

Hannan v Desir
2023 NY Slip Op 35321(U)
November 2, 2023
Supreme Court, Otsego County
Docket Number: Index No. EF2019-485
Judge: John F. Lambert
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At a term of the Supreme Court of the State of New York, held in and for the County of Otsego, at Cooperstown, New York on November 2, 2023.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF OTSEGO

Filed & Entered
November 2nd 2023 @ 2:40
Otsego County Clerk's Office

Leo Hannan

Plaintiff,

**DECISION AND ORDER
ON MOTIONS IN LIMINE
MOTIONS TO QUASH AND
OTHER REQUESTED RELIEF**

-against-

Index No. EF2019-485

Woodley Desir, M.D., United Health Services
Hospitals, Inc. and United Health Services, Inc.
Defendant.

BEFORE: HON. John F. Lambert, A.S.C.J.

APPEARANCES: For Plaintiff: Linnan & Associates
James D. Linnan, Esq.

For Defendant: O'Connor, O'Connor Bresee & First, PC
Carole C. Poles, Esq.

The Plaintiff in this matter brings suit against the Defendants as the result of an allegedly improperly performed surgery and subsequent post operative care. The Plaintiff was treated by Doctor Woodley Desir, MD who ultimately performed surgery on his left elbow on January 26, 2018, at Binghamton General Hospital. Doctor Woodley Desir, MD was assisted in the Plaintiff's surgery by Physician's Assistant Jacob Toscano. The summons and complaint were filed in 2019, and this matter has had significant delays since that time. The matter is now set for trial beginning November 6, 2023.

In anticipation of trial, motions were filed asking the Court for various forms of relief,

including the following:

The Plaintiff asks:

1. The Court preclude the Defendant from offering evidence or testimony regarding issues not disclosed in discovery. Filed October 23, 2023.

The Defendants ask:

1. Pursuant to CPLR Sections 2304 and 3103, the Court quash the subpoena issued by the Plaintiff and served on United Health Services Hospital, Inc. and grant a protective Order related to such. Filed October 24, 2023
2. Pursuant to CPLR Sections 2304 and 3103, the Court quash the subpoena issued by the Plaintiff and served on United Health Services, Inc. and grant a protective Order related to such. Filed October 24, 2023
3. Pursuant to CPLR Sections 2304, 3101(a)(4), and 3103 the Court quash the subpoena issued by the Plaintiff and served on Jacob Toscano, P.A. and grant a protective Order related to such. Filed October 24, 2023
4. Precluding the Defendant from eliciting certain testimony at trial. Filed October 30, 2023

In response to the above requests the Plaintiff filed papers in opposition to the Defendant's various forms of requested relief on October 30, 2023. The Defendant also filed papers in opposition to the Plaintiff's requested relief and subpoenas on October 26, 2023.

This decision concerns these motions filed in anticipation of the trial. The Court has considered all papers filed on NYSCEF in connection with the motions.

PLAINTIFF'S MOTION

The Plaintiff moved to preclude the Defendants from offering evidence or testimony regarding issues not disclosed in discovery. In response, the Defendants by their attorney filed an Affirmation in Opposition.

The Plaintiff asserts that following up upon previous discussions, the Plaintiff's counsel forwarded to Defense counsel Affidavits of Service confirming the proper service of Pleadings

and the timeliness of the commencement of this action and requested that the affirmative defenses regarding personal jurisdiction and statute of limitations be withdrawn on October 11th, 2023. Thereafter, Defense counsel confirmed that she would withdraw those defenses. The Plaintiff's counsel prepared a written stipulation confirming those withdrawals and other issues discussed at a pre-trial conference. Counsel for the Defense did not sign that stipulation. The Plaintiff contends that the Defense should be precluded from offering any evidence or posing any questions regarding this issue.

