

London v Mount Sinai Hosp.
2023 NY Slip Op 34099(U)
November 15, 2023
Supreme Court, New York County
Docket Number: Index No. 805333/2021
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY**PART****56M***Justice*

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AMY MYERS LONDON, as Executor of the Estate of Ronald
London, and AMY MYERS LONDON, individually,

Plaintiff,

INDEX NO. 805333/2021**MOTION DATE** 08/02/2023**MOTION SEQ. NO.** 002

- v -

THE MOUNT SINAI HOSPITAL and MOUNT SINAI
HOSPITALS GROUP, INC.,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129

were read on this motion to/for

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

In this action to recover damages for medical malpractice based on alleged departures from good and accepted practice, lack of informed consent, and wrongful death, the defendants move pursuant to 22 NYCRR 202.21(e) to vacate the note of issue, and to extend their time to move for summary judgment should the request for vacatur be denied. The plaintiff opposes the motion. The motion is granted only to the extent that, (a) on or before December 12, 2023, and while the action remains on the trial calendar, the defendants may conduct an additional deposition of the plaintiff, limited to two hours, and further limited to the claims of pecuniary loss raised by the plaintiff's June 28, 2023 supplemental bill of particulars and (b) on or before December 27, 2023, and while the action remains on the trial calendar, the defendants shall provide the plaintiff with all discovery items, as directed in this court's November 15, 2023 decision and order resolving Motion Sequence 003. The motion is otherwise denied.

In this court's most recent status conference order, dated December 14, 2022, and entered December 22, 2022, the court directed the defendants to provide the plaintiff with courtesy copies of responses to post-deposition demands, and either to respond to the plaintiff's December 6, 2022 correspondence requesting them to turn over those portions of their records "that had the 'hand-off' forms and other material in the EPIC system," or to submit a *Jackson* affidavit (*Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]) describing their search for those records. The plaintiff reserved her right to conduct nonparty depositions, if necessary, after obtaining the "hand-off" forms. The status conference order explicitly recited that, "[a]bsent good cause shown, all discovery issues not raised herein will be deemed waived." That order also fixed the note of issue filing deadline as June 30, 2023. On February 23, 2023, counsel for the parties nonetheless met with a representative of the court for a remote conference, at which they agreed that the defendants could conduct the plaintiff's daughter's deposition on March 16, 2023. The plaintiff's daughter was indeed deposed on that date, and the plaintiff herself had been deposed for two full days. On June 28, 2023, the plaintiff served a supplemental bill of particulars which, among other things, set forth the alleged pecuniary loss to the estate of the plaintiff's decedent purportedly caused by the defendants' malpractice. On June 30, 2023, the plaintiff filed the note of issue.

On July 11, 2023, the defendants' attorney wrote to the plaintiff's attorney, requesting permission to conduct depositions of the plaintiff's two adult sons and "a limited, further deposition of the plaintiff in respect to pecuniary support provided to decedent's children." Although the plaintiff initially had agreed to produce the plaintiff's sons for limited depositions while the action remained on the trial calendar, and proposed several dates for those depositions, the defendants failed to proceed with the depositions, instead making the instant motion to vacate the note of issue on July 12, 2023.

In an order dated July 24, 2023 (MOT SEQ 001), and notwithstanding the fact that the note of issue already had been filed, this court directed the defendants to

“(a) conduct and complete a further, diligent search for relevant ‘hand-off’ notes, and either produce the hand-off notes by that date if they exist and are locatable, or, if they cannot be located, provide a proper *Jackson* affidavit that describes what their search entailed, what paper or electronic records were searched, how those paper or electronic records were accessed and searched, who conducted the search, how long the search took to undertake, and the results thereof, which search shall include a search of all paper and electronic records and charts, and shall not be limited only to such hand-off documentation that was ‘in alignment with clinicians’ workflows,’ (b) produce the complete EPIC electronic chart referable to the hospitalization of the plaintiff’s decedent, and (c) produce audit trails, audit logs, and metadata of the EPIC electronic records referable to the hospitalization of the plaintiff’s decedent.”

Although the defendants produced a handful of documents in response to that directive, they did not produce all such documents, and instead moved, on August 17, 2023, “to clarify” the extent of the court’s directive (MOT SEQ 003) so as to limit the scope of the required disclosure. In an order dated November 15, 2023, this court directed the defendants to produce *all* such documentation, without limitation as to date or any other factor, and without the necessity of an in camera inspection prior to such production.

A court may vacate a note of issue where it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect (see 22 NYCRR 202.21[e]; *Rivers v Birnbaum*, 102 AD3d 26 [2d Dept 2012]; *Gomes v Valentine Realty LLC*, 32 AD3d 699 [1st Dept 2006]; *Herbert v Sivaco Wire Corp.*, 1 AD3d 144 [1st Dept 2003]). Nonetheless, where discovery is nearly completed, “[a] court, in its discretion, may allow post-note of issue discovery without vacating the note of issue as long as prejudice to either party would not result” (*WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.*, 193 AD3d 523, 523 [1st Dept 2021]; see *Samuelson v Wollman Rink Operations, LLC*, 196 AD3d 408, 408-409 [1st Dept 2021] [permitting defendant to conduct IME while action remained on the trial calendar]). Moreover, the service of a supplemental bill of particulars may warrant limited supplemental disclosure (see generally *Gelin v New York City Tr. Auth.*, 189 AD3d 789, 793 [2d Dept 2020]).

