

Bolorin v Aijaz

2018 NY Slip Op 33901(U)

November 5, 2018

Supreme Court, Westchester County

Docket Number: 65918/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the 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 WESTCHESTER : COMPLIANCE PART

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LETICIA BOLORIN and ANTHONY BOLORIN,

Plaintiffs,

-against-

DECISION AND ORDER

ANDREW ASHIKARI, ASIM AIJAZ, MADDALENA DUARTE, ASHIKARI & KELEMEN, M.D., P.C. *d/b/a* THE ASHIKARI BREAST CENTER, HUDSON VALLEY HEMATOLOGY AND ONCOLOGY, PLLC, also known as NEW YORK-PRESBYTERIAN/HUDSON VALLEY HOSPITAL,

Index No. 65918/2016
Motion Ret. Date: 10.15.2018
Motion Seq. No.: 2

Defendants.

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LEFKOWITZ, J.

The following papers were read on this application by plaintiffs, Leticia Bolorin and Anthony Bolorin for an order pursuant to CPLR § 3124 directing defendant Hudson Valley Hospital Center *a/k/a* New York-Presbyterian/Hudson Valley Hospital to provide access to plaintiffs for an expert review of all pathology slides, samples and other relevant tissues taken from plaintiff, Leticia Bolorin, during her September 8, 2014 procedure within forty-five days of such determination in accordance with the application herein and for such other and further relief as this Court deems just and proper.

Order to Show Cause, Affirmation in Support, Exhibits 1-7;
Affirmation in Opposition; and
NYSCEF file.

Upon the foregoing papers and the proceedings held on October 15, 2018, this motion is determined as follows:

This medical malpractice action was commenced by plaintiff, Leticia Bolorin and her spouse, Anthony Bolorin, by the filing of a summons and complaint on September 20, 2016. A verified answer to the complaint by defendant Hudson Valley Hospital Center *s/h/a* Hudson Valley Hospital

Center *also known as* New York-Presbyterian/Hudson Valley Hospital (“HVHC”) was filed on November 15, 2016.

Plaintiff Leticia Bolorin was diagnosed with Invasive Ductal Carcinoma of her left breast, and consequently, underwent a bilateral nipple sparing mastectomy on September 8, 2014. She alleges that the mastectomy was performed by defendant Andrew Ashikari at defendant hospital, HVHC. Following the mastectomy, plaintiff Leticia Bolorin claims that defendants Andrew Ashikari and Asim Aijaz advised her that she need not undergo a course of radiation or chemotherapy, but rather, a course of hormone therapy. Thereafter, in January of 2016, plaintiff Leticia Bolorin was diagnosed with recurrent carcinoma of her left breast. On February 23, 2016, she underwent a further mastectomy by Dr. Port at the Dubin Breast Center. Plaintiffs allege that defendants were negligent in the performance of the bilateral nipple sparing mastectomy on September 8, 2014, in that defendants left behind too much breast tissue. Plaintiffs assert that defendants’ failure to remove such breast tissue resulted in the recurrence of the Invasive Ductal Carcinoma in the left breast of plaintiff Leticia Bolorin.

By unopposed motion filed on May 17, 2017, nearly eight months after the action was commenced, plaintiffs sought an extension of time pursuant to CPLR § 2004 to file their notice of medical malpractice action and for the scheduling of a preliminary conference. By decision and order dated September 11, 2017 (Everett, J.), plaintiffs’ application was granted and a preliminary conference was scheduled for October 16, 2017.

Pursuant to the preliminary conference stipulation for medical, dental and podiatric malpractice actions so-ordered (Lefkowitz, J.) on October 19, 2017, plaintiffs were to be deposed on or before January 25, 2018. Additionally, plaintiffs were directed to provide supplemental bills of particulars with regard to, inter alia, special damages, lost earnings and dates of negligence by November 17, 2017. Further, plaintiffs were, within thirty days of the completion of all examinations before trial, to supplement their bills of particulars with regard to the vicarious liability of certain individuals and within 120 days, plaintiffs were to provide defendants with all lien information. Plaintiffs were also directed to supplement their bill of particulars as to HVHC by November 17, 2017. Finally, the parties were directed to file the note of issue and certificate of readiness on or before August 18, 2018.

