

Del Priore v Bronson
2021 NY Slip Op 31485(U)
April 23, 2021
Supreme Court, New York County
Docket Number: 805226/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY **PART** **IAS MOTION 56EFM**

Justice

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JOAN DEL PRIORE,

INDEX NO. 805226/2017

Plaintiff,

MOTION DATE 04/07/2021

- V -

MOTION SEQ. NO. 002

MICHAEL J. BRONSON, M.D., and MOUNT SINAI HOSPITAL,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, and 57 (Motion 002)

were read on this motion to/for VACATE NOTE OF ISSUE/COMPEL DISCOVERY .

In this action to recover damages for medical malpractice, the defendants move pursuant to 22 NYCRR 202.21 to vacate the note of issue and certificate of readiness, and thereupon pursuant to CPLR 3124 to compel the plaintiff, Joan Del Priore, to provide certain medical authorizations, supplement her bills of particulars, and submit to an independent medical exam (IME). In the alternative, the defendants move to compel the plaintiff to respond to all outstanding discovery demand and submit to an IME at least sixty days prior to the date of trial. The defendants also seek to compel the plaintiff to provide them with a letter from her husband's physician concerning his capacity to testify at a deposition or at trial. The plaintiff opposes the defendants' request to vacate the note of issue, but agrees to provide any outstanding authorizations and allow the defendants to conduct an IME while the action remains on the trial calendar. However, the plaintiff opposes, as redundant, the defendants' request to compel her to supplement her bills of particulars, and opposes their request to compel her to provide a physician's letter regarding her husband's capacity to testify at a deposition or at trial.

The defendants' motion is granted only to the extent of directing the plaintiff to supplement her bill of particulars and provide the four outstanding authorizations on or before May 26, 2021, and to submit to an IME on or before July 28, 2021. The defendants must provide the IME report to plaintiff on or before September 15, 2021. All other requests for relief are denied, and the action shall remain on the trial calendar while this limited discovery is conducted.

On November 1, 2016, the defendant Michael Bronson, M.D., performed a right total hip replacement on the plaintiff at Mount Sinai Roosevelt Hospital (Mount Sinai). The plaintiff alleges that she suffers from a leg-length discrepancy as a result of this surgery. The plaintiff commenced this action on June 12, 2017. Justice Martin Shulman conducted a preliminary conference on January 30, 2018, followed by 12 subsequent discovery conferences. At the last status conference, conducted on on March 3, 2020, Justice Shulman ordered, in relevant part, that the plaintiff must respond to the defendants' December 20, 2018 demand for authorizations by March 23, 2020, supplement her bill of particulars as to defendant Mt. Sinai's demands 9, 10, 12, 13, 15, 18, and 20 by April 2, 2020, supplement her bill of particulars as to Bronson's demands 9, 10, 12, 15, 16, 17 by April 2, 2020, and provide a "physician's letter regarding Thomas Del Priore's capacity to testify" by April 2, 2020. The directive to provide such a physician's letter was carried over from status conference orders dated September 3, 2019, October 29, 2019, and January 7, 2020. The status conference order indicated that the defendants reserved their rights to conduct an IME.

On March 17, 2020, the court was closed due to the COVID-19 pandemic. On March 22, 2020, the courts suspended filings in all actions. On May 2, 2020, the Chief Administrative Judge of the New York State Courts issued Administrative Order 88/20, providing that New York courts "shall not order or compel, for a deposition or other litigation discovery, the personal attendance of physicians or other medical personnel . . . who perform services at a hospital or other medical facility that is active in the treatment of COVID-19 patients." The Administrative

Order also provided that “parties are encouraged to pursue discovery in cooperative fashion to the fullest extent possible.” Electronic filings were resumed on May 5, 2020, and in-person filings in connection with non-electronically filed actions were resumed on June 10, 2020. On that same date, the Supreme Court, New York County, reopened for justices and judicial staff. On June 22, 2020, Administrative Order 88/20 was rescinded, although the Chief Administrative Judge continued to urge parties “to pursue discovery in a cooperative fashion and to employ remote technology in discovery wherever possible.”

