

Pinkhasov v Fielding
2024 NY Slip Op 35223(U)
May 2, 2024
Supreme Court, Queens County
Docket Number: Index No. 703905/2022
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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MARK PINKHASOV, As Administrator of the
Estate of SIVYA MASAN, deceased, and MARK
PINKHASOV, Individually,

Plaintiff,

-against-

GEORGE FIELDING, M.D., CHRISTINE REN-
FIELDING, M.D., NYU BARIATRICS SURGICAL
ASSOCIATES, and NYU LANGONE HEALTH
SYSTEM,

Defendants.
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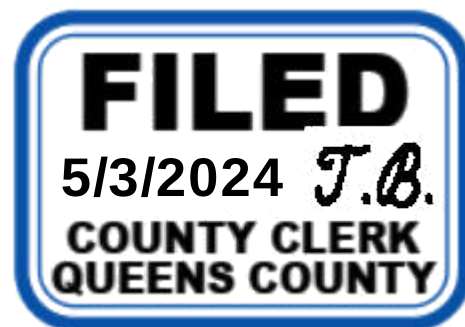
Index No. 703905/2022

Part MDP

Motion Date: April 24, 2024

Calendar No. 14

Sequence No. 1



The following papers numbered EF-36 to EF-57 read on this motion by plaintiff to compel defendants to produce discovery, and this cross-motion by defendants GEORGE A. FIELDING, M.D., CHRISTINE REN-FIELDING, M.D., NYU LANGONE HEALTH SYSTEM and NYU BARIATRIC SURGERY ASSOCIATES s/h/a “NYU BARIATRICS SURGICAL ASSOCIATES” for a Protective Order pursuant to CPLR §3103(a) preventing plaintiff from seeking further discovery and depositions on the issue of the Morbidity and Mortality Meeting materials.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....EF36-EF41
Notice of Cross-Motion, Affirmation, Exhibits.....EF43-EF54
Reply Affirmation, Exhibits.....EF55-EF57

Upon the foregoing papers and oral argument, it is ordered that these motions are determined as follows:

Plaintiff’s motion to compel discovery is denied. Defendants George A. Fielding, M.D., Christine Ren-Fielding, M.D., NYU Langone Health System, and NYU Bariatric Surgery Associates s/h/a “NYU Bariatrics Surgical Associates” cross-motion for a Protective Order preventing plaintiff from seeking further discovery and depositions on the issue of the Morbidity

and Mortality meeting materials is granted.

Plaintiff commenced this medical malpractice and wrongful death action arising from a hernia operation decedent Sivya Masan underwent on June 1, 2021. It is noted that decedent Sivya Masan passed away on July 7, 2021. Plaintiff filed the Summons and Complaint on February 21, 2022 and issue was joined via service of defendants' Verified Answers on May 2, 2022.

This discovery dispute has been the subject of multiple discovery conferences resulting in so-ordered stipulations agreed upon by the parties. A discovery conference was held on October 3, 2023 resulting in a stipulation wherein defendants agreed to provide an affidavit as to the maintenance of any statements from the Morbidity and Mortality meeting regarding decedent Sivya Masan. A further discovery conference was held on December 5, 2023 resulting in a stipulation wherein defendants agreed to provide affidavits from Dr. Fielding and Dr. Ren-Fielding with respect to their maintenance of statements from the Morbidity and Mortality meeting.

Plaintiff now makes the instant motion and argues that defendants should be compelled to produce all statements made by each defendant at the Morbidity and Mortality meeting or in the alternative produce the Morbidity and Mortality Report for an *in camera* inspection. Plaintiff further moves to direct each defendant to be produced for a further deposition following production of the statements or report. Plaintiff argues that the statements and report are subject to discovery and should be provided. Plaintiff further argues that defendants claim the statements and report are protected from discovery, in contravention of the stipulation and caselaw. Based upon the foregoing, plaintiff argues that he is entitled to the requested discovery.

Defendants oppose plaintiff's motion and cross-move for a Protective Order preventing plaintiff from seeking further discovery and depositions on the issue of the Morbidity and Mortality Meeting. Defendants argue that plaintiff's motion lacks a good faith affirmation demonstrating good faith efforts to resolve the perceived discovery dispute prior to motion practice. They further defendants argue that they are not in possession of any statements made by any individually named defendants at the meeting and therefore cannot produce the requested discovery, as it is not in their custody, possession, or control. Defendants produced their discovery responses including affidavits from defendants Dr. Fielding and Dr. Ren-Fielding articulating that they do not maintain statements relative to the meeting, and an affidavit from Michael Browdy, Director of Insurance at NYU Langone Health, articulating that the institutional defendants do not maintain statements relative to any Morbidity and Mortality conferences. Defendants argue that NYU Langone Health System is not a hospital and therefore does not maintain Morbidity and Mortality Meeting materials relative to patients. Therefore, defendants argue that they cannot produce the statements or report as they do not possess the materials. Defendants argue that based upon the foregoing, plaintiff's motion should be denied, and they are entitled to a Protective Order preventing plaintiff from making further duplicative discovery demands.