By compliance conference referee report so-ordered (Lefkowitz, J.) on January 23, 2018 (two days prior to the deadline within which plaintiffs’ depositions were to be completed in accordance with the preliminary conference stipulation and order), plaintiffs’ examinations before trial were adjourned to February 16, 2018. Additionally, plaintiffs were instructed to provide pre-operative photographs of plaintiff Leticia Bolorin within one week or advise defendants that she did not have such pre-operative photographs in her possession. Plaintiffs were further directed to, inter alia, serve supplemental bills of particulars. The next compliance conference was scheduled for February 20, 2018. By consent to change attorney filed via NYSCEF on February 9, 2018, new counsel was substituted for defendant hospital.

By compliance conference referee report so-ordered on February 20, 2018 (Lefkowitz, J.), plaintiffs' examinations before trial were to be completed on March 9, 2018 and continued, if necessary, on March 23, 2018. Additionally, plaintiffs were directed to comply with this Court's prior order by February 26, 2018 with regard to outstanding discovery demands, and a further compliance conference was scheduled. By compliance conference referee report so-ordered on March 28, 2018 (Lefkowitz, J.), plaintiffs' continued examinations before trial were scheduled for April 16, 2018 and April 27, 2018. The deposition of defendant Andrew Ashikari was scheduled to be completed on or before June 8, 2018. The examination before trial of defendant Asim Aijaz was to be completed on or before June 15, 2018, and the examinations before trial of Maddalena Duarte, M.D. *s/h/a* Maddalena Duarte was to be completed on or before June 22, 2018. Additionally, defendants (with the exception of defendant Maddalena Duarte, M.D. *s/h/a* Maddalena Duarte) were instructed to provide responses to plaintiffs' January 22, 2018 discovery demand. By compliance conference referee report so-ordered on May 3, 2018 (Lefkowitz, J.), having learned that plaintiffs' examinations before trial were still not completed, the depositions were rescheduled to be conducted on June 7, 2018, continuing if necessary on June 21, 2018, and defendant Asim Aijaz' deposition was scheduled for June 28, 2018. Further, plaintiffs were directed to provide responses to defendants' discovery demands within one week, including the provision of all outstanding authorizations. By compliance conference referee report so-ordered on May 15, 2018 (Lefkowitz, J.), the deposition of defendant Andrew Ashikari was rescheduled for June 28, 2018, the examination before trial of defendant Asim Aijaz was scheduled for July 31, 2018 and the examination before trial of Maddalena Duarte, M.D. *s/h/a* Maddalena Duarte was scheduled to be conducted on or before August 17, 2018. Further, plaintiffs were again directed to provide authorizations and responses to all of defendants' outstanding discovery requests on or before May 18, 2018. By compliance conference referee report so-ordered on June 1, 2018 (Lefkowitz, J.), the deposition of defendant Andrew Ashikari was rescheduled for June 21, 2018, the examination before trial of defendant Asim Aijaz was rescheduled for July 27, 2018 and the examination before trial of Maddalena Duarte, M.D. *s/h/a* Maddalena Duarte was rescheduled to be conducted on or before August 15, 2018 with the proviso that no further adjournments would be granted. By compliance conference referee report so ordered on July 17, 2018 (Lefkowitz, J.), among other things, plaintiffs were directed to provide authorizations for Leo Keegan, M.D. and authorizations in proper form for the release of plaintiff Leticia Bolorin's records at Mount Sinai Pathology. By compliance conference referee report so-ordered on August 28, 2018 (Lefkowitz, J.), plaintiffs were directed to serve its responses to defendants' discovery demands dated July 13, 2018 by September 6, 2018. By compliance conference referee report so-ordered dated September 12, 2018 (Lefkowitz, J.), unrestricted authorizations by plaintiffs were directed to be provided to all defendants.