The court concludes that there would be no prejudice to the defendants in permitting the action to remain on the trial calendar while they conduct a further, limited deposition of the

plaintiff in connection with the allegations of pecuniary loss set forth in the supplemental bill of particulars and while they complete the production of “hand-off” forms, other documents, audit logs, audit trails, and metadata. The court concludes that the depositions of the plaintiff’s adult sons have been waived. Moreover, by filing the note of issue, the plaintiff waived her right to conduct further depositions in connection with the “hand-off” forms, metadata, and the like. In this regard, the court notes that “an agreement by the parties to conduct further discovery does not constitute a ‘special, unusual or extraordinary circumstance’” (*Armatys v Edwards*, 229 AD2d 906, 907 [4th Dept 1996]) permitting additional post-note of issue disclosure pursuant to 22 NYCRR 202.21(d).

The court denies the defendants’ request to extend their time to move for summary judgment. As of June 30, 2023, when the plaintiff filed the note of issue, the defendants had in their possession all of the facts and information that they needed to support any potential request for summary judgment on the issues of alleged departures from good medical practice, lack of informed consent, and proximate cause with respect to the decedent’s conscious pain and suffering and death. Any additional, limited discovery on the issue of the extent of any pecuniary loss to the decedent’s estate is completely irrelevant to the defendants’ ability to move for summary judgment. Consequently, they have not established a reasonable basis for submitting a late summary judgment motion (*Brill v City of New York*, 2 NY2d 648, 652 [2004]), and their request for such an extension of time is denied.

Finally, the court draws the attention of the plaintiff’s attorney to Rules of Professional Conduct (22 NYCRR 1200.0), Appendix A (Standards of Civility), which provide, at section I, that “[l]awyers should be courteous and civil in all professional dealings with other persons,” and further provide at section I(B) thereof, in relevant part, that, “[w]hether orally or in writing, lawyers should avoid . . . disparaging personal remarks or acrimony toward other counsel.”

The plaintiff’s attorney asserted, in his affirmation in opposition, that “defense counsel’s real purpose” in making the instant motion “is to delay for as long as possible,” that the

defendants' suggestion that they would only depose the plaintiff's adult sons after the deposition of a physician's assistant was a "frivolous" and "nonsensical statement," made "solely for the purpose of delay," and that "[f]or defense counsel not to attach any [relevant] emails and to take the self-righteous position that the[y] did not have an opportunity to depose the decedent's two sons is offensive and shows their lack of candor, particularly since I advised new counsel 'I suggest you review your file.'" The plaintiff's attorney also asserted that, even prior to the submission of any motion for summary judgment, such a motion would be "frivolous," and that, as a general matter, "defense counsel in malpractice cases who have recently taken over a case, need a forum for billing and thus make frivolous summary judgment motions." He described one of the partners at the defendants' attorneys firm as a "super lawyer" who "knows what I know, that the Court cannot possibly grant summary judgment under the facts of this case, and all of this is a game for delay," characterizing the defendants' request for depositions of the plaintiff's sons as "belated clamoring for alleged discovery . . . on pecuniary issues" that was "fabricated." Counsel concluded that the history of the underlying discovery dispute

"shows that their real purpose is to make a motion for purposes of delay or for pecuniary reasons by stating that under no circumstances are they withdrawing the motion to vacate the note of issue.

"Although prior defense counsel's cross-motion was frivolous, this motion by Defendants' new counsel is even more frivolous.

"Defense counsel gets paid by the motion; plaintiff's counsel and the Court do not. It is time to put an end to this frivolous motion practice by imposing costs upon counsel who make these frivolous motions."

These types of allegations are precisely of the sort that are addressed in the Rules of Professional Conduct as being beyond the bounds of proper legal argument, particularly because the dispute here involves garden-variety discovery issues.

Consequently, although the court is denying the defendants' request to extend their deadline for submission of a summary judgment motion, and is permitting the action to remain on the trial calendar while very limited discovery is conducted---particularly because the plaintiff

served a supplemental bill of particulars only two days prior to filing the note of issue, and because the defendants have not fully complied with this court's July 24, 2023 order---the plaintiff's counsel is cautioned to refrain from engaging in such hyperbolic personal attacks on the integrity of the defendants' attorneys.

Accordingly, it is

ORDERED that the defendants' motion is granted only to the extent that

- (a) the defendants may conduct an additional deposition of the plaintiff, while the action remains on the trial calendar, limited to two hours, and further limited to the claims of pecuniary loss raised by the plaintiff's June 28, 2023 supplemental bill of particulars, which shall be conducted no later than December 12, 2023; and
- (b) while the action remains on the trial calendar, the defendants, on or before December 27, 2023, shall provide the plaintiff with all discovery items, as directed in this court's November 15, 2023 decision and order resolving Motion Sequence 003,

and the motion is otherwise denied; and it is further,

ORDERED that, should the defendants, through any fault of their own, fail to conduct the additional deposition of the plaintiff on or before December 12, 2023, their right to the deposition shall be waived, and should the deposition fail to proceed due to the fault of the plaintiff, the plaintiff shall be precluded from adducing evidence at trial in support of the allegations of pecuniary loss to her decedent's estate, as set forth in the supplemental bill of particulars.

This constitutes the Decision and Order of the court.

11/15/2023

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

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DENIED

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GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE