MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. George J. Silver PART 10
Justice

BARBARA ROBINS

Plaintiff

v.

PROCURE TREATMENT CENTERS, INC., PRINCETON PROCURE MANAGEMENT LLC, PROCURE PROTON THERAPY CENTER, PRINCETON RADIATION ONCOLOGY, OREN CAHLON, MD, HENRY K. TSAI, MD, EUGEN B HUG, MD, BRIAN H. CHON, MD, LISA "DOE" (JANE DOE #1), JOSE "DOE" (JOHN DOE #1), RAJ SHRIVASTAVA, MD, THE MOUNT SINAI HOSPITAL and IBI PROTON THERAPY, INC. a/k/a IBI PROTON EQUIPMENT

Defendants.

INDEX NO. 805644/2015
MOTION DATE
MOTION SEQ. NO. 005
MOTION CAL. NO.

Plaintiff BARBARA ROBINS ("plaintiff") moves for leave to renew or clarify this court's decision and order dated April 18, 2017, wherein this court denied motions by defendants PRINCETON PROCURE MANAGEMENT, LLC, PRINCETON RADIATION ONCOLOGY, HENRY TSAI, MD, and BRIAN CHON, MD, ("defendants") to dismiss this action on personal jurisdiction grounds, but did not set forth the manner in which discovery should proceed. Defendants opposes the instant application, and cross move for a protective order denying, limiting, conditioning, and regulating the disclosure of future discovery in this matter.

BACKGROUND

This matter involves the alleged blinding of plaintiff, a retired New York City school psychologist, by defendants in the prescribing and administering of proton radiation to her head in close proximity to her sensitive optic structures, as part of a New York City based for-profit enterprise centering on patients from the five major New York City cancer centers. Plaintiff's treatment with defendants occurred from April to June, 2013. She went blind over the course of the ensuing months. Subsequent to the commencement of this action, plaintiff developed vertigo and claims that she is continuing to develop other adverse *sequalae* from the irradiation of her optic structures. Plaintiff now moves to compel full and complete responses to the following outstanding discovery demands by a date certain to be set by the

court: 1.) November 13, 2015 D & I served on Princeton Radiation Oncology and Drs. Cahlon, Hug, Tsai and Chon; 2.) November 20, 2015 D & I served on Procure Treatment Centers, Inc.; 3.) November 20, 2015 D & I served on Princeton Radiation Oncology and Drs. Cahlon, Hug, Tsai and Chon; 4.) January 15, 2016 D & I served on Mt. Sinai Hospital and Dr. Shrivastava; 5.) June 22, 2017 combined demands served on all defendants; 6.) July 17, 2017 D & I served on Princeton Procure Management LLC; 7.) July 19, 2017 notice to inspect served on all defendants except Mt. Sinai Hospital; and 8.) July 21, 2017 notice to produce served on all defendants except Dr. Shrivastava and Mt. Sinai Hospital.

Additionally, plaintiff is requesting that an outside date be set for completion of party and non-party depositions, predicated on the dates certain to be established for the completion of paper discovery.

At conferences in June of 2017, certain defendants advocated that all discovery other than personal jurisdiction discovery be stayed even though this court's decision dated April 18, 2017 denied motions to dismiss this action on personal jurisdiction grounds. In the instant motion, plaintiff contends that it would be unfair and prejudicial to plaintiff to deprive her of discovery on the merits at this late juncture. Plaintiff also contends that there is no rational basis to delay discovery on the merits in order to complete jurisdictional discovery first and separately. Notably, plaintiff highlights that she requested that discovery on personal jurisdiction defenses proceed prior to the resolution of the motion, but that the movants resisted that accommodation. Having refused to engage in personal jurisdiction discovery, first sought in 2015, plaintiff argues that defendants should be estopped from using personal jurisdiction discovery as a tactic to delay this case further. Plaintiff further notes that several defendants, including Procure Treatment Centers, Inc., Oren Cahlon, MD, Eugen B. Hug, MD, Raj Shrivastava, MD, Mt. Sinai Hospital, and, IBA Proton Therapy, Inc., have not interposed personal jurisdiction defenses.[1] As such plaintiff contends that allowing those parties that have interposed such defenses to control this litigation while others are not impacted would be patently unfair to plaintiff. In opposing plaintiff's motion and cross moving for a protective order, defendants assert that all jurisdictional discovery should be completed prior to defendants issuing responses to plaintiff's outstanding discovery demands.

DISCUSSION

"A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination" (*Jackson Heights Care Center, LLC v. Bloch*, 39 AD3d 477 [2nd Dept 2007] *quoting* CPLR § 2221 [e][2]). "A motion to renew is intended to draw the court's attention to new or additional facts

[1]Raj Shrivastava, MD, and Mt. Sinai Hospital, among others, have attempted to assert this defense following the filing of plaintiff's instant motion.

which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court's attention" (*Natale v. Jeffrey Samel & Associates*, 264 AD2d 384 [2nd Dept 1999]). "The requirement that a motion for renewal be based upon newly-discovered facts is a flexible one, and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion" (*Karlin v. Bridges*, 172 AD2d 644 [2nd Dept 1991]). A motion for "renewal is granted sparingly...it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Mundo v. SMS Hasenclever Maschinenfabrik*, 224 AD2d 343 [1st Dept 1996]).

