

Kennedy v Naka

2012 NY Slip Op 33765(U)

September 13, 2012

Supreme Court, Westchester County

Docket Number: 14511/10

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED AND ENTERED
ON 9-13 2012
WESTCHESTER COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
LAWRENCE W. KENNEDY as Administrator
of the Estate of SHERRY ANNE KENNEDY
deceased and Individually,

Plaintiffs,

-against-

YOSHITUMI NAKA, STEVE XYDAS,
ELIAS ZIAS, HENRY TANNOUS,
MID-ATLANTIC SURGICAL ASSOCIATES,
FACULTY PRACTICE ASSOCIATES, INC.,
COLUMBIA UNIVERSITY MEDICAL CENTER
d/b/a COLUMBIA PRESBYTERIAN MEDICAL
CENTER, THE NEW YORK PRESBYTERIAN
HOSPITAL, THE MOUNT SINAI MEDICAL
CENTER and EDWARDS LIFESCIENCES
CORPORATION d/b/a EDWARDS
LIFESCIENCES LLC, d/b/a EDWARDS
LIFESCIENCES, (U.S.) INC.,

Defendants.
-----X

DECISION & ORDER

Index No. 14511/10

Motion Date: 8/20/12

Seq. No. 4, 5

FILED
SEP 13 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER



LEFKOWITZ, J.

The following papers numbered 1-17 were read on this motion by defendant Edwards Lifesciences Corporation (Edwards) for an order compelling plaintiffs to provide a supplemental response to the interrogatories and the first set of requests for production of documents and demands served by Edwards, striking plaintiffs' amended complaint, specifically the cause of action sounding in products liability, as against Edwards, and granting Edwards costs related to this motion. Plaintiffs move for an order pursuant to CPLR 3126 striking defendant Edwards' answer for its willful and contumacious failure to provide discovery, and directing an inquest as to damages. In the alternative, plaintiffs move to compel defendant Edwards to provide a supplemental discovery response.

- Order to Show Cause - Affirmation in Support by Paul Svensson
- Exhibits 1-6
- Affirmation in Opposition by Patrick McCorley - Exhibits 7-11
- Order to Show Cause - Affirmation in Support by Patrick McCorley
- Exhibits 12-16

Upon the foregoing papers and the proceedings held on August 13, 2012, these motions are determined as follows:

In this wrongful death action, plaintiffs allege medical malpractice and products liability. On June 24, 2008, the decedent underwent a pericardiectomy and a pericardial valve was implanted. It is alleged the valve was removed on September 22, 2008 because the leaflets of the valve were not working properly. Plaintiffs allege that a result of the September 22, 2008 surgery, the decedent suffered a right frontal lobe stroke, severe brain damage, and died on April 30, 2011.

Defendant Edwards' Motion

Edwards argues plaintiffs failed to comply with the discovery order of this Court requiring them to provide substantive responses to Edwards first set of interrogatories and first set of requests for production of documents and demands. Edwards argues the Court must dismiss plaintiffs' products liability claims against Edwards because plaintiffs failed to disclose any information or materials upon which the claim is premised.

As to the first set of interrogatories, Edwards argues they were not signed by plaintiff and several responses are deficient. In opposition, plaintiffs argue the interrogatories at issue are inappropriate and poorly formed, requiring plaintiffs to make legal, medical, and technological conclusions that are beyond the scope of interrogatories. Plaintiffs contend that the interrogatories repeatedly request that the allegations in the complaint be amplified and request material in Edwards' possession. Plaintiffs argue the interrogatories should be stricken.

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The phrase "material and necessary" is "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" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, "a party does not have the right to

¹ The Court is in receipt of an affirmation in opposition submitted by counsel for Edwards Lifesciences. The order to show cause directs that any answering papers be served so as to be received in hand and filed by August 6, 2012. The affirmation in opposition was served and filed on August 10, 2012. Additionally, the affidavit of service indicates the papers were served on plaintiffs' counsel at the wrong address. The affirmation in opposition was not considered on the cross motion. Insofar as the affirmation was submitted in further support of Edwards' motion to compel, counsel should note the order to show cause directs that no reply papers shall be accepted.

uncontrolled and unfettered disclosure” (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). “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” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]). A motion to compel responses to demands and interrogatories is properly denied where the demands and interrogatories seek information which is irrelevant, overly broad, or burdensome (*Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283 [2d Dept 2011]; *Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]).

