

Whitnum v Plastic & Reconstructive Surgery, P.C.
2012 NY Slip Op 33856(U)
March 7, 2012
Supreme Court, Westchester County
Docket Number: 19222/09
Judge: Joan B. Lefkowitz
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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 March 8, 2012 WESTCHESTER COUNTY CLERK

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

-----X
LISA WHITNUM,

Plaintiff,

-against-

PLASTIC & RECONSTRUCTIVE SURGERY, P.C.
and DAVID PALAIA, M.D.,

Defendants.
-----X

LEFKOWITZ, J.

DECISION & ORDER

Index No. 19222/09
Motion Date: Jan. 23, 2012
Seq. No. 6

FILED
MAR - 8 2012
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following papers numbered 1 to 4 were read on this motion by pro se plaintiff for “approval of a Subpoena Duces Tecum for the deposition of a support staff member of ... Plastic & Reconstructive Surgery ... who has been employed at the practice for more than 2 years and is familiar with all procedures.”

- Order to Show Cause - Affidavit of Service 1, 4
- Proposed Subpoena and Subpoena Duces Tecum
- Affirmation in Opposition - Affidavit of Service 2-3
- Filed Papers (Complaint/Revised Verified Bill of Particulars)

Upon the foregoing papers and the proceedings held on January 23, 2012, it is ordered that the motion is decided as follows:

In this medical malpractice and fraud action, pro se plaintiff alleges, inter alia, that defendant Palaia negligently performed a mastectomy which left a disfigurement in the form of a “hanging concave effect,” even after breast implants were inserted. Plaintiff also alleges that defendant Palaia, without her consent, used breast implants which were larger than plaintiff had requested and were silicone, rather than the “gummy bear” implants which plaintiff had requested.

During a compliance conference held on November 23, 2011, the court issued a Discovery Motion Briefing Schedule for a motion by plaintiff to compel a deposition and the production of photocopies and records.

By Order to Show Cause plaintiff now moves for “approval of a subpoena duces tecum for the deposition of a support staff member of defendant Plastic & Reconstructive Surgery”

regarding the normal and customary procedure for recording device numbers associated with implants, and an order compelling defendants to produce “white-out” consent forms. Plaintiff does not annex an affidavit in support of the motion. In the Order to Show Cause, however, which she signed but did not have notarized, plaintiff asserts that since she is claiming that defendant Palaia deviated from the normal standard of care and intentionally covered up his “wrong-doing,” the deposition testimony is “crucial.” Plaintiff also seeks to compel the staff member produced for a deposition to produce other patients’ consent forms with their names redacted so that plaintiff can prove that defendant Palaia purposefully deviated from the standard procedure when he filled out plaintiff’s consent form.

With the Order to Show Cause, plaintiff submitted a proposed subpoena duces tecum addressed to “Staff Member” at the address of defendant Plastic & Reconstructive Surgery, P.C. The proposed subpoena duces tecum is signed by plaintiff and seeks a deposition and production of (1) “photocopies of the consent form for the last twenty patients for whom Dr. Palaia performed a mastectomy” with all names “white[d]-out,” and (2) device information on record for the implant given to plaintiff. In the subpoena duces tecum, plaintiff alleges that the original device cards must be in defendants’ office as she did not receive a device card and only received a photocopy of the alleged device cards in March, 2011.

Although plaintiff did not seek the relief in the Order to Show Cause, plaintiff also submitted with the Order to Show Cause a proposed subpoena addressed to “Ms. Laura Capicotto, former office manager.” The proposed subpoena seeks a deposition of Ms. Capicotto regarding her knowledge of the case. Plaintiff does not attach any exhibits to the Order to Show Cause other than the subpoena and subpoena duces tecum.

Defendants oppose the motion. Initially, defense counsel contends that insofar as the Order to Show Cause is “ineloquently” written, it is not clear what relief plaintiff seeks and, therefore, he is at a disadvantage in opposing the motion. With respect to the proposed subpoena for Ms. Capicotto, defense counsel asserts that she was not an office manager for defendant Plastic & Reconstructive Surgery, P.C., and it is unknown how her testimony could shed light on plaintiff’s claim. Defense counsel notes that Ms. Capicotto’s name was not mentioned at any of the depositions and defense counsel speculates that plaintiff learned of Ms. Capicotto during an inappropriate telephone call to defendant Plastic & Reconstructive Surgery, P.C. after she initiated this action. Defense counsel further contends that plaintiff has failed to prove how Ms. Capicotto’s deposition is material and necessary to her claims. Defense counsel also asserts that plaintiff has failed to prove the requisite level of “need” for a non-party deposition as required by *Kooper v Kooper* (74 AD3d 6 [2d Dept 2010]).

