

Baird v Borin

2023 NY Slip Op 32057(U)

June 21, 2023

Supreme Court, New York County

Docket Number: Index No. 101365/2019

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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SCOTT BAIRD,

Plaintiff,

- v -

JAMES BORIN, NYU LANGONE HEALTH/TISCH
HOSPITAL, NYU UROLOGY ASSOCIATES, KARL STORZ
ENDOVISION, INC., and KARL STORZ ENDOSCOPY-
AMERICA, INC.,

Defendants.

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INDEX NO. 101365/2019

MOTION DATE 02/03/2023

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for COMPEL DISCOVERY.

In this action to recover damages for medical malpractice and strict products liability based on design and manufacturing defects, the plaintiff moves pursuant to CPLR 3124 to compel the defendants to produce certain witnesses for depositions. The defendants Karl Storz Endovision (KSE), Karl Storz Endoscopy-America, Inc. (KSEA), as well as the defendants James Borin, NYU Langone Health/Tisch Hospital, and NYU Urology Associates (collectively the NYU defendants) oppose the motion. The NYU defendants also cross-move pursuant to CPLR 3101(a) for a protective order precluding the plaintiff from continuing to seek the deposition of its chief executive officer, Robert I. Grossman, as well as other high-ranking institutional executives who they allege do not have knowledge relevant to, or any involvement in, the events underlying the claims at issue. The plaintiff's motion is denied. The NYU defendants' cross motion is granted.

The plaintiff alleged that, on March 3, 2017, in the course of a ureteral endoscopy performed by the NYU defendants to remove a kidney stone, a piece of an endoscope

manufactured by KSE broke off in his ureter, causing him to sustain injuries. The plaintiff commenced this action on September 3, 2019 against the NYU defendants and KSE. On December 30, 2019, KSE moved to dismiss the complaint insofar as asserted against it, based upon lack of jurisdiction (SEQ. 001), which this court denied in an order dated March 19, 2021. On January 28, 2022, the plaintiff moved for leave to file and serve a supplemental summons and amended complaint to add KSEA as a party defendant, and to amend the caption accordingly (SEQ. 004). Neither KSE nor the NYU defendants opposed the motion. On April 6, 2022, this court granted the motion, and the plaintiff subsequently filed his amended complaint on April 29, 2022. On May 27, 2022, KSEA moved to dismiss the complaint insofar as asserted against it on the ground that the action was time-barred (SEQ 006). On September 22, 2022, the court denied the motion without prejudice to renewal upon the completion of discovery, including, but not limited to, several of the depositions at issue in this motion.

On June 23, 2022, the court issued a status conference order directing the parties to conduct discovery, including depositions of the plaintiff, as well as of witnesses on behalf of the NYU defendants, KSE, and KSEA. In that same order, the plaintiff was directed to designate witnesses for the institutional defendants at least 45 days prior to the scheduled deposition. On August 16, 2022, the plaintiff sent a second notice to the NYU defendants advising that he wished to designate Chief Executive Officer of NYU Langone Health System and Dean of the NYU Grossman School of Medicine, Robert I. Grossman, as the witness on behalf of NYU Langone Health. The NYU defendants objected to Grossman's designation on the grounds that he was not the appropriate institutional witness, and that they have "the initial right to designate the appropriate institutional witness." On September 14, 2022, the plaintiff timely served counsel for KSE and KSEA with a "45 Day Notice to Take Video Deposition of Witness," and designated general manager Bruce Watkins for KSE and manufacture contact Susie Chen, or the current general manager, for KSEA. On September 15, 2022, KSE responded to the plaintiff's notice pursuant to CPLR 3106(d) and advised that they instead would produce

Richard Santora, who KSE's Director of Operations, New Products, Rapid Repair, Product Evaluations, Engineering and Maintenance. On the same date, KSEA responded to plaintiff and advised that they would not produce a witness while its motion to dismiss the complaint as time-barred remained pending.

On January 4, 2023, the parties appeared virtually via Microsoft Teams for a status conference, wherein the plaintiff advised the court that he had filed an order to show cause earlier that day, seeking to compel the depositions of Watkins, Chen, and Grossman. On the same date, the court directed the plaintiff to refile his order to show cause, and specifically demonstrate why those witnesses were appropriate deponents for this case. The court also asked the defendants to identify who would be a more suitable witness with respect to the particular facts of this case. On January 6, 2023, the plaintiff refiled his order to show cause. On January 27, 2023, KSE and KSEA filed their opposition papers. On January 31, 2023, the NYU defendants filed their opposition and cross motion papers.

The plaintiff argued that the witnesses that he had designated for KSE and KSEA are relevant because they can speak to the proper procedures for cleaning, sterilization, and maintenance of the subject endoscope, as outlined in the device's instruction manual. In particular, the plaintiff argued that Watkins should be the witness for KSE because, as general manager, he can testify to issues relating to a 2014 Food and Drug Administration (FDA) Warning Letter and a 2022 Urgent Medical Device Recall Notice referable to the subject endoscope. The plaintiff also claimed that Watkins could clarify issues regarding affidavits by two NYU Langone Hospital employees that listed a model of the endoscope that the plaintiff believes to be incorrect. With regard to Chen, the plaintiff argued that she should be deposed because she is listed as the contact person in a 2017 Manufacturer and User Facility Device Experience (MAUDE) Report that had been submitted to the FDA in connection with the plaintiff's March 3, 2017 procedure.

