Montefiore defendants' proposed amended answers, appended to their motion at Exhibit F; and it is further

[1] "[D]iscovery determinations are discretionary; each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (*Andon v 302-304 Mott St. Assocs.*, 94 NY2d 740, 747 [2000] [citation omitted]).

ORDERED, that plaintiff's cross motion for an order compelling the deposition of Dr. Cynthia Taub is granted solely to the extent that Dr. Taub shall appear for deposition by remote means, or by any other means to which the parties stipulate, within 120 days after service of a copy of this order with written notice of its entry; and it is further

ORDERED, that plaintiff's cross motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: November 6, 2020

Hon. John R. Higgitt, J.S.C.