

Mazarakis v Caremount Med. P.C.
2020 NY Slip Op 34944(U)
October 30, 2020
Supreme Court, Westchester County
Docket Number: Index No. 68955/2018
Judge: Joan B. Lefkowitz
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
YERASIMOS MAZARAKIS and KELLY
MAZARAKIS,

Plaintiffs,

DECISION & ORDER

Index No. 68955/2018

Seq. No. 2

-against-

CAREMOUNT MEDICAL P.C., DANA L. MURPHY,
M.D., JEFFREY S. POWELL, M.D. AND
BENJAMIN A. SPENCER, M.D.,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiffs pursuant to CPLR 3101(a)(1), CPLR 3124 and CPLR 3126 seeking to compel defendants to comply with items (1) and (2) of plaintiffs' Notice for Discovery and Inspection dated April 27, 2020 (the "discovery demand") and for such other and further relief as the Court deems just and proper:

Order to Show Cause; Affirmation in Support; Exhibits 1-3
Affirmation of Good Faith
Affirmation in Opposition
Reply Affirmation
NYSCEF File

Upon the foregoing papers, this motion is determined as follows:

Facts and Procedural History

Plaintiff Yerasimos Mazarakis ("Mr. Mazarakis") commenced this medical malpractice action by filing a summons and verified complaint on November 13, 2018 (NYSCEF Doc. 1). Among plaintiffs' allegations is that defendants were negligent in their failure to order PSA testing, to assure that the PSA testing was performed, and their failure to diagnose Mr. Mazarakis's prostate cancer. Kelly Mazarakis, asserts a derivative claim as Mr. Mazarakis's wife. Defendants served their verified answer on or about December 10, 2018 (NYSCEF Doc. 6).

Defendant Benjamin A. Spencer, M.D. ("Dr. Spencer") was deposed on January 10,

2020. During his deposition Dr. Spencer stated that he had previously testified as a defendant in two separate lawsuits. He stated that one case occurred in Massachusetts and went to trial approximately in the year 2000 and the other case occurred in New York but was “dropped” after the deposition but prior to trial, on or about 2018 (Dr. Spencer’s Deposition Transcript, pp. 13-15) (Exhibit 3). Dr. Spencer was unable to provide the names of the plaintiffs or of the attorneys or law firms which represented him in either lawsuit.

On or about April 27, 2020, plaintiffs served the discovery demand seeking:

- “1. The names of the actions, attorneys for the parties, parties and courts in which the cases were pending that were referred to by Dr. Spencer in his deposition at transcript pages 14-15.
2. Transcripts of the testimony given by Dr. Spencer in the two cases identified by Dr. Spencer in his deposition at transcript pages 14-15.” (Exhibit 1)

On or about August 21, 2020, defendants objected to demands 1 and 2 on the grounds that they were “[p]atently irrelevant and beyond the scope of discovery.” (Exhibit 2)

When the parties were unable to resolve the issue, plaintiffs were provided a discovery motion briefing schedule for the present motion (NYSCEF Doc. #55).

Contentions by the Parties

Plaintiffs contend that the information they seek is relevant to their claims or may lead to the discovery of relevant evidence to be used either on plaintiffs’ direct case or in cross-examination of Dr. Spencer’s credibility. Plaintiffs state that based on Dr. Spencer’s inability to recall the names of the plaintiffs or the attorneys in the prior actions plaintiffs are unable to obtain the deposition and trial transcripts without this disclosure. Plaintiffs contend that it is common practice to use prior deposition or trial testimony of defendant physicians in a medical malpractice case and that there is no better evidence to attack defendant’s credibility than that of inconsistent prior testimony.

In opposition, defendants contend that Dr. Spencer was not asked about the nature of the allegations of those prior lawsuits at his deposition and as a result there is no reason to believe the transcripts of those unrelated proceedings contain relevant information. Additionally, defendants argue that the claim against Dr. Spencer, who they contend is a peripheral defendant in this case, involve a very narrow claim related to his alleged failure to order and ensure that plaintiff underwent PSA testing which was ordered by co-defendant Dr. Dana Murphy. Defendants argue that Dr. Spencer’s treatment of plaintiff does not relate to the primary claims in the case. Defendants also argue that the cases cited by plaintiffs are inapplicable to the instant matter. Lastly, defendants contend that they are not in possession of either transcript or any further information regarding transcripts from either case.

Analysis:

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Although “sweeping demands” for all transcripts of deposition testimony of the defendant doctors in prior actions are inappropriate (*Sonsini v. Memorial Hosp, for Cancer and Diseases*, 262 AD2d 185, 186 [1st Dept 1999]), targeted, relevant requests for materials from prior actions have been granted (*see Davis v. Solondz*, 122 AD2d 401 [3rd Dept 1986]; *Zarate v. Mount Sinai Hosp.*, 142 Misc2d 426 [Sup Ct, New York County 1989]).”

In the present action, plaintiffs have failed to demonstrate the relevancy of Dr. Spencer’s testimony from the prior actions to plaintiffs’ claims in the present action. Despite plaintiffs’ contentions that Dr. Spencer’s prior testimony may be relevant to plaintiffs’ claims herein or for impeachment purposes plaintiffs have failed to explain in what manner the prior testimony would be helpful or relevant. Moreover, at Dr. Spencer’s deposition plaintiffs failed to ascertain the nature of the prior proceedings or the claims propounded herein. Notably, it has not been established that the prior cases included claims of medical malpractice. Accordingly, upon the record before the Court, plaintiffs have failed to establish that the transcripts from the prior proceedings are material and necessary to their case (*see Davis v. Solondz*, 122 AD2d 401 [3d Dept 1986]).

In view of the foregoing, it is

ORDERED that plaintiffs’ motion is denied in its entirety: and it is further

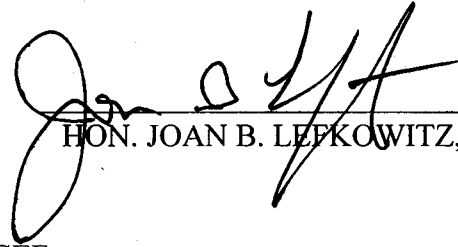
ORDERED that the parties are directed to appear by Microsoft Teams for the previously scheduled virtual conference before Chief Court Attorney Diane Clerkin on December 9, 2020 at 10:00 a.m. or as the Court may otherwise direct in accordance with the Virtual Courtroom

Protocol implemented in the Ninth Judicial District; and it is further,

ORDERED that defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiffs within five days of entry. Proof of such service shall be filed to NYSCEF on or before November 16, 2020.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
October 30, 2020



HON. JOAN B. LEFKOWITZ, J.S.C.

To: Service upon all counsel via NYSCEF

CC: Compliance Part Clerk