

Watkins v Hospital for Special Surgery PHO, Inc.

2011 NY Slip Op 33414(U)

December 14, 2011

Supreme Court, New York County

Docket Number: 402027/10

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS
Justice

PART 6

Cheryl WATKINS, ET AL.

INDEX NO. 402027/10

HOSPITAL For Special
Surgery Phos, ET AL.

MOTION DATE _____

MOTION SEQ. NO. 2

MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion to for Wampel discovery

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-7

8-10

11

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
ORDER

FILED

DEC 14 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/12/11

JOAN B. LOBIS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X
CHERYL WATKINS and JOSEPH WATKINS,

Plaintiffs,

Index No. 402027/10

Decision and Order

-against-

THE HOSPITAL FOR SPECIAL SURGERY PHO,
INC., MICHAEL J. MAYNARD, M.D., and JOHN
KARWOWSKI, M.D.,

Defendants.

-----X
JOAN B. LOBIS, J.S.C.

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Defendant, John Karwowski, M.D., seeks an order compelling a further deposition of plaintiff, Cheryl Watkins, pursuant to C.P.L.R. §§ 3101 and 3124. Plaintiffs oppose this motion.

Plaintiff, Cheryl Watkins, commenced this medical malpractice action on February 22, 2010, seeking to recover damages for physical pain and suffering and loss of enjoyment of life, and asserting a derivative claim for loss of services on behalf of her husband, Joseph Watkins. Counsel for Dr. Karwowski states that plaintiffs withdrew the claim for loss of consortium during the deposition of Joseph Watkins.

On May 21, 2008, Ms. Watkins underwent a hip resurfacing procedure at co-defendant Hospital for Special Surgery Pho, Inc., with co-defendant Michael J. Maynard, M.D., performing the surgery. During the surgery, Dr. Karwowski was called to assist in closing a blood vessel. After the surgery, Dr. Karwowski performed a grafting procedure and a calf fasciotomy on the leg on which Dr. Maynard operated. As to Dr. Karwowski, plaintiffs allege that the grafting

procedure and calf fasciotomy were performed negligently. Plaintiffs allege in their verified bill of particulars that Ms. Watkins suffered permanent injuries including headaches with facial pain; left lower leg ischemia; extensive nerve damage and swelling to the lower extremity with loss of feeling and numbness in areas of the fasciotomy and below; muscle necrosis; chronic pain in the affected extremity; deficits in strength, balance, and stability; and loss of enjoyment for life.

During Ms. Watkins' deposition on May 23, 2011, plaintiffs' counsel objected to four of Dr. Karwowski's counsel's questions and directed Ms. Watkins not to answer those questions. Ms. Watkins was asked to identify the kind of facility where she participated in physical activities; whether she was a member of a country club; whether she has taken any vacations after her procedure; and whether anyone, other than her attorney, has criticized the care she received by Dr. Karwowski.

Dr. Karwowski's counsel argues that Ms. Watkins should be compelled to appear for further deposition on the grounds that it was impermissible for plaintiffs' counsel to instruct his client not to answer the four aforementioned questions. Defendant asserts that plaintiffs' counsel acted in violation of 22 N.Y.C.R.R. § 221.1, which states, in relevant part, that "no objection shall be made at a deposition except those which, pursuant to subdivision (b), (c), or (d) of [C.P.L.R. § 3115], would be waived if not interposed, and except in compliance with subdivision (e) of such rule." The rule further states that all objections "shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the

C.P.L.R.” 22 N.Y.C.R.R. § 221.1. Dr. Karwowski also argues that plaintiffs’ counsel’s objections violate the stipulation entered into by all parties at the commencement of the deposition on May 24, 2011, which provides “that a deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, could cause significant prejudice to a person.” See 22 N.Y.C.R.R. § 221.2. Defendant’s counsel states that none of the four questions posed to Ms. Watkins is privileged or falls into any of the exceptions. Additionally, he argues that the questions are material and necessary, as Ms. Watkins’ activity level and vacations relate to her alleged damages and claims for loss of feeling and numbness to her left lower extremity; deficits in strength, balance, and stability; and loss of enjoyment of life. These questions, defendant further states, seek to elucidate the manner in which Ms. Watkins’ lifestyle has been altered since the May 21, 2008 procedure. As to the question regarding whether anyone besides Ms. Watkins’ counsel has criticized the care provided by Dr. Karwowski, defendant’s counsel alleges that it seeks to discover names of potential witnesses, which can only be learned from Ms. Watkins’ deposition.

Plaintiffs oppose this motion, arguing that defendant merely seeks to portray Ms. Watkins as a well-to-do person of means and that the question regarding the criticism of care provided by Dr. Karwowski seeks the names of potential medical experts, which violates C.P.L.R. § 3101(d). Plaintiffs further argue that there is no relationship between the kind of facility in which Ms. Watkins participated in physical activity and the claims alleged in this action, and, as such, the questions about the kind of facility to which Ms. Watkins belongs and her vacation schedule are irrelevant.

Parties in a civil action are entitled to "full disclosure of all matters material and necessary" (C.P.L.R. § 3101[a]), and such discovery provisions are to be liberally construed to require disclosure of any facts bearing on the case. Allen v. Crowell-Collier Pub., 21 N.Y.2d 403, 406 (1968). Here, plaintiffs' counsel has not articulated that the questions posed by defendant's counsel are privileged, or that answering the questions would cause his client significant prejudice. However, as to whether anyone, other than Ms. Watkins' attorney, has criticized the care that Ms. Watkins received by Dr. Karwowski, this question should be limited to exclude any medical professional hired by Ms. Watkins or her attorney solely as an expert witness in this matter. In other words, if defendant's question is not limited in this capacity, plaintiff shall be permitted to not answer this question, in accordance with C.P.L.R. § 3101. As such, Ms. Watkins shall appear for further deposition regarding the four aforementioned questions and those questions which reasonably flow from her responses to those questions, to the extent limited by this order. The length of the deposition shall not exceed one (1) hour unless good cause is shown to extend the time. Accordingly, it is hereby

ORDERED that defendant John Karwowski, M.D.'s motion to compel further deposition of plaintiff Cheryl Watkins is granted, to the extent set forth above.

Dated: *Dec. 12*, 2011

ENTER:

FILED

DEC 14 2011

JB

 JOAN B. LOBIS, J.S.C.

NEW YORK
 COUNTY CLERK'S OFFICE