Plaintiffs are directed to provide on or before October 5, 2012 an amended response to defendant Edwards’ first set of interrogatories dated May 13, 2011. The amended response shall be answered and verified by the party served (CPLR 3133[b]) and shall provide supplemental responses to interrogatories 8, 9, 12, 13, 14, 18(1)(2), 20, 23, and 27 (Edwards’ Exhibit A, Edwards’ First Set of Interrogatories). Plaintiffs are directed to supplement interrogatory 6, to identify any such documents or materials plaintiff or the decedent reviewed or relied on. These interrogatories are proper, seeking information pertaining to the allegations in the complaint. Contrary to plaintiffs’ contention, interrogatories seeking to clarify and amplify plaintiffs’ allegations, as well as different legal theories plaintiffs are pursuing are appropriate to prevent unfair surprise at trial (*Wiseman v American Motors Sales Corp.*, 101 AD2d 859 [2d Dept 1984]). As to interrogatories 1, 2, 3, 4, 5, 10, 11, 15, 17, 22, 24, 25, and 34, the Court finds the interrogatories are overly broad, seek information that is not relevant, or plaintiffs’ responses are sufficient. As Edwards has failed to demonstrate on this motion that plaintiffs even assert a loss of earnings claim, interrogatories 30 and 31 are overly broad. As to interrogatories 16, 18(3)(4), 19, and 21, the interrogatories are duplicative, seeking information sought in other interrogatories.

Plaintiffs are directed to provide on or before October 5, 2012 a supplemental response to Edwards’ first set of requests for production of documents and demands dated May 13, 2011, as to demands 9, 10, 16, 18, 21, 24, 26, 28(1)-(4), 30, and 38 (Edwards’ Exhibit C, Edwards’ First Set of Requests for Production of Documents and Demands). Plaintiffs are directed to supplement demand 7, as to photographs, slides and video concerning the Carpentier Edwards 27mm pericardial valve that plaintiffs or plaintiffs’ counsel have taken or received from any source. The requests for the production of documents contained in paragraphs 3, 5, 11, 12, 14, 15, 19, 20, 28(5), 33, 34, 35, 36, 37 are patently overbroad or seek an expert opinion (*Scudder v Chemical Bank*, 186 AD2d 730). As to demand number 32, seeking reports regarding the decedent’s physical and mental condition, plaintiffs indicate authorizations to obtain the decedent’s medical records have been provided. This response is sufficient. As to demands 6, 13, 17, 22, 23, 25, 27, and 41, the demands are duplicative, seeking information or documents sought in other demands.

Insofar as Edwards seeks sanctions pursuant to CPLR 3126, the requested relief is not warranted (*see Voutsinas v Voutsinas*, 43 AD3d 1156 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v Your Home Funding, Inc.*, 40 AD3d 919 [2d Dept 2007]).

Plaintiffs' Motion

Plaintiffs move for an order pursuant to CPLR 3126 striking defendant Edwards' answer for its willful and contumacious failure to provide discovery, and directing an inquest as to damages. In the alternative, plaintiffs move to compel defendant Edwards to provide a supplemental discovery response. Plaintiffs argue they have served numerous discovery demands which were either inappropriately objected to or answered in a non-responsive manner. Plaintiffs argue they have been prejudiced by defendant's failure to provide the requested discovery materials.

Plaintiffs served combined discovery and inspection demands dated February 8, 2011 on defendant Edwards (Plaintiffs' Exhibit 1). The parties signed a confidentiality agreement on or about March 21, 2012. Defendant Edwards served a May 10, 2012 response (Plaintiffs' Exhibit 2). Plaintiffs argue the response included over a thousand pages of Bates stamped documents which were not responsive to plaintiffs' specific demands (Plaintiffs' Exhibit 3). Plaintiffs contend the answer served on behalf of Edwards should be stricken, or alternatively, Edwards should be compelled to provide a supplemental discovery response as to the following: the names and addresses of the referenced individuals in the defendant's discovery response, the demand for warranties (Plaintiffs' Exhibit 1, p. 35; Exhibit 2, p. 83), the demand for standards (Plaintiffs' Exhibit 1, p. 13; Exhibit 2, p. 39), a copy of the Edwards valve pre-market approval application (PMA), documentation regarding quality control tests used in the industry, and the demand for storage information (Plaintiffs' Exhibit 1, p. 7; Exhibit 2, p. 25). Plaintiffs argue Edwards should be directed to provide the PDF documents referenced on Bates stamped page 5, copies of the defendant's prior testimony and documentation relating to prior lawsuits, and color photographs as referenced on certain Bates stamped pages.²