The Defendants' Second Affirmative Defense pled "Whatever injuries plaintiff may have sustained were caused in whole or in part, or were contributed to, by the culpable conduct and/or want of care on the part of the plaintiff or by someone over whom answering defendants had no control". The Defendants Fifth Affirmative Defense pled "The relative culpability of each party who is or may be liable for damages alleged by plaintiff in this action should be determined in accordance with the decisional and statutory law of the State of New York, and the equitable share of each party's liability for contribution should be determined and apportioned in accordance with the relative culpability of each such party pursuant to Article 14 of the CPLR." The defendants Seventh Affirmative Defense pled "Plaintiff has failed to mitigate his damages". In response thereto, the Plaintiff submitted various demands for a Bill of Particulars including:

1. A detailed itemization of the acts and/or omissions of the plaintiff, constituting negligence, culpable conduct, or lack of ordinary care, relative to the incidents complained of.
2. A detailed itemization of the acts and/or omissions of any third-party over whom the defendant claims he/she/they had no control, constituting negligence, culpable conduct or lack of ordinary care, relative to the incidents complained of. With respect to each such third-party, set forth the name and address of such person, and if not known, a description of each such person and the actions of that party that caused or contributed to plaintiff's injuries.

9. Set forth how and in what manner the answering defendant will allege that this plaintiff has failed to mitigate damages. Set forth the actions, or inactions of the plaintiff that the defendants claim is a good faith basis for raising this affirmative defense, including the date and place the plaintiff engaged in such conduct, and the name and address of any witnesses who allegedly observed such conduct.

11. Identify each party, whether a named defendant or an unnamed party, who the demanding defendant will allege has contributed to or is in any way responsible for the total liability for the non-economic loss sustained by the plaintiff herein, further setting forth each and every act and/or omission of each of the foregoing persons and/or entities that forms the basis for the culpability of each such person and/or entity.

12. A detailed itemization of each and every intervening and/or superseding factor, which forms the basis for the defendant's defense that he should be relieved from liability to the plaintiff in this action.

The Plaintiff further asserts that Defendant's Bill of particulars responded to these demands in the following numbered responses:

1. At this early juncture, without having had the discovery to which defendants are entitled, defendants lack sufficient information to respond to this demand fully. This affirmative defense is asserted to protect defendants' rights should it be determined through the course of discovery that the actions of plaintiff contributed to the injuries alleged. Defendants reserve the right to supplement this response upon completion of discovery.
2. Defendants lack sufficient information to fully respond to this demand. This affirmative defense is asserted to protect defendants' rights should it be determined through the course of discovery that individuals and/or third parties' culpable conduct caused or contributed to the injuries alleged. Defendants reserve the right to supplement this response upon completion of discovery.
9. At this early juncture, without having had the discovery to which defendants are entitled, defendants lack sufficient information to respond to this demand fully. This affirmative defense is asserted to protect defendants' rights should it be determined through the course of discovery that the actions, or inactions, of the plaintiff contributed to the injuries alleged. Defendants reserve the right to supplement this response upon completion of discovery.
11. Defendants lack sufficient information to fully respond to this demand. This affirmative defense is asserted to protect defendants' rights should it be determined through the course of discovery that individuals and/or third parties' culpable conduct caused or contributed to the injuries alleged. Defendants reserve the right to supplement this response upon completion of discovery. Further, to the extent that plaintiff seeks particularization of the Fourth Affirmative Defense, such defense

operates as a matter of law and does not require particularization.

12. **Objection.** Defendants object to this demand as beyond the proper scope of a Bill of Particulars as Defendants do not bear the burden of proof on the issues set forth in plaintiff's demand. Further, this demand is in the nature of an improper interrogatory and otherwise palpably improper.

As a result of the Defendants' failure to respond, the Plaintiff asserts that the Defendants should be precluded from offering any evidence or posing any questions that would tend to raise any issue contained in the Plaintiff's Demand of a Bill of Particulates to which the defense did not give an affirmative response and/or offer any information or allegation upon which the Plaintiff could rely to prepare for this trial.

