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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis Justice PART 6

Index Number : 117000/2008
LEWIS, MARY R.
VS.
NY UNIVERSITY MEDICAL CENTER
SEQUENCE NUMBER : 003
VACATE NOTE OF ISSUE/READINESS

INDEX NO.
MOTION DATE 6/24/11
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1-12

Answering Affidavits — Exhibits 13-14

Replying Affidavits

FILED

AUG 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION and ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/24/11

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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MARY R. LEWIS,

Plaintiff,

-against-

NEW YORK UNIVERSITY MEDICAL CENTER d/b/a NYU HOSPITAL FOR JOINT DISEASES, and ORRIN H. SHERMAN, M.D.,

Defendants.

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Index No. 117000/08

Decision and Order

JOAN B. LOBIS, J.S.C.:

Defendant Orrin H. Sherman, M.D., moves for an order, pursuant to 22 N.Y.C.R.R. § 202.21(e), vacating plaintiff's note of issue due to plaintiff's failure to provide certain authorizations and refusal to undergo x-rays of her right lower femur and knee. Plaintiff opposes the motion.

In this case sounding in medical malpractice and lack of informed consent, plaintiff alleges that Dr. Sherman negligently performed two surgeries on her right knee at New York University Medical Center ("NYU") in May and June 2006.[1] The action was commenced on December 19, 2008, and proceeded with discovery thereafter. On or about March 23, 2009, Dr. Sherman made a demand for IRS records, W-2 records, and employment records. On January 18, 2010, Dr. Sherman demanded that plaintiff provide an authorization for Dr. Quraishi. On May 18, 2010, Dr. Sherman demanded authorizations for, inter alia, Drs. Taylor, Hurst, Petit, Leib, Shridharani, Sweeney, Sacks, and Zatzkin. On February 17, 2011, Dr. Sherman demanded

[1] NYU was granted summary judgment on July 22, 2011. See Decision and Order on Motion Sequence Number 004.

authorizations for John Carlisle, Dr. Meryl Becker Joerg, Dr. Craig Foster, and Dr. John Troccoli. All of the demands set forth that if plaintiff failed to respond within twenty (20) days, Dr. Sherman would make the "appropriate motion" to the court. Plaintiff did not respond to the demands for these authorizations, but no motions were made after the twenty-day period. The court held numerous conferences, but the authorizations were not specifically referenced or ordered to be turned over in any court order (there are orders that plaintiff "respond" to outstanding discovery demands with no reference to any specific discovery).

On March 1, 2011, Edward Crane, M.D., at the request of Dr. Sherman, performed an independent medical examination ("IME") of plaintiff. Dr. Crane performed a physical examination and requested an x-ray of plaintiff's lower right femur and right knee. Plaintiff refused to undergo the x-ray. According to Dr. Crane's IME report, the x-rays are necessary to evaluate her condition. Dr. Sherman never moved to compel the x-rays.

On March 29, 2011, the parties appeared for a pre-trial conference and entered into a pre-trial stipulation and order (the "March 2011 Order"). In addition to setting a trial date, the March 2011 Order set forth that outstanding IMEs were to be completed by May 31, 2011. The March 2011 Order does not address the issue of the outstanding authorizations. Plaintiff filed her note of issue the next day on March 30, 2011.

Now, Dr. Sherman seeks to vacate the note of issue on the grounds that discovery remains outstanding. Dr. Sherman asserts that plaintiff has failed to respond to the discovery

demands from March 23, 2009; January 18, 2010; May 18, 2010; and February 17, 2011. Dr. Sherman further maintains that Dr. Crane needs to perform x-rays on plaintiff in order to complete his evaluation of her.

In opposition, plaintiff argues that she has valid reasons for refusing x-rays in that Dr. Sherman has "received ample x-rays" and that she has a "fear of unnecessary and excessive radiation exposure." As to the authorizations, plaintiff asserts that Dr. Sherman waived his right to compel the authorizations because any outstanding discovery should have been addressed, at the latest, during the March 29, 2011 pre-trial conference, but was not. Even so, plaintiff maintains that she responded to the demands immediately after Dr. Sherman made the instant motion. Annexed to the opposition papers is plaintiff's response dated April 20, 2011, which sets forth that eight of the thirteen treaters for which Dr. Sherman seeks authorizations rendered care irrelevant to the case, in that Drs. Taylor and Foster are plastic surgeons; that Drs. Troccoli and Sweeney are dermatologists; that plaintiff visited with Dr. Shridharani only once when she had the flu; that plaintiff treated with Dr. Quraishi more than three years prior to the malpractice; that Dr. Leib is an ophthalmologist; and that Dr. Zatzkin is a periodontist. The response further sets forth that the remaining treaters are unknown to plaintiff. Attached to the response are authorizations for plaintiff's IRS records, W-2s, and employment records from 2006 to the present.

