Plaitis v Manolakakis
2018 NY Slip Op 31154(U)
June 6, 2018
Supreme Court, New York County
Docket Number: 805482/2016
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6
---X
Andreas Plaitis,

Plaintiff,

-against-

Manolis G. Manolakakis, M.D., and The Center For Advanced Oral and Facial Surgery, LLC d/b/a Advanced Facial Surgery,

Defendants.

Index No. 805482/2016

DECISION and ORDER

Mot. Seq. 001

---X

HON. EILEEN A. RAKOWER, J.S.C.

This is an action for personal injuries allegedly sustained by plaintiff, Andreas Plaitis ("Plaitis" or "Plaintiff"), due to the negligence and dental malpractice of defendants Manolis G. Manolakakis, M.D. ("Manolakakis") and The Center for Advanced Oral and Facial Surgery, LLC, d/b/a Advanced Facial Surgery ("The Center") arising from dental services provided to Plaitis on January 6, 2014. (Verified Complaint, ¶ 1) Manolakakis is alleged to be the sole member of The Center. (*Id.* at ¶11)

This action was timely commenced in the United States District Court for the Eastern District of New York ("E.D.N.Y.") on December 8, 2015. (Verified Complaint, ¶ 2) The action was dismissed for lack of diversity jurisdiction pursuant to the "So-Ordered Stipulation" by the Court on November 14, 2016. (*Id.* at ¶ 3, Exhibit A) The Stipulation provides that Plaitis may reinstate the action in New York State Supreme Court, New York County, within 6 months. (*Id.*) The Stipulation also provides "that discovery already exchanged and depositions conducted will not have to be repeated in the State Court action." (*Id.*)

Plaintiff commenced this action with the filing of a Verified Complaint on December 19, 2016. On January 23, 2017, Manolakakis and The Center (collectively, "Defendants") interposed Verified Answers to the Complaint.

As alleged in the Verified Complaint, on January 6, 2014, Plaitis came under Manolakakis' care for a fracture of his left mandible. (Verified Complaint, ¶16) On January 7, 2014, Manolakakis "extracted Plaintiff's tooth number 17 and performed an open reduction and internal fixation of the fracture of plaintiff's left mandible with a pre-bent Synthes Matrix plate with 6 mm and 8 mm screws at Monmouth Medical Center." (*Id.* at ¶17) Plaitis alleges that Manolakakis "did not employ proper fixation during the surgery," and "did not employ proper maxillomandibular fixation after the surgery." (*Id.* at ¶18-19) On January 29, 2014, Manolakakis "had to perform emergency surgery to remove the Plaintiff's loose screws and misaligned plate." (*Id.* at ¶21) Plaintiff alleges that Manolakakis, *inter alia*, "did not employ proper maxillomandibular fixation during or after the surgery of January 29, 2014," "and failed to treat Plaintiff's infection." (*Id.* at ¶27, 30-70) Plaintiff alleges that on July 29, 2014, a different doctor performed surgery "to "remove the infected hardware, debride the osteomyelitis from the Plaintiff's left mandible, and place a 2 mm Synthes mandibular 8-hole reconstruction plate and arch bars with intermaxillary fixation." (*Id.* at ¶85)

In Defendants' respective Answers, they denied the allegations except to admit Manolakakis "rendered certain professional services to the plaintiff." Manolakakis' Answer is verified by his attorney, Joseph P. Rosh, Esq.

Pending Motions[1]

Defendants move pursuant to CPLR § 3103 and § 3123 striking Plaintiff's Notice to Admit. Plaintiff opposes.

Plaintiff cross moves for an Order striking Defendants' answer for failure to comply with prior orders and to appear for court ordered depositions. In the alternative, Plaintiff moves pursuant CPLR § 3124 to compel Manolakakis and Tanya Scott of Advanced Facial Surgery to proceed with court ordered deposition or be precluded from offering any testimony contesting Plaintiff's claims. Plaintiff also moves pursuant to CPLR § 3124 to preclude Defendants from conducting a

[1] The parties appeared to address the issues raised in the motion and cross motion on May 8, 2018. The parties addressed their respective positions on the record. The court requested that the parties order the minutes of the transcript of the arguments, and stated that the motions would be marked fully submitted once the transcript was received. To date, despite follow-up reminders to the parties by the part, no transcript has been provided. Nevertheless, the court has proceeded to render this decision on the motions.

physical examination of Plaintiff because of their failure to comply with prior orders. Defendants oppose Plaintiff's cross motion.

