

**Moss v Mumford**

2022 NY Slip Op 30382(U)

January 10, 2022

Supreme Court, New York County

Docket Number: Index No. 805392/2017

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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KATHY MOSS, as administrator of the estate of ESTHER MOSS, deceased

Plaintiff,

INDEX NO. 805392/2017

MOTION DATE 11/15/2021

MOTION SEQ. NO. 003

- v -

JAMES MCNEILL MUMFORD, M.D., MOUNT SINAI BETH ISRAEL, BETH ISRAEL MEDICAL CENTER, MOUNT SINAI HEALTH SYSTEM, INC.,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 100, 101, 102, 103, 104, 105, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this motion to/for DISCOVERY/X-MOT FOR PROTECTIVE ORDER .

In this action to recover damages for medical malpractice and wrongful death, the plaintiff moves pursuant to CPLR 3124 to compel the defendants Beth Israel Medical Center (BIMC) and Mount Sinai Health System, Inc. (MSHS), to comply with this court's February 11, 2021 order, in which the court directed those defendants to produce a witness for a deposition on or before April 29, 2021 and to produce certain documents on or before April 15, 2021. BIMC and MSHS oppose the motion. BIMC and MSHS cross-move pursuant to CPLR 3103 for a protective order prohibiting the plaintiff from conducting the deposition of Barbara J. Barnett, M.D., as their witness. The motion is granted and the cross motion is denied. On or before February 28, 2021, BIMC and MSHS shall produce Barbara J. Barnett, M.D., for a deposition, and shall provide the plaintiff with unredacted documents in connection with all of those items of discovery previously directed to be produced, including those documents that remain outstanding. The failure of BIMC and MSHS to comply with this order shall result, upon the

plaintiff's motion, in the issuance of an order precluding them from adducing evidence in support of their defenses at trial.

In its February 11, 2021 order, the court, among other things, granted the plaintiff's motion to compel BIMC and MSHS to produce a witness for a deposition, fixing the outside date for that deposition for April 29, 2021. The order directed the plaintiff to designate such a witness on or before March 31, 2021. The order explained that

“[t]he court rejects BIMC/MSHS's contention that it can simply ignore the scheduling of depositions where the deposition deadline dates set forth in two prior court-ordered schedules have lapsed. The court also agrees with the plaintiff that BIMC/MSHS's must fully respond to her request for relevant agreements between BIMC/MSHS and IFH, records of invoices, bills, and payment memoranda exchanged between BIMC/MSHS and IFH, bills submitted by or on behalf of [the defendant James McNeill] Mumford, and documents reflecting the relationship between BIMC and MSHS.”

In addition, the order expressly directed that,

“on or before April 15, 2021, the defendants Beth Israel Medical Center/Mount Sinai Health System, Inc., shall *fully* respond to so much of the plaintiff's March 29, 2018 notice for discovery and inspection as requested them to produce relevant agreements between Beth Israel Medical Center/Mount Sinai Health System, Inc., and the Institute for Family Health that were in effect between October 1, 2015 and November 30 2015; records of invoices, bills, and payment memoranda exchanged between Beth Israel Medical Center/Mount Sinai Health System, Inc., and the Institute for Family Health in connection with the plaintiff's decedent's treatment between October 1, 2015 and November 30, 2015; bills submitted by or on behalf of James McNeill Mumford by Beth Israel Medical Center/Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015 in connection with the plaintiff's decedent's treatment; and documents reflecting the relationship between Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015”

(emphasis added).

On April 19, 2021, approximately three weeks after the date fixed by the court for designating a deposition witness to appear on behalf of BIMC and MSHS, the plaintiff noticed Dr. Barnett's deposition to be conducted on June 2, 2021. Notwithstanding this short delay in identifying Dr. Barnett as the appropriate witness, BIMC and MSHS unilaterally “rejected” the notice by letter dated April 27, 2021, contending that the plaintiff was only seeking Dr. Barnett's

deposition for the improper purpose of questioning her about the credentialing of Dr. Mumford, and that she was not involved in the medical treatment rendered to the plaintiff's decedent. The plaintiff thus established that BIMC and MSHS have yet to produce a witness for a deposition.

In addition, the plaintiff has established that BIMC and MSHS have yet to respond to her March 12, 2019 demand for the identification of an individual who made a particular entry into the decedent's hospital chart. Moreover, in response to the court's directive "fully" to produce various contracts, BIMC and MSHS provided the plaintiff with redacted versions. The plaintiff further notes that, while BIMC and MSHS produced a certified copy of her decedent's hospital bill, they failed to produce records of "invoices, bills, and payment memoranda *exchanged between Beth Israel Medical Center/Mount Sinai Health System, Inc., and the Institute for Family Health* in connection with the plaintiff's decedent's treatment between October 1, 2015 and November 30, 2015," as set forth in the court's February 11, 2021 order, or an affidavit describing a search for such records and whether that search yielded any results. The plaintiff also has shown that BIMC and MSHS failed to address the provision of that order directing them to produce "documents reflecting the relationship between Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015."

Prior to submitting this motion, the plaintiff's attorney established that he complied with the provisions of 22 NYCRR 202.20-f(b) by describing the several telephonic conferences he had with counsel for BIMC and MSHS in a good-faith attempt to resolve the discovery dispute presented here.

In an affidavit submitted in opposition to the plaintiff's motion, and in support of the cross motion, Dr. Barnett averred that

"[i]t is my understanding that my deposition is being sought in connection with a meeting with the Moss family which ostensibly took place on February 2, 2017. By virtue of an attendance sheet maintained by my office, it does indeed appear that I participated in such a meeting. After a thorough search of our files, there are no other documents, minutes, notes or recordings in the possession of Beth Israel Medical Center regarding that meeting.