In response, the Defendants note that they have withdrawn their First and Eighth Affirmative Defenses. With regard to the Second, Fifth, and Seventh Affirmative Defenses, the Defendants assert that Plaintiff's motion must be denied. The Defendants maintain that the affirmative defenses that Plaintiff complains of involve culpable conduct on the part of the Plaintiff, the Plaintiff's failure to mitigate his damages, and apportionment of liability pursuant to CPLR Article 14. The Defendants state, that the Defendants are not seeking apportionment of liability to the Plaintiff. Rather, the Defendants will argue that the Plaintiff failed to reasonably mitigate the damages claimed. Defendants propose supplementation to the Defendants' Bill of Particulars indicating that it will not cause undue prejudice or surprise to the Plaintiff. The Defendants offer further particularization of Plaintiff's culpable conduct and failure to mitigate as follows: Plaintiff failed to take reasonable precautions to avoid foreseeable injury/aggravation to his left elbow, arm, and hand post-surgery with Doctor Woodley Desir, MD; Plaintiff failed to take reasonable precautions to avoid foreseeable injury/aggravation of his left elbow, arm, and hand after surgery with Doctor Woodley Desir, MD and before surgery with his subsequent

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treating orthopedic surgeon in 2018; overused his left upper extremity post-surgery by Doctor Woodley Desir, MD and before surgery with Plaintiff's subsequent treating surgeon; failed to follow post-operative instructions following surgery by Doctor Woodley Desir, MD, among other things.

The Defendants further maintain that these allegations cannot prejudice or come as a surprise to plaintiff as both he and his significant other, Kiley Strub, testified about what the Plaintiff did with his left arm after his surgery with Doctor Woodley Desir, MD and his course of treatment with his subsequent treating orthopedic provider, PA Tomaino. Defendants will offer testimony of both the Plaintiff and Ms. Strub in support of plaintiff's post-operative course, and in support of the respective affirmative defenses.

The Court agrees with the Defendants that as set forth in the Defendants' proposed supplemental Bill of Particulars and limited thereto, the Plaintiff will suffer no surprise or prejudice.

Having reviewed the submissions the Court determines and accepts, pursuant to CPLR § 3025(b), the Defendants' supplemental bill of particulars as set forth in attorney Carol C. Pole's affirmation dated October 26th, 2023, including the stipulation that the Defendants are not seeking apportionment of liability pursuant to CPLR Article 14. Defendants may offer evidence in support of their Second, Fifth, and Seventh Affirmative Defenses as set forth above.

DEFENDANTS' MOTIONS

The Court will address each form of requested relief in kind.

Quashing the Subpoenas

The Plaintiff has subpoenaed several different kinds of documents, employment contracts, W-2s, 1099s, payroll records, physician, and physician assistant supervisor plan, Credentialling documents for UHS Binghamton General, UHS Wilson Medical Center, UHS Orthopedic Clinic from United Health Care Services Hospital, Inc. and United Health Services, Inc. Additionally, the Plaintiff has subpoenaed the same documents from PA Toscano, less the supervisor plan, and additionally his Federal Tax Return in 2018 and Curriculum vitae from 2018.

Since the motion was filed, the Defendants have complied with the request for employment contracts. As such the Court will deem that issue resolved.

a. W-2s, 1099s, pay roll records

The Court of Appeals has reiterated that:

disclosure in civil actions is generally governed by CPLR 3101 (a), which directs: “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” We have emphasized that “[t]he words, ‘material and necessary’, are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason” *Forman v. Henkin*, 30 NY3d 656, 661 (2018).

When determining if materials sought are material and necessary, the deciding court must also weigh “any special burden to be borne by the opposing party” *Vargas v. Lee*, 170 AD3d 1073, 1076 (2d Dept. 2019)

In their objection the Defendants assert that the W-2s, 1099s, and pay roll records are neither

material or necessary. In support of this position, they cite *Jordan v. Blue Circle Atlantic, Inc.*,

296 AD2d 752 (3d Dept. 2002). In that matter the Third Department found that the requested information, an entire personnel file, was neither relevant nor reasonably calculated to lead to relevant information. Id.

However, the facts in Jordan are not analogous. In this matter the Defendants' have created a web of entities with regard to employment. In their depositions, both PA Jacob Toscano and Doctor Woodley Desir, MD stated they worked for UHS. However, it was recently disclosed by the Defendant's attorney that neither was employed by UHS, but rather a totally different entity, UMA.