<u>Defendants' Motion to Strike the Notice to Admit</u>

Plaintiff served a Notice to Admit on Defendants. Plaintiff's Notice to Admit asks Manolakakis to admit, *inter alia*, items that relate to his medical treatment of Plaintiff, informed consent, and certain documents. Defendants move to strike the Notice of Admit. Defendants argue that the Notice to Admit "goes to the heart and/or controversy" of the subject case or involve "contested ultimate facts." Defendants also argue that, to the extent that the Notice to Admit contains references to the presence or absence of documents, Plaintiff could have made document demands to obtain the requested documents or asked about them at depositions.

More specifically, the Notice to Admit requests that Defendants admit the following items:

1. Item 1 states: "On January 7, 2014, defendant Manolakakis performed an open reduction and internal fixation of the fracture of plaintiff's left mandible, inserting a 1.0 mm pre-bent Synthes matrix plate with 6.0 mm and 8.0 mm screws at Monmouth County Medical Center."

2. Item 2 states: "The only maxillomandibular fixation employed by defendant Manolakakis during the January 7, 2014 surgery was manual fixation of the plaintiff's mandible."

3. Item 3 states: "On January 28, the plaintiff's 6 mm and 8 mm screws were loose."

4. Item #4 states: "On January 20, 2014, the plaintiff's Synthes plate was misaligned."

5. Item #5 states: "On January 20, 2014, the plaintiff had developed wound dehiscence."

6. Item #6 states: "Annexed hereto as Exhibit 'A' are true and correct copies of Informed Consent forms signed by the plaintiff contained within defendant Manolakakis' records."

7. Item #7 states: "The signature on the January 28, 2014, Informed Consent form is not ANDREAS PLAITIS's."

8. Item #8 states: "On January 29, 2014, the defendant Manolakakis had to perform emergency surgery on plaintiff's left mandible."

9. Item #9 states: "On January 29, 2014, defendant Manolakakis debrided the plaintiff's wound and fracture site."

10. Item #10 states: "On January 29, 2014, defendant Manolakakis inserted a 1 mm pre-bent Synthes plate, fixated by 8 mm and 10 mm screws."

11. Item #11 states: "Defendant Manolakakis did not submit the hardware and tissue removed during the January 29, 2014 surgery to a pathologist for examination or analysis."

12. Item #12 states: "The only maxillomandibular fixation employed by defendant Manolakakis during the surgery on January 29, 2014 was manual fixation of the plaintiff's mandible."

13. Item #13 states: "On February 5, 2014, the plaintiff's wound was dehisced."

14. Item #14 states: "On February 5, 2014, plaintiff's Synthes plate was loose."

15. Item #15 states: "On February 5, 2014, plaintiff's screws were loose."

16. Item #16 states: "On March 12, 2014, the plaintiff was suffering from osteomyelitis of his mandible."

17. Item #17 states: "On April 15, 2014, the defendant Manolakakis removed a 1.0 mm Synthes plate in plaintiff's left mandible."

18. Item #18 states: "On April 15, 2014, the 1 mm plate removed from plaintiff's left mandible was floating in 'non-union callus'."

19. Item #19 states: "On April 15, 2014, defendant Manolakakis debrided the entire segment of plaintiff's 'non-union mandible'."

20. Item #20 states: "On May 2, 2014, defendant Manolakakis's examination revealed a painful wound with intraoral dehiscence, a loose tooth and osteomyelitis."

21. Item #21 states: "On May 2, 2014, defendant Manolakakis debrided the plaintiff's left mandible and extracted tooth #18."

22. Item #22 states: "On May 2, 2014, defendant Manolakakis prescribed only Percocet and Valium."

23. Item #23 states: "On May 9, 2014, the plaintiff was suffering from osteomyelitis."

24. Item #24 states: "On May 9, 2014, defendants gave the plaintiff a prescription for 14 'Augmentin 875 mg-125 mg tablet; 1 tablet twice daily, dispense: 14, refills: 01."

25. Item #25 states: "On May 16, 2014, plaintiff was suffering from osteomyelitis."

26. Item #26 states: "On May 16, 2014, defendant Manolakakis prescribed Ibuprofen 600 mg tablet, take one tab every 6 hours as needed for pain, Dispense 30, refill: 0."

27. Item #27 states: "On May 30, 2014, defendant Manolakakis treated plaintiff's infection by stab incision and blunt dissection."

28. Item #28 states: "On May 30, 2014, Manolakakis prescribed Clindamycin 300 mg capsule, 1 tablet every 6 hours, Dispense 28, refills: 01."