Defendant Edwards is directed to serve on or before October 5, 2012 a supplemental response to plaintiffs' combined demands for discovery and inspection dated February 8, 2011 as

² Although Edwards' affirmation in opposition was served and filed late and was not considered on this motion, the Court notes counsel for Edwards states the PDF documents referenced on Bates stamped page 5 and quality control tests used in the manufacture of the subject valve were previously produced. Edwards is agreeable to producing the color photographs referenced on certain Bates stamped pages. Edwards valve pre-market approval application (PMA) includes documents filed with the FDA, including laboratory, preclinical and clinical testing, promotional and post-marketing surveillance related to the Edwards valve. It is a voluminous set of records and it continues to grow over time. At oral argument counsel for Edwards agreed to make the PMA available for inspection and copying in California where it is maintained.

to the demand for standards (a), (b), (c), and the demand for warranties # 5, 12, and 14, including a statement clarifying what demand the documents Bates stamped 00001-00003 are responsive to. Edwards is directed to provide the PDF documents referenced on Bates stamped page 5 and color photographs as referenced on certain Bates stamped pages. Edwards shall produce a copy of the Edwards valve PMA in New York for inspection and/or copying, upon receipt of the cost of duplication. Edwards is directed to notify all parties of the cost of duplication of the color photographs and the PMA.

Plaintiffs argue Edwards' responses repeatedly reference more than one thousand Bates stamped pages and defendants should be required to further particularize their responses. Edwards is directed to serve a supplemental response as to those responses to the demand for component part information, demand for manufacturing information, demand for production information, demand for protocols for quality control, and demand for tests and inspections referring to bates stamped pages 00042-01151 to further particularize the specific documents responsive to each demand.

The branch of plaintiffs' motion seeking the names and addresses of the individuals referenced in plaintiffs' combined demands is denied. Plaintiffs' counsel fails to note the discovery demands in which he is seeking names and addresses. Furthermore, plaintiffs fail to demonstrate on this motion that the information sought is relevant. The branch of plaintiffs' motion seeking a supplemental response to plaintiffs' request for documentation regarding quality control tests used in the industry is denied. It is unclear which demand plaintiffs are seeking to have supplemented, as plaintiffs' counsel fails to reference the page or heading of the specific demand at issue. Furthermore, the demand for "quality control tests used in the industry" is overly broad and not relevant to the allegations in this matter. The branch of plaintiffs' motion seeking a supplemental response to plaintiffs' demand for storage information is denied, as this demand is overly broad, unduly burdensome, and irrelevant. The demand for standards (d), (e), (f), (g), (h) are overbroad. Furthermore, as none of the parties submitted a copy of the bill of particulars, it is unclear whether these demands are relevant to the allegations in this matter.

As to Edwards' response to plaintiffs' demand for warranties #1, 2, 3, 9, 10, 13, Edwards states it has not provided any express warranties to any purchaser, distributor or consumer of the subject valve (plaintiffs' Exhibit 1, p. 35; Exhibit 2, p. 83). The response provided is sufficient. As to plaintiffs' demand for warranties #6 and 8, the Court finds Edwards' response is sufficient. As to plaintiffs' demand for warranties #4, seeking the standard warranties or guarantees that defendant gives in the sale of similar or comparable products, demand for warranties #7, seeking the names and addresses of the persons who own any patents that are claimed or registered and which cover the Edwards Pericardial Mitral Valve 27mm serial number 1679035 or any part thereof, and demand for warranties #11, seeking written or printed warranties or guarantees of defendant in the sale of similar products, the Court finds these demands are not relevant to the claims in this matter.

Insofar as plaintiffs argue Edwards has limited over twenty of its responses to the valve

used on the decedent and it should be required to provide a supplemental response concerning all Carpentier, Edwards Pericardial Mitral Valves, the request is denied. Plaintiffs' counsel fails to cite to the specific demands at issue. Without reference to the specific demands and a copy of the bill of particulars, it is impossible to determine whether the demands should be supplemented.

