

Geron v Haber

2022 NY Slip Op 30705(U)

March 1, 2022

Supreme Court, New York County

Docket Number: Index No. 800432/2011

Judge: Sabrina Kraus

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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. SABRINA KRAUS PART 57TR

Justice

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INDEX NO. 800432/2011

YONN GERON, AS CHAPTER 7 BANKRUPTCY TRUSTEE
OF THE ESTATE OF IONA FREEMAN,

MOTION DATE 3/1/2022

Plaintiff,

MOTION SEQ. NO. 017

- v -

GREGORY HABER, DAVID ROBBINS, CHRISTOPHER
GOSTOUT, LENOX HILL HOSPITAL,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 017) 51, 52, 53, 54, 55,
56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 87, 88, 89

were read on this motion to/for QUASH SUBPOENA & FOR A PROTECTIVE

Upon the foregoing documents, the motion to quash and vacate plaintiff's Judicial
Subpoena served on Lenox Hill Hospital as to Dr. Jill Kalman and the motion for a protective
order are granted. 1

This action involves the then 58-year old plaintiff, Iona Freeman, who underwent a
colonoscopy/polypectomy on December 18, 2009 at Lenox Hill Hospital (Hospital). Plaintiff
claims, inter alia, lack of informed consent for the procedure, that the procedure was performed
improperly, and that she suffered from a perforated ascending colon, which required additional
treatment.

Plaintiff commenced her medical malpractice action in 2011 and since then the parties
have litigated this case, completing pre-trial discovery, including, but not limited to, the

1 The motion is noticed to be heard on March 4th, 2022. However, the motion is an in limine motion for a trial
scheduled to commence on March 2, 2022. In accordance with this court's previous directives pertaining to in
limine motions, no reply is accepted, and the matter is full briefed and accelerated for determination prior to the
commencement of trial.

exchange of medical records and depositions of multiple witnesses. On April 29, 2019, plaintiff filed a Note of Issue and Certificate of Readiness, certifying the completion of discovery. Thereafter, the parties engaged in significant motion practice for summary judgment, which resulted in the dismissal of several of plaintiff's claims, but also the denial of defendants' motions.

A jury has been selected and opening arguments will start tomorrow.

On or about January 21, 2022, plaintiff served a Judicial Subpoena on the Hospital, which directs Jill Kalman, M.D., to appear for trial on March 7, 2022, and produce records and "all other reports and writings" in her possession.

Plaintiff states in her opposition papers that the portion of the subpoena directing Dr. Kalman to produce and documents is withdrawn, and that only Dr. Kalman's testimony is sought. Plaintiff has noticed Dr. Kalman for a deposition during discovery, defense counsel objected and advised that Dr. Kalman was the Associate Director of Cardiovascular Medicine at the Hospital and did not have any knowledge of plaintiff's treatment and/or the Hospital's policies and procedures relative to plaintiff's polypectomy in the endoscopy unit.

On October 31, 2017, the court only ordered the Hospital to produce RN Zenaida Orfanel as its witness for deposition. Subsequently, plaintiff did not pursue the deposition of Dr. Kalman and agreed to the deposition of RN Orfanel.

On December 23, 2019, the parties appeared before Judge Eileen A. Rakower for oral argument on defendants' respective motions for summary judgment (Exhibit M). Consistent with the foregoing procedural history of this case, defense counsel and plaintiff's counsel never mentioned, discussed, or referenced Dr. Kalman.

Judge Rakower issued various verbal directives, including limited plaintiff's case against the Hospital to plaintiff's cause of action for lack of informed consent.

Dr. Kalman submits an affidavit and states that she was never employed by the Hospital during the treatment at issue in 2009 and, instead, she was the Director of the Cardiomyopathy Program and Medical Director of the PACT Program for Mount Sinai Health Systems during plaintiff's care. Dr. Kalman further states that she never interacted or communicated with plaintiff, rendered treatment to plaintiff, or directly/indirectly supervised her care on an administrative basis. Dr. Kalman has no professional or personal knowledge of plaintiff, the Hospital's policies and procedures relative to her care, or the instant action against the Hospital and the co-defendants.

Defendant does not disagree with these facts but alleges that sometime subsequent to the procedure at issue, Dr. Kalman served as the executive director of the Hospital and therefore plaintiff assumes Dr. Kalman "should have" had knowledge about policies and procedures in place prior to her tenure.

Subpoenas may not be used as tools of harassment or for the proverbial "fishing expedition" to ascertain the existence of evidence. *See, People v. Gissendanner*, 48 N.Y.2d 543 (1979); *Oak Beach Inn Corp. v. Town of Babylon*, 239 A.D.2d 568 (2nd Dept. 1997); *See also, United States v. Gel Spice Co.*, 601 F. Supp. 1214, 1225- 1226 (E.D.N.Y. 1985).

Plaintiff long ago waived the right to depose Dr. Kalman based on the history of discovery in this action which has been pending since 2011. The factual and procedural history of this action, as well as the Affidavit of Dr. Kalman, establish that her testimony has no bearing or relation to plaintiff and/or the treatment at issue.

Based on the foregoing, the motion is granted in its entirety and the subpoena is quashed and vacated.

Wherefore it is hereby

ORDERED that the motion of Lenox Hill Hospital to quash or modify a subpoena returnable in this court, served upon Jill Kalman, MD it on January 21, 2022, is granted to the extent that the movant need not, and shall not, produce the witness; and it is further

ORDERED that plaintiff withdrew its request for the production of any documents and therefore no such documents need be produced; and it is further

ORDERED that, within 20 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/1/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: