Arias v Vecchione
2020 NY Slip Op 34670(U)
May 7, 2020
Supreme Court, Bronx County
Docket Number: Index No. 21215/2011E
Judge: George J. Silver
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Index №. 21215/2011E
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 19A
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VIRGINIA ARIAS and JULIO ARIAS,
Her husband, **Index №. 21215/2011E**

Plaintiffs

-against-

JOHN VECCHIONE, DDS, AMERICAN DENTAL OFFICES, P.L.L.C d/b/a AMERICAN DENTAL CENTERS, JULES V. LANE, DDS, J.V. LANE PROFESSIONAL CORPORATION, AND "JOHN DOE" CORPORATION, TRUE IDENTITY UNKNOWN AT THIS TIME

Defendants
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HON. GEORGE J. SILVER:

With the instant motion, defendant AMERICAN DENTAL OFFICES, PLLC d/b/a AMERICAN DENTAL CENTERS ("American Dental") moves, pursuant to CPLR §2304, for an order quashing plaintiffs VIRGINIA ARIAS and JULIO ARIAS' ("plaintiffs") judicial subpoena and judicial subpoena *duces tecum*. Separately, American Dental moves, pursuant to CPLR §3103, for an order granting a protective order barring the production of further documents and the deposition of Philip Hirschhorn, DDS ("Dr. Hirschhorn"), or anyone else associated with American Dental. American Dental also seeks a stay of the enforcement of the subpoenas pending the disposition of its application, and asks for costs and attorney's fees in light of the instant application having to be filed.

Separately, plaintiffs move to motion to compel discovery, and to strike American Dental's answer on account of discovery not being previously provided. Plaintiffs also seek sanctions for American Dental's purported intentional delay of this case.

BACKGROUND AND ARGUMENTS

Plaintiffs commenced this action to recover damages for alleged personal injuries associated with dental treatment rendered by defendants. Notably, this action was commenced in 2011, nearly a decade ago. Despite years of discovery and related motion practice, as well as this court's inspection of unrelated closing documents from the sale of American Dental, plaintiffs now seek to subpoena and notice a deposition of Dr. Hirschhorn, the Chief Executive Officer ("CEO") of American Dental. American Dental argues that plaintiffs attempt is a misguided effort to obtain unnecessary documents, harass American Dental, and delay this lawsuit.

Plaintiffs served documents entitled "Judicial Subpoena" and "Judicial Subpoena Duces Tecum," on June 14, 2019. Separately, plaintiffs also served a notice of examination before trial, dated June 13, 2019 seeking the deposition of Dr. Hirschhorn as well as a list of documents that this court has addressed at previous conferences. Specifically, the demands include twenty-one requests, seeking documents related to Carlos Luna, a dental assistant who allegedly assisted in the dental treatment at issue in this lawsuit, as well as documents related to other employees of American Dental.

American Dental argues that plaintiffs' subpoenas are defective since both purport to be "Judicial Subpoenas" and state that this court witnessed the issuance of the subpoenas on June 14, 2019 even though neither subpoenas is signed or "so ordered" by the court. These deficiencies, American Dental argues, at a minimum require that the subpoenas be quashed.

American Dental further contends that the subpoenas are improper since they seek deposition testimony and document disclosures from a party to this lawsuit, and demand documents that have already been addressed by this court. To be sure, plaintiffs previously demanded documents relative to the sale of American Dental, a sale that took place about two years prior to any of the subject care in this case. These demands were the subject of plaintiffs' motion to compel (Motion Sequence #002). That motion was filed on October 31, 2016, and remains the subject of this court's ongoing *in camera* review. American Dental argues that plaintiffs' subpoenas amount to nothing more than an attempt to circumvent this court's authority, and continue to harass American Dental.