Plaintiffs now seek an order directing defendant HVHC provide access to plaintiffs for an expert review of all pathology slides, samples and other relevant pathologic tissues taken from plaintiff Leticia Bolorin during her September 8, 2014 nipple sparing mastectomy within forty-five days of this Court directing same and for such other and further relief as this Court deems just and proper.

Plaintiffs assert that defendants' failure to adhere to this Court's compliance conference

referee reports and orders has caused an extensive delay in the discovery phase of this proceeding which prevented plaintiffs from obtaining access to defendant HVHC for an expert review of the pathology slides, samples and other relevant pathologic tissues taken from plaintiff Leticia Bolorin during her September 8, 2014 operation. They argue that if defendant hospital HVHC had not delayed in commencing plaintiffs' depositions and taken four days in conducting plaintiffs' examinations before trial, plaintiffs would have conducted the deposition of Maddalena Duarte, M.D. *s/h/a* Maddalena Duarte earlier rather than waiting three days before the expiration of the standards and goals in this case to complete her examination before trial.

Additionally, plaintiffs claim that at a compliance conference before this Court, counsel for defendant hospital HVHC agreed to make the requested pathology material available to plaintiffs' expert for review, and subsequently refused. They argue that defense counsel should not now be permitted to breach such agreement after previously consenting to provide the discovery requested.

Moreover, plaintiffs contend that there is no basis in law for this Court to refuse plaintiffs access to such post-deposition discovery demands nor has defendant hospital HVHC articulated any basis for refusing to turn over plaintiff Leticia Bolorin's pathology slides, samples and other relevant pathologic tissues, and since defendant hospital HVHC failed to move for a protective order, any objection to such disclosure has been waived. Finally, plaintiffs claim this Court has given defendant hospital HVHC an unfair advantage by ordering that plaintiffs provide authorizations to defendants to enable them to perform a review of the results of the pathology materials while refusing plaintiffs the same opportunity.

Defendant hospital HVHC counters that this Court previously ruled that it would not order the inspection of the pathology specimens as plaintiffs had unreasonably delayed their discovery demands to conduct such inspection, and therefore, had waived their right to do so. Since the Court had determined that plaintiffs' discovery request was untimely, it was unnecessary for defendant hospital HVHC to seek a protective order.

Defense counsel also disputes that defendant HVHC agreed to provide the pathology slides, samples and other relevant pathologic tissues of plaintiff Leticia Bolorin within forty-five days of plaintiffs' demands. Counsel for defendant hospital asserts that he advised plaintiffs' attorney that he would discuss plaintiffs' demands with this client. He states that following such discussion, defendant hospital HVHC advised him that having plaintiffs' counsel and their expert come to the hospital's pathology department to conduct their discovery and examination of the materials they seek would constitute an impermissible burden and disturbance in such department's efficient and important goal of providing proper care to its patients. Moreover, under no circumstances would his defendant HVHC release original pathology materials from its possession given that such materials may be lost, destroyed or altered, either intentionally or accidentally.

Analysis:

CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution

or defense of an action.” The phrase “material and necessary” is “to 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. The test is one of usefulness and reason” (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Foster*, 74 AD3d at 1140; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The party seeking disclosure has the burden 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 (*Foster*, 74 AD3d at 1140).