In opposition, KSE exercised its right under 22 NYCRR 202.20-d(d) and CPLR 3106(d) to designate a person with the most knowledge of the facts, since Watkins, as the highest-ranking executive officer of KSE, was too far removed from the facts in dispute, and her responsibilities were too much attenuated from the information that the plaintiff needs to prosecute his action. Watkins himself submitted an affidavit explaining his role as president and general manager, in which he attested that he was not personally involved in the production, maintenance, or servicing of the endoscope, nor did he have personal knowledge of the details surrounding the Warning Letter and Recall Notice. Both KSE and Watkins advised that Santora would be a better deponent, as his day-to-day duties could better address the issues raised by the plaintiff. KSEA, on the other hand, argued that it could not produce Chen since she was no longer employed with KSEA nor could it produce a current general manager, as that position does not exist. Thus, KSEA designated its current Director of Regulatory Affairs, Leigh Spotten, which was the same position held by Chen prior to her retirement.

With respect to the NYU defendants, the plaintiff contended that Grossman was a relevant witness because he could testify as to how doctors are supervised at NYU Urology Associates and NYU Langone Hospitals, as well as how and why Borin was the doctor on his case. In opposition, the NYU defendants argued that, as a high-ranking executive, Grossman had no knowledge of or involvement in the facts of this case. Grossman submitted an affidavit describing his duties, and explaining that he had no knowledge of or involvement in the treatment and care rendered to the plaintiff, he is not and has never been a practicing urologist, and he was not involved in the purchase or maintenance of the endoscope at issue. Finally, the NYU defendants designated their Senior Director of Perioperative Services for Ambulatory Surgery Nadine Drescher, their Director of Strategic Sourcing Gerardo DeCaro, and Operating Room Nurse Maria Sezza as more appropriate institutional witnesses.

CPLR 3106(d), entitled “designation of deponent,” states that,

“[a] party desiring to take the deposition of a particular officer, director, member or employee of a person shall include in the notice or subpoena served upon such person the identity, description or title of such individual. Such person shall produce the individual so designated unless they shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced.”

Similarly, 22 NYCRR § 202.20-d(d)(1) states that

“pursuant to CPLR 3106(d), the named entity shall produce the individual so designated unless it shall have, no later than ten days prior to the scheduled deposition, notified the requesting party that another individual would instead be produced and the identity, description or title of such individual is specified. If timely notification has been so given, such other individual shall instead be produced.”

Moreover, a corporate defendant is not obligated, in the first instance, to produce a witness of the plaintiff's choosing for depositions (*see Mangual v New York City Tr. Auth.*, 48 AD3d 212, 212 [1st Dept 2008]), and can designate “which of its employees will represent it for purposes of pretrial depositions” (*Faber v New York City Tr. Auth.*, 177 AD2d 321, 322 [1st Dept 1991], quoting *Lotz v Albany Med. Ctr. Hosp.*, 85 AD2d 836, 837 [3d Dept 1981]; see *Conte v County of Nassau*, 87 AD3d 559, 560 [2d Dept 2011]). In this case, all the defendants exercised their right to designate individuals other than the ones originally noticed by the plaintiff, and did so timely and properly pursuant to CPLR 3106(d) and 22 NYCRR 202.20-d(d)(1). Of importance is the compulsory language of the statutes that provides that the other individuals designated by the defendants “*shall* instead be produced” (emphasis added). Thus, the parties shall proceed with the depositions of the witnesses designated by the defendants.

With regard to Chen, however, since she is no longer employed by KSEA and, thus, not under its control, KSEA shall instead provide her last known address to the plaintiff. Should the plaintiff so choose to depose Chen instead of Spotten, he can take the appropriate measures to do so. Additionally, upon the completion of the depositions of witnesses designated by the defendants, if the plaintiff feels that additional depositions of other witness are warranted, he has the burden of demonstrating “(1) that the representatives already deposed had insufficient

knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the person sought for depositions possess information which is material and necessary to the prosecution of the case” (*Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 638, 640 [2d Dept 2020]; *Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 731 [2d Dept 2011]; *Nunez v Chase Manhattan Bank*, 71 AD3d 967, 968 [2d Dept 2010]).

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 deposition of Grossman and other high-ranking executives, if permitted, is likely to lead to unreasonable annoyance to both parties and/or harassment of the executives. While the plaintiff believes that Grossman can address the various matters in this case, Grossman’s affidavit unequivocally demonstrates that he has no knowledge of or involvement in the issues involved. Thus, the NYU defendants are granted a protective order precluding the plaintiff from seeking the deposition of Grossman and other high-ranking officials who can demonstrate that they have no knowledge of or involvement in the relevant matters of this case.

The plaintiff’s remaining contentions are without merit.

Accordingly, it is

ORDERED that the plaintiff’s motion is denied, and Richard Santora, Leigh Spotten, Nadine Drescher, Gerardo DeCaro, and/or Maria Fezza shall be produced for depositions instead of the persons designated by the plaintiff; and it is further,

ORDERED that the cross motion of the defendants James Borin, NYU Langone Health/Tisch Hospital, and NYU Urology Associates is granted to the extent that they are granted a protective order precluding the plaintiff from continuing to seek the deposition of Robert I. Grossman and the depositions of other high-ranking executives who can demonstrate

that they do not have knowledge of and/or involvement in the relevant matter of this case; and it is further,

ORDERED that the parties shall appear remotely for a status conference on July 11, 2023, at 10:30 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 deposition dates shall be scheduled.

This constitutes the Decision and Order of the court.

6/21/2023
DATE


JOHN J. KILLEY, J.S.C.

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