29. Item #29 states: "On June 10, 2014, defendant Manolakakis diagnosed an abscess of the plaintiff's face and the draining fistula of his cheek."

30. Item #30 states: "On June 10, 2014, defendant Manolakakis performed another stab incision with blunt dissection and placement of Lodofrom packing."

31. Item #31 states: "Defendant Manolakakis prescribed no antibiotics on June 10, 2014."

32. Item #32 states: "On June 12, 2014, defendant Manolakakis had arranged to examine and treat the plaintiff at plaintiff's place of business on June 14, 2014."

33. Item #33 states: "Manolakakis did not keep the appointment he scheduled with the plaintiff on June 14, 2014."

34. Item #34 states: "On June 14, 2014, defendant Manolakakis told the plaintiff that his wound was not infected."

35. Item #35 states: "Manolakakis deleted all of the plaintiff's text messages, annexed hereto as Exhibit B."

36. Item #36 states: "Defendants did not take cultures of plaintiff's wounds … during the course of his treatment of plaintiff."

37. Item #37 states: "Manolakakis did not seek consultation with a specialist in Infection Disease … during his treatment ...."

38. Item #38 states: "Manolakakis never referred the plaintiff to an Infectious Disease specialist."

39. Item #39 states: "Annexed hereto as Exhibit "C" is a true and accurate copy of a still shot from a 3D CAT scan showing the condition of plaintiff's left mandible on June 17, 2017."

<u>Legal Standard</u>

CPLR § 3103 provides, in relevant part:

> The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

(CPLR § 3103[a]). The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper, and must offer more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome. (*see Sage Realty Corp. v. Proskauer Rose, L.L.P.*, 251 A.D.2d 35, 40 [1st Dep't 1998]). "When the disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper." (*Jones v. Maples*, 257 A.D.2d 53, 57 [1st Dep't 1999]).

CPLR § 3123 permits the service of a request for admission "of the genuineness of any papers or documents . . . or the truth of any matters of fact set forth in the request, as to which the party requesting the admission *reasonably believes there can be no substantial dispute at the trial* and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry." (CPLR § 3123[a])(emphasis added).

Where a party fails to respond to a Notice to Admit "within twenty days after service thereof or within such further time as the court may allow," the matters therein are deemed admitted for the purpose of the litigation. (CPLR 3123[a]). However, if the recipient of Notice to Admit pursuant to CPLR 3123 deems the notice unreasonable, the prompt and proper application for a protective order pursuant to CPLR § 3103 stays the time to respond, at least until the adjudication of the motion for protective order. (*See Nader v. General Motors Corp.*, 53 Misc.2d 515 [N.Y. County 1966] *aff'd* 29 A.D.2d 632, 286 N.Y.S.2d 209 [1st Dep't 1967]).

The purpose of a notice to admit is "to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices." (*Taylor v. Blair*, 116 A.D.2d 204, 205-06 [1st Dep't 1986]). This device is used "to eliminate from contention factual matters which are easily provable and about which there can be no controversy" and "to expedite the trial by eliminating as issues that as to which there should be no dispute." (*Taylor*, 116 A.D.

2d at 206). "Such requests for admissions may not cover ultimate conclusions which can only be made after a full and complete trial nor may they properly relate to technical, detailed and scientific information which is the subject for examination by an expert witness." *Berg v. Flower Fifth Ave. Hosp.*, 102 A.D.2d 760, 476 N.Y.S.2d 895, 897 (1984). The notice to admit may not be employed as a "substitute" for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories. (*Taylor*, 116 A.D. at 206).

Discussion

Here, the Notice to Admit mainly seeks admissions that bear on the dental treatment that Manolakakis provided Plaitis and Manolakakis' alleged departures in that care which form the basis of Plaitis' claims for malpractice. As these are material issues or ultimate facts, which can only be resolved after a full trial, a notice to admit is not a proper disclosure device for such inquiries. (*See Taylor*, 116 A.D. at 205-206) As was the case in *Berg*, Plaintiff has "made no attempt to limit [the items] to factual matters which they reasonably believe are not in dispute." (*Berg* at 897) Rather, Plaintiff seeks "admissions with respect to a wide range of information, including causation, accepted medical practices and procedures, diagnosis and expert medical opinion, all clearly beyond the scope of a notice to admit as a disclosure device." (*Id.*) As the Court reasoned in *Berg*, "Essentially, the notices here amount to a deposition on written questions which, in this case, would permit plaintiffs the benefit of an examination before trial conducted solely by leading questions, which, it has been observed "[j]ustice and fair play dictate ... should not be allowed." (*Id.*) While there may possibly be a few items in the notice that may be proper that relate to records, the court "deem[s] it unwise and unnecessary for the court to prune the requests to construct for counsel and the parties a proper notice to admit." (*Id.*)

Accordingly, Defendants' motion to strike Plaintiff's Notice to Admit is granted. The court notes that Plaintiff states that the Notice to Admit "was served in response to defendant's improper Verified Answer, which was prepared and verified by [defendants'] attorneys" and which Manolakakis claims he never reviewed (Flanagan Reply Affirmation at ¶3, 5). However, that is not a proper justification for an improper Notice to Admit.

