Lawi v Complete Wellness Med., P.C.

2023 NY Slip Op 31427(U)

April 27, 2023

Supreme Court, New York County

Docket Number: Index No. 805350/2017

Judge: Sabrina B. Kraus

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA B. KRAUS** **PART** **57**

Justice

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NICOLE LAWI,

Plaintiff,

- v -

COMPLETE WELLNESS MEDICAL, P.C.,DANIEL FENSTER

Defendant.

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INDEX NO. 805350/2017

MOTION DATE N/A

MOTION SEQ. NO. 003 004

AMENDED DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 120, 121, 122, 123, 124, 125, 126, 127, 130, 132

were read on this motion to/for PRECLUDE.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 128, 129, 131, 133

were read on this motion to/for PRECLUDE.

BACKGROUND

Plaintiff commenced this action seeking damages for alleged chiropractic malpractice.

On September 12, 2016, defendant Dr. Daniel Fenster, a chiropractor and clinical director of defendant Complete Wellness Medical, P.C., performed an electrical stimulation procedure on the left side of plaintiff's lower back, and the next morning, she had a burn on her back in the area of the procedure.

Plaintiff alleges the burn was caused by Dr, Fenster's malpractice. Defendant alleges it was a result of plaintiff's using ice on the area after the procedure.

PENDING MOTIONS

Defendants have made two *in limine* motions.

Motion Seq No 3 seeks an order: precluding plaintiff from offering hearsay statements regarding the alleged mechanism of her injury during her testimony at trial; requiring that the hearsay statements contained in the emails kept with the Dr. Fenster's chart be redacted; and requiring that hearsay statements contained in the records of Dr. Lash be redacted on the grounds that they were not germane to treatment.

Motion Seq No 4 seeks an order precluding plaintiff from introducing the testimony of both of her expert witnesses to establish a causal connection between the alleged departures from the standard of care and the claimed injuries on the grounds that their testimony would be impermissibly cumulative.

The motions are consolidated herein for disposition and granted to the extent set forth below.

Defendants' Motion to Exclude Hearsay Evidence And To Exclude/Redact for The Redaction of Text Messages

The first portion of defendants' motion *in limine* is to preclude plaintiff from testifying at trial, as she did at her deposition, to what other people said to her. The testimony sought to be excluded is identified through excerpts from plaintiff's deposition transcripts in the moving papers. All of this testimony about what friends or medical professionals said to plaintiff is indeed hearsay. The opposition papers submitted by plaintiff do not address this portion of the motion and only speak to the text messages/emails.

As the testimony identified is classic hearsay and this part of the motion is unopposed, the motion to preclude is granted and plaintiff will not be able to testify as to out of court statements made to her by others as identified in the excerpts of the deposition transcripts annexed to the moving papers.

As far as the text messages/emails sent on September 13, 2016 (annexed to moving papers as exhibit C) if defendants seek to introduce any part of those messages as an admission by plaintiff as to the over-icing of her back, then the court agrees with plaintiff that the balance of text messages exchanged on that date would also be admissible.

As to the email dated October 24, 2016 (Exhibit C), the following words from the email should be redacted as inadmissible hearsay "They all agree this is not a burn from ice!!". The balance of the email is admissible.

That part of the motion seeking to redact plaintiff's statements to Dr. Lash and Dr. Kaufman as contained in their records as to how plaintiff thinks the injury occurred is not precluded. While defendants argue that how the scars came to be is not germane to their treatment, this is a conclusory statement with no empirical support in the motion. As such the statements shall be admitted as part of the records.

The motion to preclude the text messages which plaintiff only disclosed two days before jury selection is granted (Exhibit F to moving papers). The text messages are precluded as they were admittedly not timely disclosed. Preclusion is the proper remedy against a party who refuses to disclose evidence. *Sanchez v. New York*, 266 A.D.2d 127 (2nd Dept. 1999); *Scherer v. North Shore Car Wash*, 45 A.D.3d 564 (2nd Dept. 2007).

Defendant's Motion to preclude Cumulative Testimony

Defendants motion to preclude the testimony of plaintiff's two experts is denied without prejudice. Plaintiff asserts that the testimony it intends to offer will not be cumulative.

Plaintiff asserts Dr. Cash is a Board Certified pain management specialist who is familiar with the type of medical device (i.e., electrical stimulation unit) that it is claimed caused plaintiff's injuries. His expertise includes knowledge as to the correct manner the device should

be used; the potential for that device causing the type of injuries sustained by plaintiff; and the precautions that should have been taken by the defendant to prevent such an occurrence.

Plaintiff further asserts Dr. Reed is a Board Certified plastic surgeon. He approaches this trial not from the perspective of someone who use such devices - - but rather a physician who treats such burn injuries. His expertise allows him to offer competent evidence as to the cause of the plaintiff's injuries - - in addition to evidence as to the permanency of such resulting scarring and deformity.

However, if at trial the testimony of the second witness called is substantially the same as what the first expert already testified to, defendants may renew their motion to preclude that portion of the testimony that is substantially repetitive.

4/27/2023
DATE

SABRINA B. KRAUS, J.S.C.

CHECK ONE:		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