The court however has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

Plaintiffs’ claims that it was the defendant hospital’s delay in conducting the examinations before trial of plaintiffs and otherwise prolong the discovery period is wholly without merit and is disingenuous at best. Plaintiffs fail to explain why they waited nearly eight months after this action was commenced to move for an extension of time to file their notice of medical malpractice action and request the scheduling of a preliminary conference. Moreover, plaintiffs were aware, from the outset of this proceeding, that they would require discovery regarding the pathologic materials of plaintiff Leticia Bolorin. Indeed, as early as May 17, 2017, plaintiffs asserted in their bill of particulars that defendant hospital was negligent and careless in failing to resection plaintiff’s left breast tumor, negligent and careless in failing to perform the mastectomy of plaintiff’s left breast leaving residual cancer, negligent and careless in failing in performing the mastectomy of plaintiff’s left breast so as to allow for the recurrence of breast cancer in residual breast tissue, “in negligently and carelessly failing to secure appropriate frozen section for pathology during the surgical procedure on September 8, 2014; and negligently and carelessly failing to obtain cancer free margins during the surgical procedure of September 8, 2014”.¹ Yet no discovery with respect to the pathology slides, samples and other relevant pathologic tissues taken from plaintiff Leticia Bolorin during her September 8, 2014 operation were requested.

Moreover, plaintiffs’ contention that the defendant hospital’s delay in commencing plaintiffs’ depositions caused them to postpone the deposition of defendant Maddalena Duarte, M.D. s/h/a Maddalena Duarte until three days before the expiration of the standards and goals in this case to complete her examination before trial, which in turn, delayed their demand for the pathologic discovery is implausible. Following defendant’s attorneys’ substitution as counsel for defendant hospital on February 9, 2018, defense counsel sent an email to this Court dated February 14, 2018 requesting “...a short adjournment of the plaintiffs’ deposition given that we have just today received a large box of materials and plaintiffs’ counsel refused to agree to the request for a short

¹ Plaintiffs’ exhibit 3 to motion, NYSCEF Doc. No. 23.

adjournment. I therefore request an immediate conference to resolve this issue and to get a short court authorized adjournment to enable this office to properly review the file and prepare for the plaintiffs' ebt".² The conference was held two days later, and the depositions of plaintiff were scheduled to be completed on or before March 9, 2018, and the deposition of plaintiff, Leticia Bolorin commenced on that date in accordance with this Court's order. Plaintiffs fail to address how this short adjournment prevented plaintiffs from timely serving a demand for the pathological material they now seek.

Additionally, plaintiffs fail to explain why they failed to comply with this Court's compliance conference referee report and order of February 20, 2018 and May 2, 2018 with regard to defendants' outstanding discovery demands and requests for authorizations or why, on May 14, 2018, the Court was again required to order plaintiffs to provide proper authorizations and comply with all outstanding discovery demands or why, on July 16, 2018, August 28, 2018 and September 12, 2018, this Court, yet again, was required to order plaintiffs to provide defendants with proper authorizations. In sum, plaintiffs' attempts to blame defense counsel for their delay in seeking discovery cannot be countenanced.³

Moreover, plaintiffs have not provided this Court with a copy of any formal discovery demand for the pathologic material they now seek (*see*, CPLR 3102). Plaintiffs attach as an exhibit to their moving papers a request by letter to defendant hospital's counsel dated August 17, 2018 in which plaintiffs' counsel requests: "Plesae [sic] acet [sic] this letter in follow up to our discussion...Kindly advise as to when Plaintiff's Expert can have access to review all pathology slides, samples and other relevant pathologic tissues taken from Letecia [sic] Bolorin." By letter dated September 7, 2018, plaintiffs' counsel again requests access for an expert review of the slides, samples and other relevant pathologic tissues taken from "Letecia [sic] Bolorin" or in the alternative, requests defendant hospital "provide all of the referenced material to the undersigned so that appropriate arrangements can be made for a review". Correspondence by plaintiffs' counsel seeking discovery is not tantamount to one of the articulated methods of obtaining disclosure (*see*, CPLR 3102[a]). Further, despite plaintiffs' attempt to cast this demand as a post-deposition demand, it is clear from at least May of 2017, well before depositions were conducted, that plaintiffs would require discovery regarding plaintiff Leticia Bolorin's pathologic information as set forth in their bill of particulars.