In the present case, plaintiff's motion to renew, is not premised on plaintiff seeking to draw the court's attention to new facts not known to the court at the time of its April 18, 2017 determination, but rather is based on plaintiff seeking to facilitate discovery following this court's denial of defendants' applications for dismissal on personal jurisdiction grounds. As such, to the extent that plaintiff seeks disclosure of information previously requested form defendants, this court's instant decision and order is guided by applicable statutes and case law regarding discovery.

CPLR §3101(a)(1) provides, in relevant part, that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The terms "material and necessary" in this statute "must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' " (*Matter of Kapon v. Koch*, 23 NY3d 32, 38 [2014], *quoting Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). At the same time, a party is "not entitled to unlimited, uncontrolled, unfettered disclosure" (*Geffner v. Mercy Med. Ctr.*, 83 AD3d 998, 998 [2d Dept. 2011]; *see Quinones v. 9 E. 69th St., LLC*, 132 AD3d 750, 750 [2d Dept. 2015]). "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture v. Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept. 1989]; *see Quinones v. 9 E. 69th St., LLC*, 132 AD3d at 750, *supra*). CPLR § 3124 allows a court to compel disclosure "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question, or order."

Here, plaintiff is seeking responses to various discovery demands that defendants have yet to respond to. Those demands include records of procedures and protocols relevant to treatment rendered by defendants between April and June, 2013. It is axiomatic that such records are material and necessary to plaintiff's prosecution of this case, as the records requested are likely to lead to the discovery of relevant information bearing on plaintiff's claims of negligence against defendants. Notably, defendants opposition and respective cross motions to plaintiff's request do not deny the materiality or relevance of the materials sought, but rather challenge the timing of the disclosure of those materials. Defendants

claim that all jurisdictional discovery must be completed before they can respond to plaintiff's outstanding demands. Defendants assertions to that effect are unpersuasive, especially in light of the fact that defendants were opposed to plaintiff's suggestion that jurisdictional discovery proceed while their prior motions seeking dismissal were pending before this court. To argue that jurisdictional discovery takes precedence now, even though defendants were disinclined to invite it while their motions were pending, would be highly prejudicial to plaintiff. Indeed, advancing such an argument appears to be a artful attempt to prolong the discovery process in this action. Defendants argument is also undercut by the fact that some defendants, including Procure Treatment Centers Inc., have cross moved for a protective order even though they have not previously moved for dismissal, let alone mounted a defense premised on personal jurisdiction. To be sure, all defendants in this action have interposed answers on the merits, and served plaintiff with discovery demands, thus subjecting themselves to the jurisdiction of this court for the purpose of discovery. Moreover, the preponderance of defendants in this action, including defendants Procure Treatment Centers, Inc., Oren Cahlon, MD, Eugen B. Hug, MD,Raj Shrivastava, MD, Mt. Sinai Hospital, and, IBA Proton Therapy, Inc., have never interposed personal jurisdiction defenses. Consequently, defendants' argument that there is a constitutional bar to discovery proceeding, is unpersuasive.

Accordingly, based on the foregoing, it is hereby

ORDERED that plaintiff's motion to compel is granted to the extent that the parties are directed to provide responses to plaintiff's following outstanding discovery demands on or before August 17, 2018: 1.) plaintiff's November 13, 2015 D & I served on Princeton Radiation Oncology and Drs. Cahlon, Hug, Tsai and Chon; 2.) plaintiff's November 20, 2015 D & I served on Procure Treatment Centers, Inc.; 3.) plaintiff's November 20, 2015 D & I served on Princeton Radiation Oncology and Drs. Cahlon, Hug, Tsai and Chon; 4.) plaintiff's January 15, 2016 D & I served on Mt. Sinai Hospital and Dr. Shrivastava; 5.) plaintiff's June 22, 2017 combined demands served on all defendants; 6.) plaintiff's July 17, 2017 D & I served on Princeton Procure Management LLC; 7.) plaintiff's July 19, 2017 notice to inspect served on all defendants except Mt. Sinai Hospital; and 8.) plaintiff's July 21, 2017 notice to produce served on all defendants except Dr. Shrivastava and Mt. Sinai Hospital; and it is further

ORDERED that defendants' respective cross motions are denied in their entirety; and it is further

ORDERED that the parties are directed to appear for a conference on August 21, 2018 to set forth a schedule for the remaining discovery.

The foregoing constitutes the decision and order of the court.

Dated: July 2, 2018
New York, New York

HON. GEORGE J. SILVER

1. Check one: ..... ☐ Case Disposed ■ Non-Final Disposition

2. Check as Appropriate: ..... Motion is: ■ Granted ■ Denied ☐ Granted in Part ☐ Other