The confusion does not end there. By way of an example, the employment agreement between PA Jacob Toscano and UMA is on UHS letterhead. This raises obvious questions. Further, the already noted deposition testimony. Now the Plaintiff has been provided with an employment contract between the Doctor and UMA and/or UHS Medical Group. UHS Medical Group being an **entirely** new entity. Simply put, it is both material and necessary to determine who in fact was paying and employing Doctor Woodley Desir, MD and PA Jacob Toscano. Therefore, the motion to quash the subpoena related to these items is DENIED.

b. Physician and Physician Assistant supervisor plan

The Plaintiff has subpoenaed the Physician and Physician Assistant supervisor plan. This subpoena is wholly appropriate for two reasons. First, the question of who the Physician's Assistant was acting as an agent for at the time of the surgery and after care provided the Plaintiff may be necessary in determining culpability. Second, as previously the Defendants' have created a circumstance where information related to whom employs who, and the scope of the Physician's Assistant duties and supervision is fully relevant and potentially necessary in this

matter.

c. Federal Tax Returns and Curriculum vitae

The Plaintiff has requested the Physician Assistant's tax returns and curriculum vitae for 2018. The Court will grant the motion to quash the production of these particular documents. The Court finds that when balancing these documents and their privacy concerns against the Plaintiff's need for this information, the Plaintiff can readily obtain this information from other sources.

d. Credentiailling documents for UHS: Binghamton General, Wilson Medical Center, Orthopedic Clinic

In opposition to this request by the Plaintiff, the Defendant cites Education Law Section 6527(3) and Public Health Law Section 2805-j and 2805-m. Education Law Section 6527 exempts from discovery records relating to medical review or quality assurance functions, records demonstrating participation in a medical and dental malpractice prevention program, and reports required by the Department of Health. From the Court's reading of the subpoena and the information requested, the asserted portion of the Education Law is inapplicable.

Further, the Court does not have enough information to rule on this portion of the motion. Pursuant to CPLR Section 3122(b), where a party is withholding documents unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.

As the Defendants have failed to comply with the discovery rules, they are hereby

ORDERED by 9:00 am on November 3, 2023, to provide to the Court a privilege log, all credentialling documents for UHS Binghamton General, UHS Wilson Medical Center, UHS Orthopedic Clinic and separately, the suggested redactions pursuant to the cited law.

Preclusion of Testimony

The Defendants move for an order precluding the Plaintiff from eliciting certain testimony at trial. Specifically, that of the Plaintiff, Leo Hannan, and his girlfriend, Kyley Strub, who the Defendants believe will testify at trial.

The Defendants maintain that both the Plaintiff, and his girlfriend, provided several hearsay statements during their respective depositions. The statements were allegedly made by non-party PA Jacob Toscano and relate to the Plaintiff's arm being treated with glue. It is the Defendants' position that PA Toscano is not a party to this action, and these alleged statements may not be considered a party statement against interest. The Defendants assert that PA Toscano was not employed by any of the Defendants at the time of the subject care, as reflected in the attached employment agreement in effect in 2018. Additionally, the Defendants assert that Plaintiff cannot establish that PA Toscano was an agent authorized to make any binding statements on behalf of the Defendants. The Defendants also maintain that PA Toscano's presence at trial and his availability for cross examination cannot cure this defect. It is also noted that the Defendants also assert that PA Toscano did not recall ever making such statements, which further are unsupported by the record anywhere.

In response, the Plaintiff asserts that he sought treatment at the UHS Orthopedic Center in Vestal, New York. The Plaintiff commenced an action against Dr. Woodley Desir, MD, and the two entities listed in the NYS Corporation listing of active corporations, United Health

Services, Inc and United Health Services Hospitals, Inc. At depositions, both Jacob Toscano PA and Defendant Woodley Desir, M.D. testified that they were employed by UHS. Defendant Woodley Desir, M.D. testified that he was the Plaintiff's Orthopedic surgeon. Jacob Toscano PA testified that he was the Orthopedic physician's assistant for Dr. Woodley Desir, M.D. at UHS from January 2018 until he left the practice in November of 2020.