Plaintiff's Cross Motion

Plaintiff cross moves to strike Defendants' Answer for their failure to comply with prior orders and to appear for court ordered depositions; or, in the alternative, to compel certain discovery. Defendants oppose.

Importantly, with respect to discovery, the parties agreed in the stipulation discontinuing the federal action that "that discovery already exchanged and depositions conducted [in the federal action] will not have to be repeated in the State Court action." (*Id.*) In the federal action, Manolakakis was deposed on September 16, 2016 and September 30, 2016.

In the cross motion, Plaintiff seeks to compel certain information, including telephone records and text messages, social medial information, medical records, insurance policies, electronically stored information, an analysis of the number of mandibular fractures created by Manolakakis, and a further deposition of Manolakakis.

With respect to conferences, Part 6's Rules provide, "Counsel must bring a list of all outstanding discovery. Items not on the list will be deemed (1) not requested; (2) complied with; or (3) withdrawn." Here, the parties appeared for conferences in Part 6 on April 6, 2017 and September 19, 2017, and entered into orders with respect to outstanding discovery. Neither of the orders contain any provisions regarding demands for electronically storied information, social media, or cellular phone information.

Telephone Records and Text Messages

Turning to Plaintiff's cross motion, Plaintiff seeks Manolakakis' telephone records and texts reflecting any communications between the parties. On May 8, 2018, the parties entered into a compliance conference order which directed them to exchange authorizations to obtain each other's telephone and text records that reflect communications between the parties. Accordingly, the portion of Plaitis' cross motion which seeks to compel these records from Manolakakis is denied as moot.

Manolakakis' Social Media Accounts and Information

Plaintiff also seeks Manolakakis' social media account information and postings. However, Plaintiff has not demonstrated the relevancy of this information to his claims of medical malpractice against Manolakakis. Therefore, the portion of

Plaintiff's motion which seeks to compel information relating to Manolakakis' social media accounts is denied.

Medical Records

Plaintiff also seeks to compel a complete and certified copy of his medical records from Defendants in the federal litigation. In opposition, Manolakakis avers in an affidavit:

> On September 16, 2016, I produced a complete copy of the medical records maintained by my office for Andreas Plaitis including all diagnostic films. I certify that the copy, which is included in these reply papers, and was available to plaintiff's counsel at my deposition, is a complete copy of the chart maintained by my office referable to Andreas Plaitis. During the span of two days, I was exhaustively questioned for 573 pages concerning these records, as well as my care and treatment of Andreas Plaitis.

(Manolakakis Aff. at 3)

In reply, Plaintiff argues that to date, Manolakakis has not produced a complete copy of his medical records because he has failed "to include, among other things, records for the office visits of January 6, January 21, February 12, 2014 and May 7, 2014." Plaintiff states, "As noted, defendant testified that the first time he saw his record of May 7, 2014 was when it was marked as Exhibit at his deposition." (paragraph 17 of Flanagan's Reply Affirmation) Here, while Plaintiff contends that Manolakakis' production is not complete, Manolakakis avers in an affidavit that "a complete copy of the medical records maintained by [his] office" for Plaitis has been produced. (Manolakakis Aff. at 3). Plaintiff has had an opportunity and in fact questioned Manolakakis at his deposition regarding these medical records and alleged discrepancies. Any issue concerning the completeness of the medical records provided by Manolakakis shall be addressed at trial.

Insurance Policies

Plaintiff states that to date, Defendants have failed to produce their insurance policies. Defendants have failed to produce a complete copy of the policies. Defendants, in opposition, assert that on August 10, 2016, they produced the

applicable insurance policies for both The Center and Manolakakis. (Exhibit 4). In reply, Plaintiff contends that Defendants "have yet to fully comply with the demand for insurance information, neglecting to provide the number of claims brought against each defendant during the applicable policy period, the existence or identity of an excess or umbrella insurance carrier, and so forth." (Flanagan Reply Aff., paragraph 7). However, Plaintiff moved only to compel Defendants to produce "a complete copy of their insurance policies," and did not request any other insurance information. Since Defendants have shown that they previously produced a complete copy of their insurance policies, Plaintiff's request is deemed moot.