In reply, Dr. Sherman sets forth that plaintiff cannot unilaterally decide which authorizations are relevant and that he is entitled to all of the authorizations requested. Dr. Sherman further sets forth that x-rays are material and necessary to his defense of the action and that the

March 2011 Order extended the time for completing an IME until after the filing of the note of issue.

Under 22 N.Y.C.R.R. § 202.21(e), the court may vacate the note of issue if, within twenty (20) days of the filing of note of issue, a party demonstrates that the case is not ready for trial because "a material fact in the certificate of readiness is incorrect, or . . . the certificate of readiness fails to comply with the requirements of [22 N.Y.C.R.R. § 202.21]." Vacating the note of issue is not appropriate when the moving party has had "ample opportunity to complete discovery." Mardiros v. Ghaly, 206 A.D.2d 413, 414 (2d Dep't 1994); see also Plonka v. Millard Fillmore Emergency Physicians Servs., P.C., 9 A.D.3d 869, 870 (4th Dep't 2004); Ireland v. GEICO Corp., 2 A.D.3d 917 (3rd Dep't 2003). Here, three of Dr. Sherman's demands were outstanding for many months prior to the filing of the note of issue—one demand is over two years old—yet prior to the instant motion, Dr. Sherman failed to inform the court that he believed that discovery was incomplete. See Rosenbaum v. Schlossman, 72 A.D.3d 623 (1st Dep't 2010). There is no basis to vacate the note of issue since Dr. Sherman had ample opportunity to compel disclosure and failed to do so due to his "own inaction." Ford v. J.R.D. Mgmt. Corp., 238 A.D.2d 307 (2d Dep't 1997).

Even assuming that Dr. Sherman did not have ample time to complete discovery, he has not shown that the records sought are "material and necessary" to his defense. A plaintiff in medical malpractice suit waives the physician-patient privilege only with respect to his or her "relevant past medical history." Gill v. Mancino, 8 A.D.3d 340 (2d Dep't 2004). The waiver does not extend to "unrelated illnesses or treatments." Id. at 341. Dr. Sherman fails to set forth why he needs records for plaintiff's dermatologists, plastic surgeons, periodontist, and the general practioner

who treated her on one occasion for flu symptoms. Nor does he offer reasons to compel authorizations for a treater that has not rendered care to plaintiff since before 2003 or treaters that plaintiff does not recall seeing.

Turning to the issue of the x-ray, the March 2011 Order does allow Dr. Sherman to complete any outstanding IME past the note of issue date,[2] so Dr. Sherman should not be precluded from obtaining the x-ray on timeliness grounds. For the same reason, Dr. Sherman's request to vacate the note of issue due to the outstanding IME is denied. He agreed to hold any outstanding IME while the case was on the trial calendar.

The court notes that plaintiff does not dispute that x-rays of her knee and femur are material and necessary to the defense of this action. Her objection to Dr. Crane taking x-rays rests on the grounds that they would be redundant and harmful. She has not provided any expert medical opinion or medical evidence to support her position. See Humphrey v. Cartagena, 55 A.D.3d 333 (1st Dep't 2008). Absent support for her claim that the x-rays would be harmful, by putting the condition of her knee at issue, plaintiff "may be compelled to undergo additional objective testing procedures which are safe, painless and noninvasive, including X rays[.]" Lapera v. Shafron, 159 A.D.2d 614, 614-15 (2d Dep't 1990) (citation omitted).

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[2] Outstanding IMEs were to be completed by May 31, 2011, but that time will be extended as set forth below.

The court notes that Dr. Sherman does not move to compel the x-rays. Nevertheless, the court has discretion in supervising discovery to "grant relief on a motion which was not specifically requested as long as it is not dramatically unlike the relief sought, the proof supports it, and the court is satisfied that no one is prejudiced by it." Geffner v. Mercy Med. Ctr., 83 A.D.3d 998, 999 (2d Dep't 2011). Given the need to resolve this issue quickly, the x-ray shall take place within 30 days of the date of the entry of this order. Accordingly, it is hereby

ORDERED that the motion is granted to the extent that plaintiff shall appear at Dr. Crane's office for x-rays of her right knee and right lower femur within thirty (30) days of the date of entry of this order; and it is further

ORDERED that the remainder of the motion is denied.

Dated: August 24, 2011

JOAN B. LOBIS, J.S.C.