An admission by an agent or servant is admissible against the principal as an exception to the hearsay rule only if it is within the scope of the authority of the agent to speak. *Bd. of Ed. of Ellenville Cent. Sch. v. Herb's Dodge Sales & Serv., Inc.*, 79 A.D.2d 1049, 1049 (1981). In *Brusca v. El Al Israel Airlines*, the Second Department held that a statement allegedly made by the defendant's agent could be held against the principal because said agent's position and responsibilities gave him the requisite "incentive to carefully check the correctness of the statements" he made. 75 A.D.2d 798, 800, 427 N.Y.S.2d 505, 508 (1980)

There are a number of ways in which statements by an agent may be held against the principal. One such way occurs where the employer directs the employee to make such statement. *Merchants' Nat. Bank of Gardner vs. Clark*, 139 NY 314, 319 (1893). Even if speaking in general is not part of the employee's specifically designated duties, the particular statement was implicitly authorized. This can either be through the position of manager or as a spoke person, or other person appointed for the purpose of speaking for the entity. see *Bransfield vs. Grand Union Co.*, 17 NY2d 474 (1965). Another way is specific job duties which include the making of statements.

This Court finds that contrary to the assertions of the Defendant's counsel, and for the

reasons set forth in the Plaintiff's Memorandum of Law in Opposition to the Motion In Limine, PA Toscano acted as an agent or servant of both Defendant Dr. Woodley Desir, MD and Defendants United Health Services Hospitals, Inc. and United Health Services, Inc. As a result, PA Toscano's statements are admissible against Defendants. Furthermore, the probative value of PA Jacob Toscano's and Defendant, Dr. Woodley Desir's statements outweigh any prejudice to the Defendants, in that, statements relating to the use of a known allergen on the Plaintiff by the treating physician is highly probative on an ultimate issue in the case and are not unduly prejudicial. Accordingly, the motion to preclude this testimony is denied.

Defendants also move to preclude testimony related to statements made by both Ms. Strub and Plaintiff, Leo Hannan. Ms. Strub and the Plaintiff both testified as to alleged opinions of PA Tomaino relative to whether Doctor Woodley Desir, MD care and treatment of plaintiff complied with standard of care and whether it was a proximate cause of the claimed injuries. Defendants assert that neither of these witnesses is qualified to provide any reliable medical expert opinions as to either issue; neither witness has any medical education, training or experience. However, this testimony is highly relevant to state of mind, and while it cannot be used for the truth of the matter asserted, it can be used as to steps taken by the Plaintiff after he allegedly heard this information. As to the truth of these statements, the Court agrees that it is only PA Tomaino, or a qualified expert who can speak to this.

FEEES AND COSTS

The Court will hold in abeyance a decision and order on the question of costs, fines and fees until such time that the Defendants have complied with their obligation to provide a privilege log, the noted documents and suggested redactions.

As such, it is hereby

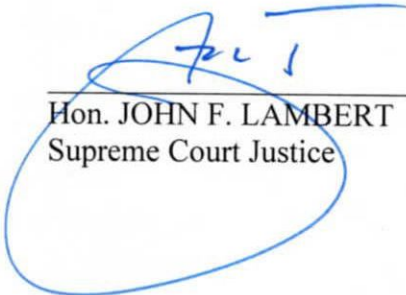
ORDERED that the defendants are to provide to the court a privileged log, all credentialling documents for UHS Binghamton General, UHS Wilson Medical Center, UHS Orthopedic Clinic and separately, the suggested redactions pursuant to the cited law by **9:00 am on November 3, 2023** and it is further

ORDERED that a virtual conference with the court shall be held at **9:30 am on November 3, 2023.**

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this DECISION AND ORDER by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: November 2, 2023
Cooperstown, New York

ENTER,



Hon. JOHN F. LAMBERT
Supreme Court Justice

To All Parties via NYSCEF