On December 21, 2020, the plaintiff filed the note of issue, certificate of readiness for trial, and affirmation of compliance. In support of their motion, the defendants argue that a material fact alleged in the note of issue was incorrect. Specifically, they assert that the note of issue certifies that “Physical Examinations” were completed, whereas the plaintiff admits in her affirmation in opposition to this motion that physical examinations had not been conducted. In addition, the defendants argue that they never received the supplemental bill of particulars as to either defendant, as required by the March 3, 2020 status conference order, the four outstanding authorizations permitting them to obtain the records of Avigayl Gordon, Robert Griswold, Kiran Patel, and Daniel Megna, as set forth in their December 20, 2018 demand, or the physician’s letter regarding Thomas Del Priore’s capacity to testify.

In its discretion, a court may allow post-note of issue discovery without vacating the note of issue, as long as neither party would be prejudiced (*see Cuprill v Citywide Towing & Auto Repair Servs.*, 149 AD3d 442 [1st Dept 2017]; *see also WVH Hous. Dev. Fund. Corp. v Brooklyn Insulation & Soundproofing, Inc.*, ____AD3d____, 2021 NY Slip Op 02664 [1st Dept, April 13, 2021]). In accordance with CPLR 3121, defendants have a right to conduct an independent medical examination of a plaintiff where, as here, the physical condition of the plaintiff is in question. The parties to this action have substantially completed discovery, and ordering outstanding discovery to be completed while the case remains on the trial calendar will not prejudice the rights of either party. The remaining discovery can be completed within a

reasonable time frame, as permitted by this court, and this case will likely remain on the trial calendar for at least 18 to 24 months after the parties complete the remaining discovery in any event. The vacatur of the note of issue would only further delay the resolution of this action.

As per Justice Shulman's March 3, 2020 status conference order, the plaintiff was ordered to supplement her bill of particulars as to Mount Sinai's demand numbers 9, 10, 12, 13, 15, 18 and 20. She was also ordered to supplement her bill of particulars as to Bronson's demand numbers 9, 10, 12, 15, 16 and 17. Since these items of discovery remains outstanding, the plaintiff must supplement her bill of particulars as to these demands on or before May 26, 2021. The court rejects the plaintiff's contention that the supplementation of her bills of particulars as to these items would somehow be "redundant."

Also in accordance with Justice Shulman's March 3, 2020 status conference order, as well as the defendants' attorney's affirmation, four authorizations responsive to their December 20, 2018 demand remain outstanding---those permitting them to obtain the records of Avigayl Gordon, Robert Griswold, Kiran Patel, and Daniel Megna. The plaintiff thus must provide the defendants with these authorizations on or before May 26, 2021.

As set forth in the March 3, 2020 status conference order, the defendants reserved the right to conduct an IME. Hence, contrary to the plaintiff's suggestion, they did not waive the right to conduct it. In any event, the plaintiff does not oppose their request that she now submit to an IME. Therefore, the defendants must complete the IME on or before July 28, 2021 and, once the IME is completed, the defendants must provide the IME report to plaintiff on or before September 15, 2021.

In the March 3, 2020 status conference order, as well as in the three discovery orders issued prior to that one, Justice Shulman directed the plaintiff to produce a physician's letter describing any of Thomas Del Priore's cognitive impairments that would prevent him from testifying at trial or at a deposition. In issuing the prior status conference orders, however, the court may have misunderstood whether the plaintiff's husband was a party to this action. At the

time that this directive was issued, Thomas Del Priore was neither a party to the action nor under subpoena, so any directive to provide a statement from his doctor that he should not be deposed or called to testify would have been premature. It is well settled that a party cannot be compelled to produce a nonparty witness for a deposition where the nonparty is outside of the party's control (see *Holloway v Cha Cha Laundry*, 97 AD2d 385, 386 [1st Dept 1983]). Nor can one party to litigation be compelled to produce the medical records of a nonparty in the absence of an appropriately executed authorization under the Health Insurance Portability and Accountability Act of 1996 (Pub L 104-191, 110 U.S. Stat 1936; hereinafter HIPAA) (see *Liew v New York Univ. Med. Ctr.*, 55 AD3d 566 [2d Dept 2008]). Since the plaintiff's attorney cannot secure the medical records of or a medical report on behalf of a nonparty absent a properly served subpoena (see CPLR 3106[b]; 3111) and a properly executed HIPAA-compliant authorization, the plaintiff cannot be compelled to comply with such a directive.