Likewise, American Dental argues that plaintiffs' demand for insurance documents was already ruled on by this court. Finally, American Dental contends that plaintiffs' request for information regarding Carlos Luna and other American Dental employees is inappropriate, as plaintiffs' have not made a requisite showing that Carlos Luna was not acting within the scope of his employment or that American Dental negligently hired or supervised him. American Dental submits that the same applies to its other employees.

Defendant John Vecchione, DDS ("Dr. Vecchione"), joins in American Dental's application opposing plaintiffs' subpoenas.

In opposition, plaintiffs highlight that prior orders issued by this court establish that American Dental represents Carlos Luna, and that Carlos Luna's non-party deposition has been directed at various junctures during this litigation. Plaintiffs' further contend that American Dental's decision to withhold discovery, including the production of an additional witness for a deposition, amounts to bad faith, and warrants the striking of American Dental's answer.

Likewise, plaintiffs submit that American Dental circumvented the production of plaintiffs' own dental records, and is presently refusing to comply with duly served subpoenas. Among other things, plaintiffs contend that it would not be burdensome for Dr. Hirschhorn to produce the thousands of pages of records referenced in his affidavit. Indeed, plaintiffs contend that Dr. Hirschhorn's deposition is essential, since he has not produced an inventory of the documents that were available at the closing sale of American

Dental. Moreover, plaintiffs contend that knowledge of actions of the business' sale would be best explained by Dr. Hirschhorn in his capacity as a CEO.

Separately, plaintiffs seek to compel production of the aforementioned documents, and the depositions of Dr. Hirschhorn and Carlos Luna.

In reply, American Dental contends that the striking of its answer is unwarranted where much of the discovery demanded has either been provided or is the subject of this court's *in camera* inspection, and where the depositions requested lack relevance to the claims at issue. Plaintiffs submit a sur-reply in which they submit that American Dental's continued refusal to make necessary disclosures amounts to obstructive conduct, thereby warranting the striking of its answer.

DISCUSSION

A subpoena must not be used as a tool of harassment or for a "fishing expedition to ascertain the existence of evidence" (*Reuters Ltd. v. Dow Jones Telerate, Inc*., 231 AD2d 337 [1st Dept. 1997]; *Law Firm of Ravi Batra, P.C. v. Rabinowich*, 77 AD3d 532 [1st Dept. 2010]). The determination of whether the discovery sought is appropriate rests within the sound discretion of the trial court, the discovery sought must be "material and necessary."

A motion to quash or vacate is the proper and exclusive vehicle to challenge the validity of a subpoena (*see* CPLR § 2304; *Brunswick Hospital Center, Inc. v. Hynes*, 52 NY2d 333 [1981]). A motion to quash a subpoena should be granted, only when the futility of uncovering anything legitimate is obvious, or the information sought is, "utterly irrelevant to any proper inquiry" (*Kapon v. Koch*, 23 NY3d 32 [2014]). The burden of establishing the information sought is irrelevant or futile, is on the non-party being subpoenaed (*Velez v. Hunts Point Multi-Serv. Ctr., Inc.,* 29 AD3d 104 [1st Dept. 2006]). The terms "any" and "all" with limitations as to date in a subpoena, may be overbroad if the materials sought include matter that may be privileged, or is "clearly irrelevant." A subpoena is required to, "specify with reasonable precision the records sought" (*Grotallio v. Soft Drink Leasing Corp*., 97 AD2d 383 [1st Dept. 1983]).

Courts have broad authority to limit discovery devices, including subpoenas, by issuing protective orders denying, limiting, conditioning or regulating the use of any disclosure device to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts (*see Liberty Petroleum Realty, LLC v. Gulf Oil, L. P*., 164 AD3d 401, 403 [1st Dept. 2018]; *American Bank Note Corp. v. Daniele*, 81 AD3d 500, 501 [1st Dept. 2011]; *Montesano v. North Fork Bank*, 282 AD2d 537, 538 [1st Dept. 2001]).

