

Meckes v Choudhri

2022 NY Slip Op 33418(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 805094/2018

Judge: Kathy J. King

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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. KATHY J. KING PART 06

Justice

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DAVID MECKES, LISA MECKES,

Plaintiff,

- v -

TANVIR CHOUDHRI, THE ICAHN SCHOOL OF MEDICINE
AT MOUNT SINAI, THE MOUNT SINAI HOSPITAL

Defendant.

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INDEX NO. 805094/2018

MOTION DATE 05/03/2022

MOTION SEQ. NO. 005

**DECISION AND ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

Upon the foregoing papers, defendants move for an Order 1) vacating the Note of Issue and Certificate of Readiness pursuant to 22 NYCRR §202.21 (e) upon the grounds that discovery is not complete and this matter is not ready for trial; or in the alternative, 2) providing a schedule for the completion of outstanding discovery and granting an extension of time to serve a motion for summary judgment until 120 days after completion of discovery, and for an order permitting the defendants to inquire, at a further deposition of plaintiff, Dr. David Meckes (“Meckes”), concerning various phone calls made relating to the care and treatment at issue . Plaintiffs submit opposition to the requested relief.

Plaintiffs in the underlying action allege that the defendants were negligent in failing to properly perform lower back surgery on plaintiff, which resulted in unnecessary damage to the spine, spinal cord and associated nerves and nerve roots. Plaintiffs also allege that the defendants were negligent in failing to respond to the plaintiffs’ numerous phone calls made to the office and

cell phone of defendant Dr. Tanvir Choudhri (“Choudhri”). At the time of the surgery, defendant Choudhri was employed by defendant Icahn School of Medicine at Mount Sinai (“Icahn”) which owns and operates a medical facility. Defendant Mount Sinai Hospital also operates a medical facility and is united in interest with Icahn.

In the within motion, defendants assert that plaintiffs’ Note of Issue and Certificate of Readiness, filed on April 7, 2022, should be vacated because pretrial discovery remains outstanding. A review of the moving papers and opposition thereto, indicate that at issue are certain authorizations and the continued deposition of plaintiff Meckes regarding the nature and scope of various phone calls made throughout his care and treatment as alleged in the complaint. Meckes contends that he appeared for a deposition on January 31, 2022, which was limited in scope to authorizations, medical records and radiology films pursuant to a July 10, 2020 order of the court (J. Silver). Plaintiffs further contends that defendants waived the right to proceed for continued depositions by declining to ask questions at the January 31, 2022 deposition.

CPLR §3101(a) provides for “full disclosure of all matter material and necessary in the prosecution or defense of an action”, and should be “interpreted liberally to require disclosure... [t]he test is one of usefulness and reason” (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99 [1st Dept 2009]). Thus, disclosure should be permitted if the information sought is relevant to the action. (Siegel, NY Prac § 344 [4th ed]). The party seeking disclosure must show 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” (*Abrams v Pecile*, 83 AD3d 527, 528 [1st Dept 2011], quoting *Vyas v Campbell*, 4 AD3d 417 [2d Dept 2004] [internal quotation marks omitted]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]).

In this regard, the Court notes that by order dated January 5, 2021 (J. Silver), the plaintiffs were directed to provide fresh authorizations for the defendants to obtain plaintiffs' Verizon phone records on or before February 12, 2021. In its order, the court reasoned that [the phone records] were highly relevant to the instant litigation, and were likely to lead to discoverable information concerning purported phone calls plaintiffs made to Choudri and Winthrop Hospital, where he presented with a diagnosis of a cerebrospinal fluid leak, and consulted with numerous colleagues regarding said diagnosis during the relevant period. While the deposition of plaintiff Meckes was not memorialized by the court in its order, this Court now expressly determines that plaintiff's continued deposition is material and necessary to the prosecution and defense of the within action, as it is relevant to plaintiffs' negligence cause of action.

Further, the Court finds that defendants have met the criteria set forth in 22 NYCRR § 202.21(e) which provides, in pertinent part that: "[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect." The Court finds that the motion was timely made and that defendants have made a showing that authorizations remain outstanding. Additionally, defendants are now in possession of phone records, together with the records of Winthrop hospital, in which plaintiff may be examined on the nature and scope thereof. The Court notes that permitting depositions to be held as to plaintiff's phone records is consistent with the case law, "[p]retrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, ..." (*Polygram Holding, Inc. v Cafaro*, 42 AD3d 339 [1st Dept 2007], quoting

Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr., 98 AD2d 624 [1st Dept 1983] [internal quotation marks omitted]). Contrary to plaintiffs’ assertions in opposition, defendants did not waive the right to proceed with plaintiff Meckes’s deposition, thus, the Court finds the note of issue and certificate of readiness were filed prematurely.

Based on the foregoing, it is hereby,

ORDERED, that defendants’ motion is granted in its entirety; and it is further

ORDERED, that plaintiffs shall comply with any outstanding discovery demands within 45 days of the date of this order; and it is further;

ORDERED, that plaintiff Meckes be produced for a continued examination before trial within 60 days of the date of this order; and it is further,

ORDERED, that the continued examination before trial of plaintiff Meckes shall include examination regarding 1) any and all information arising from the outstanding discovery and 2) the phone records of plaintiff to determine to whom calls were made, the nature of the call, and specifically whether such phone call related to the plaintiff’s post-op complaints as alleged in the complaint; and if so, the sum and substance of said discussion.

ORDERED, that the parties shall appear for a virtual status conference on January 10, 2023 at 11:00 a.m.

This constitutes the Decision and Order of the Court.

<p><u>10/4/2022</u> DATE</p>		<p><i>/s/ Kathy J. King</i> KATHY J. KING, J.S.C.</p>
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED</p>	<p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER</p>
<p>APPLICATION:</p>	<p><input type="checkbox"/> SETTLE ORDER</p>	<p><input type="checkbox"/> SUBMIT ORDER</p>
<p>CHECK IF APPROPRIATE:</p>	<p><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE</p>