Plaintiff opposes defendants' cross-motion and argues that "there can be no logical conclusion that physicians who make statements that are included in M & M proceedings would not have access to them when they can be used in certain circumstances against them." Plaintiff argues that as Dr. Fielding testified that he made statements at the meeting, "one must conclude that he has access to same." Plaintiff also presents the LinkedIn page of Michael Browdy and argues that he discusses NYU Langone Health System as an academic medical center, and they should therefore have access to the materials.

CPLR §3101 governs the scope of discovery disclosure. Pursuant to CPLR §3101(a), there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. The test for whether something is material and necessary to the action is "usefulness and reason...It is incumbent on the party seeking disclosure to demonstrate 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, and unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy." (*Rrengo v. New York City Tr. Auth.*, 204 A.D.3d 1049, 1050 [2d Dept. 2022].) The supervision of discovery and the setting of reasonable terms and conditions for disclosure are within the sound discretion of the trial court. (*Id.*)

Pursuant to CPLR §3103(a), a court may issue a protective order denying, limiting, conditioning, or regulating the use of any disclosure device, in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts. (*Kim & Bae, P.C. v. Lee*, 173 A.D.3d 990, 993 [2d Dept. 2019].) The supervision of disclosure and the setting of reasonable terms and conditions rests within the sound discretion of the trial court and, absent an improvident exercise of discretion, its determination will not be disturbed. (*Id.*)

Plaintiff's motion to compel discovery is denied, as defendants demonstrated that they have complied with so-ordered discovery stipulations and are not in possession of statements made at the Morbidities and Mortality meeting or the report. Contrary to plaintiff's allegations, defendants do not argue that plaintiff is not entitled to the discovery or that the requested discovery is privileged, but rather argue that the requested discovery is not in their custody, possession, and control. Plaintiff's argument that defendants are in possession of the discovery despite repeated statements to the contrary, is without merit, as plaintiff failed to support his argument with competent, admissible evidence. Plaintiff's reliance on Dr. Fielding's deposition testimony is insufficient to compel further discovery, as Dr. Fielding merely stated he made a statement at the meeting, and did not assert there was a hearing or recording of the proceedings that could be produced. Defendants' argument that plaintiff failed to exercise good faith prior to making the discovery motion is moot, as the parties had a discovery conference prior to submission of the

motion, and they were unable to resolve the discovery dispute. As defendants have sworn under oath that they are not in possession of the minutes of a Morbidity and Mortality meeting, and plaintiff has not demonstrated these minutes exist, plaintiff's motion to compel is denied.

Defendants' cross-motion for a Protective Order is granted, as defendants demonstrated that the requested discovery was already addressed by so-ordered stipulations that they complied with by producing affidavits from Dr. Fielding, Dr Ren-Fielding, and Michael Browdy pursuant to court directives. They further demonstrated that this issue has been addressed by the Court and determined through so-ordered stipulations, and therefore they are entitled to a protective Order preventing plaintiff from relitigating the issue. Defendants further demonstrated that the statements made at the meeting and the report are not in their custody, possession, and control, and they therefore cannot produce the discovery for an *in camera* inspection. Plaintiff's argument that defendants must have access to the requested discovery is vague, speculative, and insufficient to articulate a good faith basis to believe that defendants maintain the requested materials and are refusing to turn them over.

Accordingly, plaintiff's motion to compel discovery is denied. Defendants George A. Fielding, M.D., Christine Ren-Fielding, M.D., NYU Langone Health System, and NYU Bariatric Surgery Associates s/h/a "NYU Bariatrics Surgical Associates" cross-motion for a Protective Order is granted. It is hereby

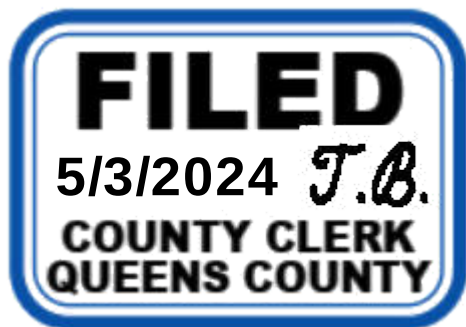
ORDERED that plaintiff shall not make any further discovery demands with respect to the Morbidity and Mortality meeting regarding decedent Sivya Masan, and it is further

ORDERED that plaintiff shall file the Note of Issue no later than June 10, 2024, and it is further

ORDERED that the parties shall appear for a pretrial conference on Wednesday, July 31, 2024 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: May 2, 2024



Hon. Tracy Catapano-Fox, J.S.C.