Here, plaintiffs erroneously style their subpoenas as "judicial subpoenas" even though neither subpoena is signed or "so ordered" by the court. Such an impermissible practice makes plaintiffs subpoenas procedurally deficient, as a matter of law (*see Matter of Lizzio*, 102 AD3d 162, 163 [1st Dept. 2012]["[R]espondent admits that…she improperly 'issued' judicial subpoena by printing the judges names without permission or authority"); *see also Irizarry v. New York City Police Dept*., 260 AD2d 269, 271 [1st Dept. 1999]["Pursuant to CPLR §2308[b], a subpoena not returnable in court is a non-judicial subpoena"]).

Plaintiffs' subpoenas are also substantively deficient. For instance, the discovery sought by plaintiff's document subpoena, including agreements and contracts, is presently the subject of this court's yet to be completed *in camera* review. To that effect, it is premature for plaintiffs to serve a subpoena for documents that are the subject of this court's *in camera* inspection. Moreover, plaintiffs have utterly failed to establish the relevance of such agreements and contracts to the allegedly negligent dental treatment in this case. To the extent plaintiffs seek information pertaining to any rules, regulations or protocols in effect for American Dental on the date of the alleged malpractice, plaintiffs have already deposed a physician with such knowledge (Dr. Raven), and have had every opportunity to question that physician about such items. Indeed, plaintiffs have failed to offer any logical connection between purported documents reflecting x-ray maintenance, hiring of staff, "complaints," and a host of other categories. Nor do plaintiffs have any basis for requesting these items, since the testimony elicited from American Dental to date merely shows that following its sale, the new owners made capital improvements in the office space, equipment and computers, and expanded dental services. None of those capital improvements had anything to do with the relevant standard of care in performing various procedures. As there is no evidence that American Dental's owners entered into any type of an agreement with its prior owners to rectify some unknown deficiencies in the practice with respect to the standard or quality of care, plaintiffs' request for such documents amounts to an impermissible fishing expedition.

Likewise, American Dental has already complied with its discovery obligations with respect to the "existence and contents" of any applicable insurance agreement. Moreover, CPLR §3101(f) expressly provides that a mere "application" for insurance shall not be treated as part of an insurance agreement. As such, plaintiffs have no legitimate basis to seek the disclosure of American Dental's application for insurance coverage, declaration pages, letters of acceptance terms, conditions, riders, etc. In addition, American Dental has previously disclosed that it is not in possession of any lease, purchase and/or maintenance records for x-ray machines or equipment.

The court also finds that the employment records sought by plaintiffs are highly inappropriate. To be sure, the employee files requested are not discoverable as it is undisputed that Carlos Luna and others were employees acting within the scope of their employment and there are no claims of negligent hiring or supervision (*see Neiger v. City of New York*, 72 AD3d 663 [2d Dept. 2010]). Moreover, plaintiffs fail to offer any possible rationale for accessing these employee records or to even suggest what these records could contain that would relate to the allegations of dental malpractice in this lawsuit. However, as plaintiffs correctly highlight that Carlos Luna's non-party deposition was previously agreed to and ordered by this court, the same should be scheduled no later than 60-days following the issuance of this decision and order.

Conversely, plaintiffs' subpoena seeking deposition testimony of Dr. Hirschhorn is improper. In the first instance, the subpoena is indecorous for seeking testimony from a party to this lawsuit (*see Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104, 108 [1st Dept. 2006]["Unless otherwise provided by the CPLR or the court, the normal method of obtaining disclosure from parties to an action, for instance, depositions upon oral questions shall be by stipulation or on notice without leave of the court][CPLR §3102[b]). Moreover, it is undisputed that Dr. Hirschhorn had no involvement whatsoever in the treatment at issue in this case. Dr. Hirschhorn merely submitted an affidavit in his capacity as CEO attesting to his

knowledge of the documents related to the sale of American Dental and the storage of such documents. As such, plaintiffs' desire to depose him is nothing more than continued harassment, thereby warranting a protective order (*see Jones v. Maples*, 257 AD2d 53, 57-58 [1st Dept. 1999]["When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper."]).