As to the proposed subpoena duces tecum to be served on a staff member of defendant Plastic & Reconstructive Surgery, P.C., defense counsel essentially contends that plaintiff failed to demonstrate why the deposition of an unnamed staff member of defendant is material and necessary or in conformity with *Kooper* (*Id.*).

With respect to the documents sought by plaintiff in the subpoena duces tecum, defense counsel asserts that all materials and medical records in the possession of defendants have been previously provided to plaintiff pursuant to her discovery requests.

Defendants seek an award of costs associated with opposing the present frivolous motion in accordance with the Uniform Rules for Trial Courts [22 NYCRR] §130-1.1.

At oral argument, plaintiff asserted that copies of other patients' informed consent forms were relevant to her claim since the informed consent form given to her by defendants to sign was "purposely vague." Plaintiff also contended that she had requested "gummy bear" implants, which plaintiff contends defendant Dr. Palaia was not approved to implant. Plaintiff, however, conceded that a current member of defendants' office could provide the information she seeks regarding the office procedure with respect to registering and giving the patient the device number for an implant.

To the extent that plaintiff appears to seek the issuance of a subpoena for the deposition of Laura Capicotto, plaintiff's application must be denied insofar as such relief was not sought in the Order to Show Cause. In any event, plaintiff failed to demonstrate that the deposition of Ms. Capicotto would lead to any relevant information that could not be obtained from defendants. At oral argument, plaintiff conceded that a current member of defendants' office could provide information regarding defendants' office procedure for registering and disseminating device numbers for implants.

That branch of plaintiff's motion seeking approval of a subpoena duces tecum for the deposition of a support staff member of Plastic & Reconstructive Surgery, who has been employed for more than two years and is familiar with all procedures, is granted only to the limited extent that defendants shall, within 20 days of the date of this order, provide plaintiff with a detailed affidavit of a member or employee of Plastic & Reconstructive Surgery regarding the office procedure for registering a device number for an implant and providing the device number to a patient. Plaintiff has established that this information may be relevant to her claims. Contrary to defendants' contention, plaintiff need not satisfy *Kooper* insofar as current employees of defendants are under the control of defendants and, therefore, are not non-parties for the purposes of *Kooper*. Plaintiff, however, failed to demonstrate entitlement to a further deposition.

That branch of plaintiff's motion which essentially sought an order compelling defendants to produce other patients' consent forms, with their identities redacted, and device information for plaintiff's implants is denied. Plaintiff failed to meet the burden of demonstrating her entitlement to other patients' consent forms, even with patient names redacted, as those forms constitute confidential health information which is protected from disclosure by HIPAA (Health Insurance Portability and Accountability Act of 1996, 42 USC § 1320d *et seq.*). Moreover, defendants have asserted that they have already provided plaintiff with all materials and medical records in their possession relating to plaintiff, and plaintiff has admitted receiving a copy of implant device cards.

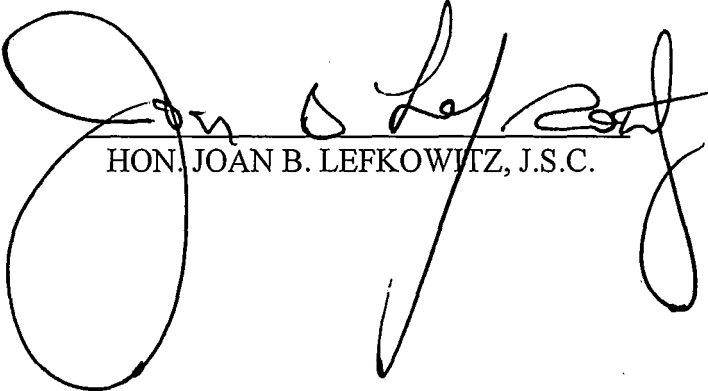
In view of the foregoing, it is

ORDERED that plaintiff's motion is granted only to the extent that defendants, within 20 days of the date of this order, shall serve plaintiff with a detailed affidavit of a member or employee of defendant Plastic & Reconstructive Surgery regarding the office procedure for registering a device number for an implant and providing the device number to a patient. The remaining branches of the motion and requests for relief are denied; and it is further

ORDERED that defendants' application for costs is denied; and it is further

ORDERED that pro se plaintiff, or counsel retained on her behalf, and counsel for defendants shall appear for a conference in the Compliance Part, Courtroom 800, on April 3, 2012 at 9:30 A.M.

Dated: White Plains, New York
March 7, 2012



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

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