

McGuire v Cheng

2020 NY Slip Op 34584(U)

July 23, 2020

Supreme Court, Columbia County

Docket Number: Index No. 12946-18

Judge: Andrew G. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF COLUMBIA

MARGARET MCGUIRE and MICHAEL MCGUIRE,

Plaintiffs,

-against-

DECISION & ORDER

MABEL M.P. CHENG, M.D., MABEL M.P. CHENG,
M.D., PLLC, THE COLUMBIA MEMORIAL
HOSPITAL, SYED A. HASSAN, M.D., ALEXANDR
L. SAFAROV, M.D., ERIVER NEUROLOGY OF
NEW YORK, LLC, DONNA M. ESPOSITO, M.D.,
and HUDSON VALLEY OPHTHALMOLOGY,

Defendants.

All Purpose Term
Hon. Andrew G. Ceresia, Supreme Court Justice
Index No. 12946-18

Appearances:

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Ceresia, J.

In this medical malpractice action, plaintiffs move to compel defendant Donna Esposito,
M.D., to submit to a continued examination before trial. Esposito cross-moves for a protective

order and other relief, and plaintiffs oppose the cross-motion.

The facts of this case, which involve defendants' alleged failure to timely diagnose plaintiff Margaret McGuire (hereinafter "McGuire") with giant cell arteritis, resulting in permanent vision loss in McGuire's right eye, are set forth in the Court's Decision and Order dated February 11, 2020, in which the Court granted plaintiffs' motion to compel defendant Mabel M.P. Cheng, M.D., to submit to a continued examination before trial. As is relevant to the instant motion, on December 13, 2016, Esposito was on call as a consulting ophthalmologist when she spoke on the telephone with a physician's assistant at Columbia Memorial Hospital regarding McGuire's symptoms of transient vision loss. Esposito's involvement in McGuire's care was limited to that telephone call.

During Esposito's examination before trial, plaintiffs' counsel asked her what tests she would have recommended to rule out giant cell arteritis if she had suspected that McGuire was suffering from it. Esposito's counsel instructed her not to answer on the ground that the question was speculative and "so far removed from what happened in this case that [he would] direct that [Esposito] not answer the question" (Wright Aff., Ex. C, p. 46, lines 6-9).

During an examination before trial, the deponent must answer all questions unless: 1) the answer would violate a privilege or a right of confidentiality; 2) the answer would violate a previous court order; or 3) the question is plainly improper and its answer would cause significant prejudice to any person (see 22 NYCRR 221.2). Here, Esposito argues that the question at issue was plainly improper because it was part of a pattern of repetitive, aggressive, and irrelevant questioning by plaintiffs' counsel. However, the Court has conducted a review of the deposition transcript and disagrees with Esposito's position. Plaintiffs' counsel's questioning was appropriate and was not overly repetitive or irrelevant. Although counsel phrased similar

questions in different ways, that largely occurred after the witness expressed difficulty understanding or answering the question. Importantly, the question at issue went to the very heart of the issues in this case. Since McGuire is alleged to have suffered from undiagnosed giant cell arteritis, a question about what tests Esposito would have ordered if she suspected giant cell arteritis is centrally relevant to plaintiffs' case.

As for plaintiffs' request that Esposito bear the costs of conducting the continuation of her examination before trial, the Court has considered this request and, under the particular facts and circumstances presented herein, it is denied in an exercise of the Court's discretion.

Accordingly, it is hereby

ORDERED, that plaintiffs' motion to compel Esposito to submit to a continued examination before trial is granted, and it is further

ORDERED, that plaintiffs' request that Esposito pay the costs of conducting the continued examination before trial is denied, and it is further

ORDERED, that Esposito's cross-motion for a protective order and other relief is denied.

This shall constitute the decision and order of the Court. The Court has uploaded the original Decision/Order to the case record in this matter as maintained on the NYSCEF website whereupon it is to be filed and entered by the County Clerk's Office. Counsel for the plaintiff is not relieved from the applicable provisions of CPLR § 2220 and § 202.5-b (h) (2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the action/proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party.

Dated: July 23, 2020
Hudson, New York



Andrew G. Ceresia
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated May 4, 2020; Affirmation of Amber Wright, Esq.; Annexed Exhibits;
2. Notice of Cross-Motion dated May 14, 2020; Affirmation of Robert Cypher, Esq.;
3. Reply Affirmation of Amber Wright, Esq., dated May 27, 2020; Annexed Exhibits;
4. Reply Affirmation of Robert Cypher, Esq., dated June 1, 2020.