A protective order is also appropriate for some of the documents requested in plaintiffs' subpoenas. CPLR § 3103 provides, in relevant part, that:

> The court may at any time on its own initiative, or on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts (*see* CPLR § 3103[b]).

Here, many of the requests contained in plaintiffs' subpoenas amount to nothing more than continued "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts," especially considering this court's decisions on previous discover motions and ongoing *in camera* inspection. To be sure, plaintiffs' demands rehash demands for documents relating to the sale of American Dental, Carlos Luna and other documents related to the allegations in the complaint. These demands have been responded to numerous times, have been the subject of multiple discovery motions and court orders and represent repeated improper attempts to circumvent this court's directives. Accordingly, this court grants a protective order with respect to Dr. Hirschhorn's deposition, the employment records referenced, plaintiffs' demand for insurance documents, and plaintiffs' demand for documents relevant to the sale of American Dental that are the subject of this court's ongoing *in camera* inspection.

Finally, for the reasons set forth above, this court similarly denies plaintiffs' motion to compel discovery or otherwise strike American Dental's answer. Striking a pleading is a drastic remedy and is only warranted where a clear showing has been made that the noncompliance with a discovery order was wilful, contumacious or due to bad faith. Thus it has been found to be an improvident exercise of the court's discretion to strike a pleading where non-compliance with discovery was due to law office failure (*Mateo v. City of New York*, 274 AD2d 337 [1st Dept. 2000]); where the defendants had already served a response to the discovery demands (*Hoi Wah Lai v. Mack*, 89 AD3d 990 [2d Dept. 2011]) or where a defendant willfully participates in discovery (*Prappas v. Papadatos*, 38 AD3d 871 [2d Dept. 2007]). Extreme conduct is required before the imposition of the ultimate penalty of striking the answer for failure to comply with a discovery order (*Pezhman v. Department of Education of the City of New York*, 95 AD3d 625 [1st Dept. 2012]). Thus an answer will be stricken where a party exhibits a pattern of partial compliance with disclosure demands, complying only after being directed by court order, delaying completion of discovery over a period

of years (*United States Fire Insurance Company v. J.R. Greene, Inc*., 272 AD2d 148 [1st. Dept. 2000]) or where a party fails to respond in a meaningful manner to various court orders and or demands for discovery (*Cavota v. Perini Corporation*, 31 AD3d 362 [2d Dept. 2006]).

Here, no aspect of American Dental's defense of this action can be considered willful or contumacious. To be sure, there is no evidence that American Dental has acted in bad faith, nor can such conduct be inferred. Moreover, the procedural history cited by this court reveals American Dental's attempts at compliance with the directives of this court in good faith. Under such a circumstance, the striking of American Dental's answer is unwarranted. Moreover, a separate order directing that discovery be provided while the court's *in camera* inspection is pending is injudicious. As such, plaintiffs' motion is denied in its entirety. The court, however, does not find American Dental or plaintiffs' conduct worthy of sanction, and therefore denies that branch of the parties' respective motions.

Based on the foregoing, it is hereby

ORDERED that American Dental's motion is granted to the extent that plaintiffs' subpoenas are quashed and a protective order is issued with respect to Dr. Hirschhorn's deposition, the employment records referenced, plaintiffs' demand for insurance documents, and plaintiffs' demand for documents relevant to the sale of American Dental that are the subject of this court's ongoing *in camera* inspection; and it is further

ORDERED that plaintiffs' separate application to compel or otherwise strike American Dental's answer is denied in its entirety; and it is further

ORDERED that the parties are directed to conduct the previously ordered non-party deposition of Carlos Luna within 60-days of this court's decision and order; and it is further

ORDERED that American Dental's application for costs and sanctions against plaintiffs is denied; and it is further

ORDERED that plaintiffs' application for sanctions against American Dental is likewise denied; and it is further

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 7, 2020

George J. Silver

GEORGE J. SILVER, J.S.C.