In plaintiffs' combined demands for discovery and inspection, plaintiffs demand copies of transcripts for any and all prior testimony given by a representative of Edwards, stating every products liability action in which the defendant was named, and stating the attorneys (Plaintiffs' Exhibit 1, p. 48). In the instant motion, plaintiffs seek deposition testimony and document discovery from other lawsuits which relate to the Edwards Heart Valve, or similar heart valves. Plaintiffs argue deposition testimony and documentation related to other defective heart valves is relevant to the claim that Edwards was negligent in manufacturing the heart valve. In products liability cases, disclosure has been permitted with respect to other claims against the defendant similar in nature to those asserted by the plaintiffs (*Singh v Hobart Corp.*, 302 AD2d 444 [2d Dept 2003]; *Mestman v Ariens*, 135 AD2d 516 [2d Dept 1987]). Here, the demand for deposition testimony and documents from other lawsuits which relate to the Edwards Heart Valve or similar heart valves is overbroad, as it is not limited in time, limited to claims similar in nature, and limited to models sufficiently similar in design to the heart valve at issue (*Cirineo v Pepsi Cola Bottling Co.*, 260 AD2d 341 [2d Dept 1999]).

Insofar as plaintiffs do not demonstrate on this motion that defendant Edwards willfully and contumaciously failed to provide court ordered discovery, an order striking defendants' Edwards' answer is not warranted (*See Voutsinas v Voutsinas*, 43 AD3d 1156 [2d Dept 2007]; *Gateway Tit. & Abstract, Inc. v Your Home Funding, Inc.*, 40 AD3d 919 [2d Dept 2007]).

In view of the foregoing, it is

ORDERED that the motion by defendant Edwards is granted to the extent that plaintiffs are directed to provide on or before October 5, 2012 an amended response to defendant Edwards' first set of interrogatories dated May 13, 2011. The amended response shall be answered and verified by the party served and shall provide supplemental responses to interrogatories 8, 9, 12, 13, 14, 18(1)(2), 20, 23, and 27. Plaintiffs are directed to supplement interrogatory 6, to identify any such documents or materials plaintiff or the decedent reviewed or relied on; and it is further

ORDERED that plaintiffs are directed to provide on or before October 5, 2012 a supplemental response to Edwards' first set of requests for production of documents and demands dated May 13, 2011, as to demands 9, 10, 16, 18, 21, 24, 26, 28(1)-(4), 30, and 38. Plaintiffs are directed to supplement demand 7, as to photographs, slides and video concerning the Carpentier Edwards 27mm pericardial valve that plaintiffs or plaintiffs' counsel have taken or received from any source; and it is further

ORDERED that the branch of Edwards' motion seeking an order dismissing plaintiffs' products liability claim is denied; and it is further

ORDERED that the branch of the motion seeking an order granting Edwards costs related to the motion is denied; and it is further

ORDERED that the branch of plaintiffs' motion seeking to compel defendant Edwards to provide a supplemental response to plaintiffs' combined demands for discovery and inspection dated February 8, 2011 is granted to the extent that defendant Edwards is directed to serve on or before October 5, 2012 a supplemental response as to the demand for standards (a), (b), (c), and the demand for warranties # 5, 12, and 14, including a statement clarifying what demand the documents Bates stamped 00001-00003 are responsive to. Edwards is directed to provide on or before October 5, 2012 the PDF documents referenced on Bates stamped page 5 and color photographs as referenced on certain Bates stamped pages. Edwards shall produce on or before October 5, 2012 a copy of the Edwards valve PMA in New York for inspection and/or copying, upon receipt of the cost of duplication. Edwards is directed to notify all parties of the cost of duplication of the color photographs and the PMA on or before September 21, 2012; and it is further

ORDERED that defendant Edwards is directed to serve on or before October 5, 2012 a supplemental response as to those responses to the demand for component part information, demand for manufacturing information, demand for production information, demand for protocols for quality control, and demand for tests and inspections referring to bates stamped pages 00042-01151 to further particularize the specific documents responsive to each demand; and it is further

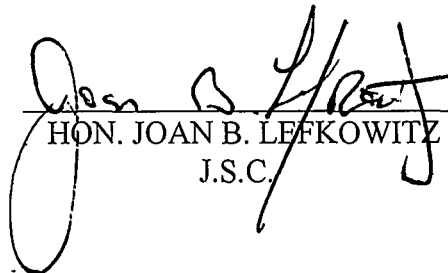
ORDERED that the branch of plaintiffs' motion seeking to compel Edwards to provide deposition testimony and document discovery from other lawsuits which relate to the Edwards Heart Valve, or similar heart valves is denied; and it is further

ORDERED that the branch of plaintiffs' motion seeking an order striking defendant Edwards' answer is denied; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on October 11, 2012 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 13, 2012


HON. JOAN B. LEFKOWITZ
J.S.C.