Romanelli v Moss-Jones
2015 NY Slip Op 32977(U)
November 30, 2015
Supreme Court, Putnam County
Docket Number: 1074/13
Judge: Lewis J. Lubell

0

SC 2/8/16 @ 9:30 AM

73

To commence the 30 day 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

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM

----------X

CHARLES ROMANELLI, Individually and as Administrator of the ESTATE OF GIA V. McGINLEY,

Plaintiff,

-against -

SADIE MOSS-JONES, CNM, HUDSON HIGHLANDS MIDWIFERY, PLLC, KEITH B. LESCALE, M.D. and HUDSON VALLEY PERINATAL CONSULTING, PLLC,

Defendants.

----------X

DECISION & ORDER

Index No. 1074/13

Sequence No. 2
Motion Date 9/28/15

LUBELL, J.

The following papers were considered in connection with this motion by plaintiff for an Order appointing a discovery referee, pursuant to CPLR Section 3104:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-D	1
OPPOSING AFFIRMATION/EXHIBITS E-H	2

This action arises out of the alleged medical malpractice of defendants in the care and treatment of plaintiff's decedent, Gia V. McGinley, who died of a uterine rupture during a vaginal birth after cesarean section during a home delivery with a nurse mid-wife, defendant Sadie Moss-Jones, CNM.

There being no judicial hearing officer available for appointment, absent a stipulation between the parties "that a named attorney may act as referee" at a stipulated fee to be taxed as disbursements (CPLR 3104[b]), plaintiff's motion for the appointment of a referee in this medical malpractice action to supervise the continuation of the deposition of defendant, Keith B. Lescale, M.D., must be denied for lack of the Court's authority to grant such relief (see Ploski v. Riverwood Owners Corp., 255 AD2d 24, 26 [2d Dept 1999]; Schlau v. City of Buffalo, 125 AD3d 1546,

1547 [4th Dept 2015]).

The deposition of Dr. Lescale is directed to go forward pursuant to CPLR 3113(b):

> . . . All objections made at the time of the examination . . . [as] to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness and parties present otherwise agree . . .

The following commentary may prove helpful:

> When ill feeling exists between the parties or counsel, deposition sessions can often be rough, with one side going perhaps too far in the questioning and the other being perhaps overzealous with objections. In such an instance, one of the parties may seek to terminate or adjourn the examination against the other's will. Although there is little cure for such behavior, CPLR 3113(b) states that the deposition "shall be taken continuously and without unreasonable adjournment, unless the court otherwise orders or the witness and parties present otherwise agree." It contemplates that objections, however numerous they may be, be noted, and that the deposition be completed insofar as possible. The objecting party is fully reserved the right to bring all objections to court for rulings on a later motion for a protective order under CPLR 3103(a). Similarly, the party who is met with the recalcitrance of the deponent can seek an order under CPLR 3124 or sanctions under CPLR 3126.

(Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3113:2, Practice at Examination).

Implementation of CPLR 3113(b) requires that

> counsel on both sides proceed as far as possible without adjournment irrespective of any objections. No matter how numerous the objections, they should be noted and the examination should proceed until all questions have been propounded. Whatever the quantum of heat generated at a given point in the examination, both sides may be surprised at how much further the examination can still go. Proceeding to other matters rather than terminating the deposition can have the salutary collateral effect of restoring some of the amenities between the opposing sides.

(Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3113:2, Practice at Examination, supra).

> All manner of objections may and often do arise at the deposition session. These may affect any number of things, procedural or substantive. The import of subdivision (b) is that these objections just be noted and that none of them be used as an excuse for a unilateral termination of the session. All such objections, whatever they relate to, are reserved, and the lot of them may be gathered up after the session and made the subject of a single motion for a protective order underCPLR 3103(a) or a disclosure order under CPLR 3124 or 3126. This procedure contemplates that upon such motion all of the objections will be ruled on, with an additional deposition to be scheduled afterwards if the court finds it necessary.

(Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C3113:2, Practice at Examination, supra).

The parties are directed to appear before the Court at 9:30 A.M. on February 8, 2016, by which time all depositions shall be held to completion, without prejudice to the reservation of rights under CPLR 3113.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
November 30, 2015

HON. LEWIS J. LUBELL, J.S.C.

John H. Fisher, Esq.
Attorney for Plaintiff
278 Wall Street
Kingston, NY 12401

Steinberg Symer & Platt, LLP
Ellen. A. Fischer, Esq.
27 Garden Street
Poughkeepsie, NY 12601

Feldman Kleidman Coffey Sappe & Regenbaum, LLP
Jeffrey Feldman, Esq.
995 Main Street
Fishkill, New York 12524