

Caruso v Kavalier

2025 NY Slip Op 32052(U)

June 2, 2025

Supreme Court, New York County

Docket Number: Index No. 805109/2020

Judge: Judith N. McMahon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH N. MCMAHON PART 30M

Justice

-----X

ANN CARUSO,

Plaintiff,

- v -

ELIZABETH KAVALER, TOTAL UROLOGY CARE OF NEW YORK PLLC

Defendant.

-----X

INDEX NO. 805109/2020

MOTION DATE 05/27/2025

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 58, 59, 60, 61, 62, 63, 64, 65, 66, 69, 85, 86

were read on this motion to/for PRECLUDE

The following e-filed documents, listed by NYSCEF document number (Motion 002) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 96, 99, 102, 104, 105, 106, 107, 108, 110, 111, 112, 113

were read on this motion to/for PRECLUDE

Upon the foregoing documents, and following oral argument held on the record on May 27, 2025, the defendants' motions to preclude certain testimony from plaintiff's expert, Dr. Kristin E. Rojas, or alternatively, to strike plaintiff's Note of Issue (Motion Seq. Nos. 001, 002), and the plaintiff's cross motion for leave to amend or supplement her Verified Bills of Particulars nunc pro tunc to allege "burning of vaginal tissue" as damages only (Motion Seq. No. 001), is granted in part and denied in part as set forth below.

In this medical malpractice action, plaintiff claims to have suffered personal injuries inclusive of vaginal narrowing and stricture, as a result of undergoing three Mona Lisa laser treatments performed by defendant, Dr. ELIZABETH ANNE KAVALER at TOTAL UROLOGY CARE OF NEW YORK, PLLC, on July 25, 2017, September 6, 2017, and October 30, 2017.

There are presently three motions before the Court.

In **Motion Seq. No. 001**, the defendants move to “preclude plaintiff from offering any evidence or testimony at the time of trial relating to plaintiff’s expert, Dr. Kristin E. Rojas’ physical examination performed on April 9, 2024, almost one year after the Note of Issue was filed and this action certified ready for trial by the plaintiff or, in the alternative, striking the Note of Issue pursuant to 22 NYCRR §202.21(e) and permitting the defendants to conduct further discovery” (*see* NYSCEF Doc. 41).

Plaintiff **cross moves** under **Motion Seq. No. 001** for leave to amend or supplement her Verified Bills of Particulars *nunc pro tunc* to allege “burning of vaginal tissue” as damages only, and to deny the defendants’ motion to preclude plaintiff from offering evidence or testimony at the time of trial related to plaintiff’s patient office visit on April 9, 2024, with treating physician Dr. Kristin E. Rojas (*see* NYSCEF Doc. No. 58).

The Court finds in this medical malpractice case involving *laser therapy*, that the plaintiff’s Verified Bills of Particulars contains language sufficiently broad to include the claim of “burning of vaginal tissue.” Moreover, Dr. Rojas’ is permitted to testify concerning her recent examination of plaintiff, with no violation of 22 NYCRR 202.17 (h), as the claim of vaginal burning was reasonably anticipated from the injuries that were fully disclosed to defendants (*see Taylor v. Daniels*, 244 AD2d 176 [1st Dept. 1997]; *see also Iasello v. Frank*, 257 AD2d 362 [1st Dept. 1999], where plaintiff’s physician and chiropractor were properly permitted to testify concerning their recent examinations of plaintiff even though reports of such examinations had not been served on defendant, where the physician’s testimony described no new injuries or claims but merely the consequences of the injuries described in previously served medical reports; *see also Lee v. Riverhead Bay Motors*, 57 AD3d 283 [1st Dept. 2008]).

Motion Seq. No. 001 is denied in its entirety, and plaintiff's cross motion to amend her Verified Bill of Particulars is accordingly denied as moot.

In **Motion Seq. No. 002**, the defendants move to "preclude the plaintiff from offering any evidence or testimony at the time of trial by and through her expert, Dr. Kristin E. Rojas, M.D., relating to (i) standard of care, proximate cause, and/or any informational testimony based upon governmental communications/publications and research or studies that post-date the 2017 treatment and care at issue herein; (ii) based upon any out-of-court writing or publication that would constitute incompetent and inadmissible hearsay for which no exception applies; and (iii) standard of care as to the use of Mona Lisa therapy to treat vaginal dryness as plaintiff's expert, Dr. Rojas, was not an attending level physician at the time this care was rendered in 2017" (*see* NYSCEF Doc. No. 73). Plaintiff opposes the motion.

With respect to Motion Seq. No. 002, the Court precludes evidence or testimony by Dr. Rojas at the time of trial relating to the standard of care, proximate cause and/or informational testimony **based upon governmental communications/publications and research or studies that post-date the 2017 treatment and care at issue**, and precludes testimony by Dr. Rohas based upon any out of court writing or publication that would constitute incompetent and inadmissible hearsay for which no exception applies. The Court denies that branch of defendants' 002 motion which seeks to preclude Dr. Rojas' testimony as to the use of Mona Lisa therapy to treat vaginal dryness in 2017.

Accordingly, Dr. Rojas may testify as to her examination of plaintiff, with no mention of any governmental, class action, or FDA opinion that post-dates the subject procedures. Likewise, plaintiff is precluded from mentioning any type of action or class action she may have sought to join concerning the procedures at issue.

Accordingly, it is

ORDERED that that branch of Motion Seq. No. 001 which seeks to strike plaintiff's Note of Issue and conduct further discovery is denied; and it is further

ORDERED that that branch of Motion Seq. No. 001 which seeks to preclude Dr. Rojas' from testifying at the time of trial is denied to the extent that Dr. Rojas may testify as to her physical examination of plaintiff on April 9, 2024; and it is further

ORDERED that plaintiff's cross motion for leave to amend or supplement her Verified Bills of Particulars *nunc pro tunc* to allege "burning of vaginal tissue" is denied as moot; and it is further

ORDERED that defendants' motion (Motion Seq. No. 002) for an order precluding plaintiff from offering any evidence or testimony at the time of trial by Dr. Rojas relating to the standard of care, proximate cause and/or informational testimony based upon governmental communications/publications and research or studies that *post-date the 2017 treatment* and care at issue, and testimony based upon any out of court writing or publication that would constitute incompetent and inadmissible hearsay for which no exception applies is granted; and it is further

ORDERED that the balance of Motion Seq. No. 002 is denied; and it is further

ORDERED that all parties shall appear in Part 40 on **July 28, 2025**, for jury selection.

06/02/2025
DATE

CHECK ONE: CASE DISPOSED DENIED

APPLICATION: GRANTED SETTLER ORDER

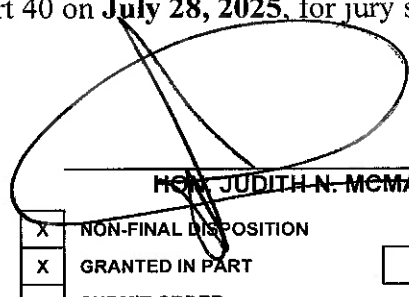
CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE



HON. JUDITH N. MCMAHON

Hon. Judith N. McMahon
J&C