"I have no independent recollection of the patient or the care rendered to her at Beth Israel Medical Center. I did not and would not participate in her inpatient care in any capacity.

"I have no independent recollection of the Moss family. Additionally, I have no independent recollection of meeting with the Moss family."

Contrary to the contention of BIMC and MSHS, this affidavit is insufficient to prevent the plaintiff from conducting Dr. Barnett's deposition. The plaintiff need not prove, at this juncture, that Dr. Barnett in fact has any relevant information in connection with those issues, as "that is the purpose of a deposition" (*Verdi v Dinowitz*, 2018 NY Slip Op 32544[U], \*5, 2018 NY Misc LEXIS 4487, \*6 [Sup Ct, N.Y. County, Oct. 9, 2018]). While the underlying purpose of a deposition is to elicit testimony that is material and necessary to the prosecution or defense of a claim,

"there are other purposes to conducting the deposition of a witness in person, including obtaining more detailed answers, assessing the strength of the witness, evaluating her credibility, and impeaching the witness at trial"

(*DiMauro v United LLC*, 2014 NY Slip Op 33333[U], \*3, 2014 NY Misc LEXIS 5602, \*6 [Sup Ct, Westchester County, Apr. 28, 2014]). Hence, there is no basis for prohibiting the plaintiff from conducting a deposition of Dr. Barnett. The court further notes that Dr. Barnett did not describe the particulars of the search that she undertook, or was undertaken on her behalf, for relevant documents, asserting in a conclusory fashion that the search was "thorough." BIMC and MSHS correctly argue, however, that the plaintiff may not inquire of Dr. Barnett as to any issue concerning the credentialing of Dr. Mumford. Hence, the plaintiff may not employ Dr. Barnett's deposition to probe into the credentialing process.

BIMC and MSHS can point to no privilege permitting them to redact provisions in the contracts that they did produce, and have provided no explanation for why they have yet to comply with the other provisions of this court's February 11, 2021 order.

Accordingly, it is

ORDERED that the plaintiff's motion to compel disclosure from the defendants Beth Israel Medical Center and Mount Sinai Health System, Inc., in full compliance with this court's February 11, 2021 order is granted; and it is further,

ORDERED that the cross motion of the defendants Beth Israel Medical Center and Mount Sinai Health System, Inc., for a protective order is denied; and it is further,

ORDERED that, on or before February 28, 2022, the defendants Beth Israel Medical Center and Mount Sinai Health System, Inc., shall

- (a) produce Barbara J. Barnett, M.D., for a deposition, which shall be conducted remotely, unless all parties stipulate otherwise, provided, however, that the deposition shall not inquire into the credentialing process or the credentialing of James McNeill Mumford, M.D., and
- (b) provide the plaintiff with the full name, address, and cell phone number (if no longer employed) of the individual described in the plaintiff's March 12, 2019 demand for discovery and inspection, and
- (c) produce an unredacted version of the agreement between the defendant Beth Israel Medical Center and Institute for Family Health, and
- (d) produce records of invoices, bills, and payment memoranda exchanged *between Beth Israel Medical Center/Mount Sinai Health System, Inc., and the Institute for Family Health* in connection with the plaintiff's decedent's treatment between October 1, 2015 and November 30, 2015, or provide an affidavit from a person with knowledge attesting that a search was conducted for such records that details the particulars of the search, and explaining that, after that search, no such records could be located, and
- (e) produce documents reflecting the relationship between Beth Israel Medical Center and Mount Sinai Health System, Inc., between October 1, 2015 and November 30, 2015; and it is further,

ORDERED that the failure of the defendants Beth Israel Medical Center and/or Mount Sinai Health System, Inc., to comply with these directives, shall, upon the plaintiff's motion, result in the issuance of an order precluding those defendants from adducing evidence in support of their defenses at trial; and it is further,

ORDERED that the plaintiff may designate any additional witness for the deposition of an institutional defendant not later than 30 days after the completion of the deposition of

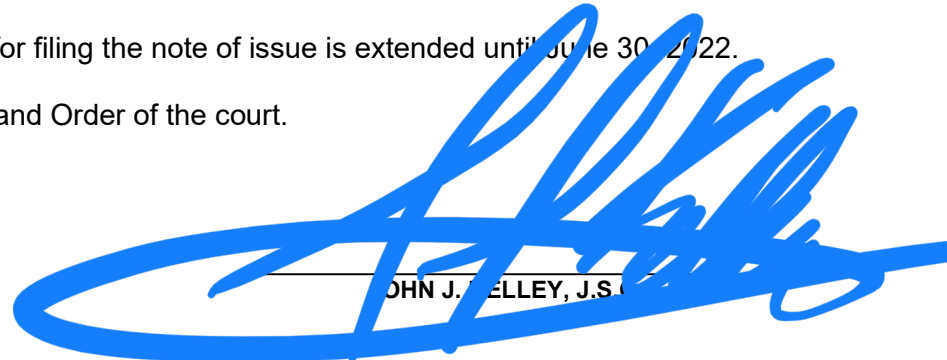
Barbara J. Barnett, M.D., and the deposition of any further witness on behalf of an institutional defendant shall be conducted on or before April 29, 2022; and it is further,

ORDERED that any nonparty depositions shall be conducted on or before May 31, 2022; and it is further,

ORDERED that the deadline for filing the note of issue is extended until June 30, 2022.

This constitutes the Decision and Order of the court.

01/10/2022  
DATE

  
JOHN J. FELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
CROSS MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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