Normally, a motion to modify a court-ordered discovery directive would require a formal motion or cross motion pursuant to CPLR 5015(a). Nonetheless, a court may, in its discretion, deem papers submitted in opposition to a motion to include an informal cross application for relief where, as here, the substance of the informal request is clearly stated and directly arises from the arguments made in opposition to the movant's request for relief (see *Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2d Dept 2013]). Thus, the court deems the plaintiff's opposition papers to include an informal cross application to modify the September 3, 2019, October 29, 2019, January 7, 2020, and March 3, 2020 status conference orders so as to delete the provision directing her to produce a physician's letter addressing her husband's cognitive condition.

Moreover, although a motion to modify a prior order generally is required to be entertained by the justice who issued it, Justice Shulman is currently "unable to hear" (CPLR 2221[a]) the plaintiff's application to modify the March 3, 2020 status conference order, inasmuch as he now sits on the Appellate Division, First Department (see generally *Pavlick v*

Trustees of Columbia Univ. in City of N.Y., 2008 NY Slip Op 30126[U] [Sup Ct, N.Y. County, Jan 3, 2008]). In any event, CPLR 2221(b) establishes an exception to that general rule where the Rules of the Chief Administrator of the Courts provide otherwise. Those Rules currently provide that “[a]ll motions,” including those governed by CPLR 2221, “shall be returnable before the assigned judge” (22 NYCRR 202.8[a]). Thus, “[b]y the adoption of the [Individual] A[ssignment] S[ystem], the CPLR 2221 requirement of referral of motions to a Judge who granted an order on a prior motion has been modified to provide for consistency with the mandate of the [IAS] that all motions in a case shall be addressed to the assigned Judge” (*Matter of New York State Urban Dev. Corp. [Fallsite, LLC]*, 85 AD3d 1723, 1724 [4th Dept 2011]; see *Matter of Quattrone v Erie 2-Chautauqua-Cattaraugus Bd. of Coop. Educ. Servs.*, 148 AD3d 1553, 1554 [4th Dept 2017]; *Billings v Berkshire Mut. Ins., Co.*, 133 AD2d 919, 919-920 [3d Dept 1987]).

Therefore, this court has the authority to entertain the plaintiff’s informal cross application, and thereupon grants the cross application and modifies the September 3, 2019, October 29, 2019, January 7, 2020, and March 3, 2020 status conferences order by deleting the provisions therein directing her to provide a physician’s note addressing Thomas Del Priore’s cognitive condition.

Although this case will remain on the trial calendar, the court will give the defendants an opportunity to subpoena Thomas Del Priore on or before July 28, 2021. At that point, he may raise his cognitive condition as a basis for objecting to the subpoena. Should that objection be raised, or should the defendants wish to compel him to provide a physician’s letter or affirmation at that juncture, the court will schedule and convene a status conference so as to avoid the need to consider a motion for a protective order quashing such a subpoena or a motion to compel compliance with the subpoena.

Accordingly, it is

ORDERED that the defendants’ motion is granted to the extent that, while the action remains on the trial calendar,

- (a) on or before May 26, 2021, the plaintiff shall supplement her bill of particulars as to the defendant Mount Sinai Hospital's demand numbers 9, 10, 12, 13, 15, 18, and 20;
- (b) on or before May 26, 2021, the plaintiff shall supplement her bill of particulars as to defendant Michael J. Bronson, M.D.'s, demand numbers 9, 10, 12, 15, 16, and 17;
- (c) on or before May 26, 2021, the plaintiff shall provide the defendants with authorizations permitting them to obtain medical records related to her treatment with Avigayl Gordon, Robert Griswold, Kiran Patel, and Daniel Megna;
- (d) on or before July 28, 2021, the defendants shall schedule, and the plaintiff shall submit to, an independent medical examination;
- (e) on or before September 15, 2021, the defendants shall provide the independent medical examination report to the plaintiff;
- (f) on or before July 28, 2021, should the defendants be so advised, they may serve a nonparty deposition subpoena ad testificandum upon Thomas Del Priore,

and the motion is otherwise denied; and it is further,

ORDERED that the plaintiff's cross application to modify the September 3, 2019, October 29, 2019, January 7, 2020, and March 3, 2020 status conference orders by deleting the provisions therein directing her to produce a physician's letter or affirmation addressing the cognitive ability of her husband, Thomas Del Priore, to testify at a deposition or at trial is granted, and those provisions are stricken; and it is further,

ORDERED that the parties shall conduct no further discovery in connection with this action


This constitutes the Decision and Order of the court.

4/23/2021
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE



 JOHN J. KELLEY, J.S.C.