Murphy v Metrikin
2021 NY Slip Op 31585(U)
May 5, 2021
Supreme Court, New York County
Docket Number: 805387/2018
Judge: John J. Kelley

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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ANNABELLA MURPHY, as Administrator of the Estate of CHARLES MURPHY, a/k/a CHARLES WILLIAM MURPHY,

Plaintiff,

- v -

AARON METRIKIN, M.D.,

Defendant.

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INDEX NO. 805387/2018

MOTION DATE 02/16/2021

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, and 127 (Motion 005)

were read on this motion to/for COMPEL DISCLOSURE/CROSS MOTION FOR A PROTECTIVE ORDER.

In this action to recover damages for wrongful death and medical malpractice, the plaintiff moves pursuant to CPLR 3124 to compel the defendant to appear and complete his deposition without delay or interruption. The defendant cross-moves pursuant to CPLR 3103 for, among other things, a protective order limiting his continued deposition to one day and to matters not previously covered. The plaintiff opposes the cross motion. The motion and cross motion are granted to the extent that the defendant shall appear for a continued deposition limited to one four-hour day and to unanswered questions, subject to the restrictions set forth herein. The motion and cross motion are otherwise denied.

In a preliminary conference order dated November 26, 2019, the court (Shulman, J.) scheduled the plaintiff's deposition for on or before January 30, 2020, and the defendant's deposition for on or before February 20, 2020. In a subsequent compliance conference order dated February 4, 2020, the court (Shulman, J.) scheduled the continued deposition of the

plaintiff for March 16, 2020, limiting said deposition to one day, and scheduled a new deposition date for the defendant for March 31, 2020.

On March 17, 2020, however, the court was closed down 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 with the court 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 November 9, 2020, the defendant appeared for his deposition, which lasted for five hours and 42 minutes, and included 72 minutes of recess time. On November 18, 2020, the defendant appeared for a second deposition, which lasted for six hours and 2 minutes, and included 107 minutes of recess time. According to the defendant, Justice Shulman thereafter "invited" him to make a motion for a protective order limiting the extent of any further deposition.

The plaintiff made the instant motion on December 14, 2020, asserting that the defendant and his counsel delayed the defendant's deposition by requesting an excessive number of breaks and providing evasive answers. On January 22, 2021, the defendant cross-moved for a protective order limiting his continued deposition to one additional day and to subject matters not previously addressed, contending that the plaintiff "wasted. . . time on

extraneous matters and confusing hypotheticals." The court notes that, on April 6, 2021, it issued an order staying all proceedings in this action until the plaintiff posted security for costs in the amount of $500 within 30 days of the entry of the order. On April 15, 2021, the plaintiff posted the undertaking, thereby causing the stay to be dissolved.

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." This language is "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" (*Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 [1st Dept 2009], quoting *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). The plaintiff alleges that the defendant has delayed his own deposition, inter alia, by contradicting his own testimony, asking for definition of "simple terms," answering questions with questions, and requesting long breaks to review documents. The defendant alleges that the plaintiff has delayed his deposition, inter alia, by repeating areas of questioning, focusing on extraneous matters and confusing hypotheticals, and attempting to rehabilitate the plaintiff's character through his testimony after her "unfavorable deposition."

After examination and review of the documents submitted in connection with the instant motion and cross motion, the court finds merit to both parties' contention that the other has contributed to the delay in completing the defendant's deposition, as set forth herein. Were the court to attempt to recount examples of obstruction and delay engendered by the conduct of both the plaintiff and defendant, it would provide a true and full depiction of the tenor of the defendant's deposition, which is rife with dozens of instances of unnecessary, obstructive behavior on the part of both the attorneys and the deponent. To set forth all such examples would require the court to issue a decision far lengthier than is warranted under the circumstances.

A party does not have a right to unlimited disclosure, and the rules provide that the court may issue a protective order "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" (CPLR 3103[a]; *see County of Suffolk v Long Is. Power Auth.*, 100 AD3d 944, 946 [2d Dept 2012]; *Accent Collections, Inc. v Cappelli Enters.*, Inc., 84 AD3d 1283, 1283 [2d Dept 2011]). Here, the defendant's continued deposition, if permitted to proceed in the same fashion as it has proceeded on prior occasions, is likely to lead to unreasonable annoyance to both parties as well as the court. Limiting this deposition to one additional four-hour session would not deprive the plaintiff of "deposition testimony relevant and necessary for preparation of trial" (*McKay v Khabele*, 46 AD3d 258, 258 [1st Dept 2007], citing *Smukler v 12 Lofts Realty, Inc.*, 178 AD2d 125, 126 [1st Dept 1991]). This conclusion is supported by the recent amendment to the Uniform Rules of the Supreme Court that now limit the deposition of a party deponent to seven hours (*see* 22 NYCRR 202.20-b[a][2]), unless the court permits a longer deposition "for good cause shown" (22 NYCRR 202.20-b[f]). Insofar as the defendant has already been deposed on two separate occasions for a total of 11 hours and 44 minutes, inclusive of almost 3 hours of recess time, the limitation imposed by the court is reasonable in light of the fact that the defendant's deposition began before the rules took effect.