Electronically Stored Information

Plaintiff requests that Defendants produce electronically stored information. Plaintiff's request for ESI as written is overbroad and not reasonably tailored to lead to admissible evidence. Moreover, Plaintiff claims ESI is needed because the defendants "have deleted extremely relevant text messages, phone records and possibly office records ..." However, in light of the parties' agreement to provide each other with authorizations to obtain text messages and phone records, Plaintiff will now have access to those records directly. Additionally, Plaintiff had the opportunity to question Manolakakis concerning these text messages and phone records at his deposition, just as Plaintiff had the opportunity to question Manolakakis concerning his office records. Furthermore, Plaintiff made no reference to demands for electronically stored information in either the April 6, 2017 or September 19, 2017 compliance orders.

Mandibular Fractures

Plaintiff demanded an analysis of the number of mandibular fractures created by Manalakakis in each of the five years preceding plaintiff's treatment in the federal litigation. Plaintiff states that the "mandible fracture study" that Manolakakis produced failed to provide the break-down for the number of mandible fractures he performed by Manolakakis in 2013. In opposition, Manolakakis avers at paragraph 4 of his affidavit:

> I have provided a breakdown, through my attorneys, of the number of mandible fracture repairs I have completed throughout the years. My attorneys have exchanged with plaintiff's counsel information that we have received in this regard from the facilities with which I have been associated. I do not have control of the information

> provided by these facilities. Furthermore, I was exhaustively questioned at my deposition regarding my surgical experience relative to treatment of mandibular fractures. (Exhibit 6).

Manolakakis has demonstrated that he has complied with the request to prepare a "mandible fracture study" based on the information he has in his possession. Moreover, Plaintiff had the opportunity and did in fact question Manolakakis regarding this analysis at his deposition.

Further deposition of Manolakakis

In Plaintiff's motion, Plaintiff requests an additional deposition of Manolakakis. Manolakakis appeared for a deposition on two different days in the federal litigation. On September 19, 2017, the parties appeared for a compliance conference in Part 6 and entered into an order which stated that Manolakakis would appear for a further deposition "re: New Issues, if any, including those raised by his Verified Answer" by December 2017." Manolakakis shall appear for a further deposition within 45 days, at which time he may be asked about any "New Issues, if any, including those raised by his Verified Answer."

A Verified Answer was interposed on Manolakakis' behalf of January 23, 2015. The Answer is certified by Manolakakis' attorney. It states:

> Joseph P. Rosh, Esq., the undersigned, an attorney admitted to practice in the Courts of New York State, state that I am the attorney of record for the defendant, MANOLIS G. MANOLAKAKIS, DMD s/h/a MANOLIS G. MANOLAKAKIS, M.D., in the within action; I have read the foregoing Verified Answer and Demands and now the contents thereof; the same is true to my own knowledge, except as to matters therein stated to be alleged upon information and belief as to those matters, I believe them to be true. The reason for this verification is made by me and not by the defendant because defendant does not reside within the county that our office is located.

Manolakakis takes the position that he should be asked questions concerning the Verified Answer because there are no "new issues" raised by his Verified

Answer. The court notes that neither Manolakakis nor Plaitis provide copies of their pleadings filed in the federal action, so this court is unable to determine whether there are "new issues" raised in Manolakakis' Verified Answer.

Manolakakis also takes the position that he has no knowledge of the Verified Answer. In his affidavit, he states, "I have never received or reviewed the Complaint or the Verified Answer in the underlying State proceeding, I did not verify this Answer, nor did my attorneys consult me regarding preparation of this Answer. These are legal documents of which I possess no knowledge or information concerning the contents therein." (Manolakakis Aff. at 3).

Manolakakis is to answer any questions regarding the Verified Answer that was interposed on his behalf, despite his objection.

Wherefore, it is hereby

ORDERED that Defendants' motion to strike Plaintiff's Notice to Admit is granted; and it is further

ORDERED that Plaintiff's cross motion to compel is granted only to the extent that Manolalakis is to appear for a further deposition to be questioned about any new issues in the Verified Answer that was interposed on his behalf. Such deposition must be noticed within 20 days or it will be deemed waived.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JUNE 6, 2018

EILEEN A. RAKOWER, J.S.C.