Cole v Rosensweig
2014 NY Slip Op 33356(U)
December 19, 2014
Supreme Court, New York County
Docket Number: 150219/2009
Judge: Peter H. Moulton

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Supreme Court of the State of New York
New York County: Part 57

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BARBARA COLE,

Plaintiff,

-against- Index No. 150219/2009

NORTON S. ROSENSWEIG, M.D.,

Defendant.

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Peter H. Moulton, J.S.C.

This action alleging medical malpractice has been assigned to me for trial. The parties appeared before me on December 17, 2014 for oral argument on defendant's in limine motion. The following constitutes the decision and order of the court on the motion.

Plaintiff Barbara Cole began treating with defendant Norton Rosensweig, an internist and gastroenterologist, in early 2003. Plaintiff complained of an array of various gastrointestinal problems. Dr. Rosensweig treated Ms. Cole approximately 40 times between 2003 and 2007. His primary diagnoses were that she suffered from gastroesophogeal reflux disease and irritable bowel syndrome. Plaintiff contends that her correct diagnosis was celiac disease, and that defendant's failure to diagnose and treat her for celiac disease constituted malpractice. She alleges that she suffered a variety of symptoms, including, but not limited to, extreme pain, hair loss, and muscle weakness, as a result of this

alleged departure and that she was unable to work or engage in daily activities as a result.

Defendant contends that his treatment of plaintiff was well within the standard of care. He disputes that she has celiac disease.

Defendant initially brought an in limine motion in August raising essentially four issues. The motion was deferred as the parties attempted to engage in settlement negotiations and then until the case was assigned to a judge for trial.

The first issue raised by defendant is that plaintiff has identified 20 lay witnesses on damages, which he contends must result in duplicative testimony and wasted time at trial. In answering papers and at oral argument plaintiff's counsel states that he has no intention of calling all 20 witnesses, but that such a large roster is necessary because the witnesses live outside of the state and have busy schedules. Once a trial date is set, he stated, he will be able to narrow down the list.

With respect to these 20 proposed lay witnesses, the court directs plaintiff to winnow the list to 5, of which she may call a maximum of three. The plaintiff shall provide the list of five potential lay witnesses on damages to defendant's counsel 20 days prior to trial.[1]

[1]The court will confer with the parties concerning a trial date via email in the coming days.

Next, defendant argues that plaintiff's "recruiting expert" should be precluded from testifying at trial. Plaintiff offers this witness in support of her lost wages claim, to verify the salary ranges in plaintiff's chosen field of employment. Given that the 3101(d) statement for this witness was provided in August, and trial of this matter will not go forward until early 2015, the notice was sufficiently timely. Additionally the content of the 3101(d) statement is sufficiently detailed to provide notice of this witness's testimony. Accordingly, the branch of the in limine motion seeking to bar this witness's testimony is denied. Defendant of course retains any the right to assert objections to the witness's qualifications and to the content of his testimony.

Defendant's next application concerns a damage allegation that was first asserted by plaintiff in the supplemental 3101(d) statement of one of her expert witnesses. This 3101(d) statement, which is dated April 24, 2014, includes the allegation that plaintiff is suffering from permanent peripheral neuropathy as a result of the alleged departure from the standard of care. This condition is not listed in the bill of particulars, nor was it discussed at plaintiff's deposition.

In general, evidence concerning a specific injury not mentioned in the bill of particulars will be excluded at trial unless the opposing party should have known of such injury. (See D'Angelo v Bryk, 205 AD2d 935.) Here defendant has been given

ample notice that plaintiff is claiming this condition. Indeed, defendant's own expert's 3101(d) statement, dated August 2, 2014, asserts that the expert's testimony will dispute any causal connection between plaintiff's alleged peripheral neuropathy and Dr. Rosensweig's care.

Any prejudice arising from plaintiff asserting this new injury after filing the note of issue can be addressed by further deposition of the plaintiff, and of the two physicians whose reports apparently first identified this condition. Accordingly, plaintiff shall appear for a continued deposition on this topic on or before January 23, 2015. At this continued deposition of plaintiff, defendant's counsel may also inquire concerning an issue discussed during oral argument on December 17: whether plaintiff has recently seen medical providers not previously disclosed to defendant. Defendant's counsel stated at oral argument that the subpoenaed medical records of Dr. Marin, a gynecologist who treated plaintiff, indicate that plaintiff has indeed seen new medical professionals.

Defendant is also given leave to depose Drs. Green and Savage. Plaintiff produced the reports of both physicians, which plaintiff states both contain a diagnosis of peripheral neuropathy. These depositions should be completed by January 30, 2015.

The final issue raised by defendant is that it has not

received HIPAA compliant authorizations nor Arons[2] authorizations for a number of the providers identified by plaintiff in her Notice of Intention to Introduce Business Records. Defendant also objects that the authorizations that he has received all call for records generated from 2003 to date. Defendant argues that the relevant period should begin before 2003, the year that defendant began treating plaintiff. He also notes that the authorizations do not include information on HIV status.

Plaintiff asserts that it has provided the relevant HIPAA authorizations and that defendant has not been sufficiently specific concerning which Arons authorizations he wants. In his affirmation, plaintiff offers to "review the providers with the defense in an effort to agree which providers are irrelevant to the issues in question..." The court directs the parties to proceed in this fashion, with an eye toward reaching consensus on the records that will be introduced at trial, and on the necessary Arons authorizations. The following parameters shall apply as the parties undertake their discussions concerning these issues. All medical records should be produced for years beginning 2001, if the provider treated the plaintiff for that duration of years. Plaintiff is not required to provide authorizations for HIV status, mental health treatment, or alcohol or drug treatment. Defendant has failed to demonstrate sufficient need for this information.

[2]Arons v Jutkowitz, 9 NY3d 393.

(See PHL § 2785(2); MHL § 33(c)(1); Abdur-Rahman v Pollari, 107 AD3d 452; Del Terzo v Hosp. For Special Surgery, 95 AD3d 551.)

To the extent the parties are unable to come to an agreement concerning the relevant medical records and Arons authorizations, or if further issues arise as this action is brought to trial, they may schedule a conference via email with Law Clerk Hasa Kingo at hkingo@nycourts.gov.

CONCLUSION

For the reasons stated, defendant's in limine motion is granted in part and denied in part as set forth above. This constitutes the decision and order of the court.

DATE: December 19, 2014

J.S.C.

PETER H. MOULTON
J.S.C.