While the court recognizes that questions that merely clarify or narrow an answer to a broader deposition question are perfectly appropriate, it notes that the repetition of already answered questions constitutes an inefficient use of limited deposition time. The court cautions the plaintiff that the continued repetition of questions that have already been answered, or the posing of questions that are unnecessarily prolix or present far-fetched hypothetical situations, may result in the imposition of sanctions, if warranted.

While the court does not reach the issue of whether the defendant's prior deposition conduct warrants the imposition of a sanction at this time, it cautions the defendant that his further refusal directly to answer clearly worded questions may result in the imposition of such a sanction. There would be no prejudice to the defendant in compelling him directly to answer

questions, rather than repeatedly asking for definitions of common words or answering a question with a question. As counsel is aware, the imposition of a monetary sanction may be appropriate where the continued examination of a party

> "was frustrated by counsel's making of extensive 'speaking objections,' which were not based on constitutional rights, privilege, or palpable irrelevance, and by [the party's] repeated refusal to answer clear questions and his ultimate departure from the deposition during the afternoon"

(*O'Neill v Ho*, 28 AD3d 626, 627 [2d Dept 2006]; *see Mora v Saint Vincent's Catholic Med. Ctr.*, 8 Misc 3d 868, 870 [Sup Ct, N.Y. County 2005]; *see also Polidori v Societe Generale Group*, 57 AD3d 369, 369 [1st Dept 2008] [obstreperous conduct at, and premature termination of, client's deposition warrants imposition of sanctions]).

The court further draws the parties' attention to CPLR 3104(a), which provides that

> "Upon the motion of any party or witness on notice to all parties *or on its own initiative without notice,* the court in which an action is pending may by one of its judges or a referee supervise all or part of any disclosure procedure."

(emphasis added). The Supreme Court thus "has the general power under CPLR 3104(a) to appoint a private attorney as Referee without all parties' consent" (*Liu v Liu*, 218 AD2d 532, 532 [1st Dept 1995]). Although CPLR 3104(b) authorizes the court to appoint a judicial hearing officer to oversee the discovery process, and permits the parties to stipulate to the choice of a private referee, "CPLR 3104(b) does not limit court's general power under subdivision [a]" (*id.* at 532). "In view of the hostility and lack of cooperation exhibited by these parties, . . . the appointment of a Referee to supervise further deposition disclosure in this action" may be an "appropriate measure" (*Lowitt v Korelitz*, 152 AD2d 506, 508 [1st Dept 1989]; *see Capoccia v Brognano*, 126 AD2d 323 [3d Dept 1987]). Hence, the court cautions the parties that continuation of the conduct exhibited thus far may compel the court to appoint a referee to attend and supervise the completion of depositions at the cost of one or both parties.

Accordingly, it is

ORDERED that both the plaintiff's motion and the defendant's cross motion are granted to the extent that

(a) the defendant shall appear for his continued deposition, limited to one additional four-hour deposition, exclusive of time spent in recess, on a date mutually agreed upon by all parties, which may be conducted remotely, but no later than June 10, 2021;

(b) the defendant shall not cause unnecessary delays and evade answering reasonably phrased questions;

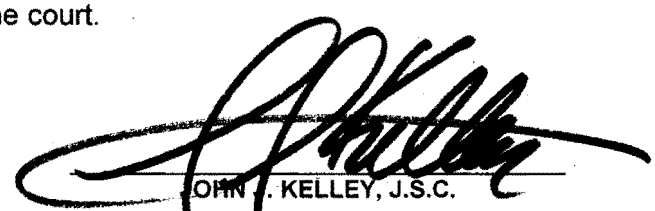
(c) the plaintiff is limited to inquiring about matters not already discussed and shall not repeat questions from previous depositions or repeat questions in the upcoming deposition if they have already been answered by the defendant, unless the defendant requests reasonable clarification of the meaning of a question, and subject to the plaintiff's ability to propound follow-up questions that merely clarify or narrow the subject matter of a prior question; and

(d) either parties' failure to comply with these directives may result in the imposition of sanctions and/or the appointment of a referee to attend and supervise the completion of the defendant's deposition, at the cost of one or both parties.

and both the plaintiff's motion and defendant's cross motion are otherwise denied; and it is further,

ORDERED that the parties shall appear remotely for a status conference on June 24, 2021, at 10:15 a.m., and the court shall send an e-mail invitation to counsel for all parties to participate in said conference via the Microsoft Teams application, at which conference a new note of issue filing deadline will be established.

This constitutes the Decision and Order of the court.



5/5/2021
DATE

JOHN J. KELLEY, J.S.C.

MOTION:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE
CROSS MOTION:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE