

Chong v New York Downtown Hosp.

2012 NY Slip Op 32877(U)

November 30, 2012

Supreme Court, New York County

Docket Number: 800334/2011

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

PRESENT: _____
Justice

PART IA PART 16

Index Number : 800334/2011
CHONG, MYONG-SOON
vs.
NEW YORK DOWNTOWN HOSPITAL
SEQUENCE NUMBER : 001
ORDER OF PROTECTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ by plaintiff for a protective order is granted to the extent provided in the accompanying memorandum decision, and the cross-motion by defendants to dismiss is denied.

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

FILED

DEC - 5 2012

NEW YORK COUNTY CLERK'S OFFICE

NOV 30 2012

Dated: November 30, 2012



ALICE SCHLESINGER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
MYONG-SOON CHONG,

Plaintiff,

Index No. 800334/11
Motion Seq. No. 001

-against-

NEW YORK DOWNTOWN HOSPITAL and
DR. ALLAN HO, M.D.,

Defendants.

FILED

DEC - 5 2012

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SCHLESINGER, J.:

COUNTY CLERK'S OFFICE

In this seemingly straightforward motion, some things are better known than others. What is clear is that the plaintiff Myong-Soon Chong, in this medical malpractice action against New York Downtown Hospital ("Downtown") and Dr. Allan Ho, is now living in Seoul, South Korea and has been denied a visa to return to the United States for her deposition or a medical examination on behalf of the defendants (an IME) or for any purpose. What is less than clear is the circumstances that brought her to this point.

What is known is that Ms. Chong was in the United States before and during 2011 and she was taken into custody by the Federal Authorities and held at the Metropolitan Detention Center while awaiting sentencing in 2011. We know also that on February 25, 2011, Ms. Chong was taken to Downtown for a colposcopy procedure after a Pap smear found abnormal cervical cells. Dr. Ho performed it and in the course of the procedure introduced trichloroacetic acid into the plaintiff's vagina. According to the complaint, filed on October 13, 2011, acetic acid is a much weaker compound and is generally used. As a result, Ms. Chong states she immediately suffered severe

chemical burns inside and outside her vagina. She further alleges that this event was a departure from accepted standards of gynecological care and caused her continuing pain, scarring and compromised function that is permanent. She was deported to Korea in May 2011.¹

Therefore, because Ms. Chong cannot return to the United States legally, her motion is for an order pursuant to CPLR §3103(a) permitting her to testify at her deposition by video teleconference and to also undergo her IME in Seoul. A translated affidavit from Ms. Chong supports the motion. Counsel refers to the recent Fourth Department opinion, *Gabriel v. Johnston's L.P. Gas Service, Inc.*, 98 AD3d 168 (2012), to show that under like circumstances this kind of protective order has been issued.

Both defendants oppose and make cross-motions to dismiss the complaint. Downtown's attorney does the heavy lifting here and Dr. Ho's counsel adopts this well-argued opposition. With regard to the dismissal requested in the cross-motions, that is predicated on "plaintiff's inability ever to return to New York to prosecute the action".

As to the mechanisms for discovery, defendants argue that the ones proposed by plaintiff would prejudice them. Further, it is argued that since Ms. Chong cannot return to this country because she was convicted of crimes involving moral turpitude, "any hardship is of her own making and accordingly the equities weigh in favor of

¹Exhibit 2 to this motion is a copy of an April 5, 2011 Order of Judicial Removal signed by U.S. District Judge Kimba M. Wood. Contained there is the statement that Ms. Chong was a defendant in a criminal proceeding wherein she was convicted (it appears by plea) of the offense of "misprison of a felony, in violation of Title 18 U.S.C. Section 4." Further on in this document, in ¶6, referring to an application by Assistant US Attorney Mark Lanpher, is the statement that Ms. Chong is subject to removal in part because "she is an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of misconduct."

dismissal here". Cases supporting that view are cited, including *Farrakhan v. N.Y.P. Holdings*, 226 AD2d 133 (1st Dep't 1996), *Doherty v. City of New York*, 24 AD3d 275 (1st Dep't 2005) and *Weinstein v. Gindi*, 92 AD3d 526 (1st Dep't 2012), to name a few. Defense counsel also attempts to distinguish *Gabriel (supra)* that was cited by the plaintiff. She points out that the Appellate Court there made it clear that the decision to allow for videotaped deposition and trial testimony was a discretionary one for each court and that the court observed there that the plaintiffs, undocumented farm workers injured in a gas explosion, were impoverished laborers without means of obtaining a visa to reenter the United States.

While acknowledging that such inability to return is shared by Ms. Chong, counsel argues that there is a significant distinction in that her hardship results from her own criminal conduct, her convictions for crimes involving moral turpitude.²

While counsel is free to opine that Ms. Chong's inability to obtain a visa is based on her criminal conviction, it seems likely that her status of overstaying her one-year visa for a number of years may also be a reason for the current denial.

However, speculation on this point does not advance a solution. On the one hand, Ms. Chong claims she suffered severe and permanent pain and injury from the carelessness of the defendants. There is no allegation under these circumstances that Ms. Chong shares any responsibility for the harm. Therefore, she is entitled to her day in court, even if she cannot actually be there.

²At oral argument, neither the attorneys nor the Court knew what the crime of "misprison of a felony" was. The US Attorney had commented in his application that this crime involved "moral turpitude not arising out of a single scheme of misconduct."

But on the other hand, at oral argument defense counsel attempted to convince the Court that taking Ms. Chong's testimony by videotape (of course at plaintiff's expense) would be prejudicial to them. But they were not successful. Depositions of material witnesses who are away from New York, and in some cases in foreign countries, have become relatively common, as in *Doherty (supra)* where the court directed plaintiff's deposition to take place in Ireland. In *Yu Hui Chen v. Chen Li Zhi*, 81 AD3d 818 (2nd Dep't 2011), for example, the Appellate Court approved the plaintiff's application to be deposed by remote electronic means from China. There was a demonstration there that traveling from China to the United States would "cause undue hardship." Defendants here were not able to show anything more than a preference for a face to face deposition. But this does not rise to the level of prejudice.

However, with regard to the medical examination, defendants make a better argument as to who shall perform it. Counsel for plaintiff suggests that a Korean doctor could do this examination, but defendants have a right to select their own physician to conduct such an examination. Therefore, after the defendants together select a physician who is agreeable to travel to Seoul, they should inform counsel for plaintiff, who will then arrange for an office for the physician to use and arrange for Ms. Chong to appear. The entire expense, presumably a considerable one, less what the doctor would normally charge for an examination in New York, will be borne by the plaintiff alone. In this action, the issue of the extent and permanency of Ms. Chong's injuries is a significant one. Therefore, the defense must be able to retain a doctor in whom they have confidence to not only perform the examination, but to be in a position to testify as well.

Ms. Chong may be guilty of extending her stay illegally in the United States and also may be guilty of "misprison of a felony," whatever that may be. But in this Court's opinion, such conduct should not result in forfeiting a plaintiff's right to compensation if she can prove that negligent conduct caused her great harm. As long as there are means to take and preserve her testimony, and there are, those should be employed. Similarly, as long as a medical examination of Ms. Chong can be done by a physician chosen by the defense, that also should be accomplished.

Ms. Chong did not choose to be injured, nor did she choose to be barred from entry into this country. But she did choose to pursue a claim for compensation for the injury she suffered. Within the above parameters, this choice should be respected.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a protective order permitting plaintiff to testify at her deposition and undergo her medical examination in Korea is granted to the extent provided herein; and it is further

ORDERED that the cross-motion by the defendants to dismiss is denied.

Dated: November 30, 2012

NOV 30 2012


J.S.C.

ALICE SCHLESINGER

FILED

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