With regard to plaintiffs' claim that defendant HVHC should turn over the pathologic material as requested insofar as such defendant never sought a protective order, such argument is without basis. As no formal discovery demand has been served upon defendant Hospital seeking such pathologic material, and this Court had previously determined that any such demand by plaintiffs would be untimely, there was simply no need for a protective order.

²Plaintiffs' Exhibit 2 to moving papers, NYSCEF Doc. No. 53.

³Plaintiffs are cautioned to timely respond to defendants' discovery demands in accordance with the CPLR and adhere to this Court's order.

Finally, with respect to plaintiffs' allegations that this Court has given an "unfair advantage" to defendant HVHC insofar as this Court previously ordered plaintiffs to defendant HVHC with appropriate authorizations as would entitle it to obtain the pathological information in possession of Mount Sinai and others, such demands were made well within the proper time frame.

Further, all parties in this action are aware that in 2009, a new Differentiated Case Management (DCM) Protocol was introduced in Westchester County Supreme Court to ensure effective case management. The DCM Protocol was designed to ensure the timely prosecution of cases from inception to trial and facilitate settlements. As implemented, the DCM Protocol limits adjournments and delays and requires that the parties actively pursue the prosecution and defense of actions. Deadlines are enforced in Westchester County Supreme Court civil cases pursuant to the DCM Protocol.

In February 2016, Chief Judge Janet DiFiore announced the "Excellence Initiative," which seeks to achieve and maintain excellence in court operations by eliminating backlogs and delays. The Excellence Initiative relies on "Standards and Goals" as the benchmark for the timely resolution of cases. The Ninth Judicial District is committed to carrying out the Chief Judge's Excellence Initiative and delivering justice timely and efficiently for all our litigants.

The Court of Appeals explained the importance of adhering to court deadlines as follows:

"As we made clear in *Brill*, and underscore here, statutory time frames – like court-ordered time frames – are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored" (*Miceli v State Farm Mutual Automobile Insurance Company*, 3 NY3d 725, 726–727 [2004] [internal citations omitted]).

The Court of Appeals again stressed the importance of adhering to deadlines as follows:

"As this Court has repeatedly emphasized, our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution. Furthermore, those lawyers who engage their best efforts to comply with practice rules are also effectively penalized because they must somehow

explain to their clients why they cannot secure timely responses from recalcitrant adversaries, which leads to the erosion of their attorney-client relationships as well. For these reasons, it is important to adhere to the position we declared a decade ago that “[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010] [internal citations omitted]).

While standards and goals are not immutable, and exceptions always will exist, compliance should be the norm, not the exception. Although extremely untimely, in order to avoid prejudice to the plaintiffs, this Court will exercise its discretion and permit plaintiffs’ attorneys to examine the pathology slides, samples and other relevant pathologic tissues taken of plaintiff Leticia Bolorin at defendant HVHC (*see, Fernandez v Cornwall Hosp.*, 26 AD2d 437 [2d Dept 2002]; *Lucarello v North Shore University Hospital*, 184 AD2d 623 [2d Dept 1992]; *Lee v Curtin*, 2018 NY Slip Op 31174(U)[Sup Ct NY Co]; *Keyser v Chang*, 2011 NY Slip Op 33746(U)[Sup Ct Nassau Co]).

Although not addressed in the parties’ motion papers, at oral argument, attorneys for defendants Ashikari & Kelemen, M.D., P.C. *s/h/a* Ashikari & Kelemen, M.D., P.C. *d/b/a* The Ashikari Breast Center, Andrew Y. Ashikari, M.D. *s/h/a* Andrew Ashikari requested “recuts” of plaintiff’s pathology slides in possession of non-party Mount Sinai Hospital and asked this Court to order plaintiffs to provide authorizations to that effect. Given the liberal interpretation of the rules of disclosure, an item of arguable relevance should be disclosed (*see, Allen*, 21 NY2d 403 [1968]). Counsel for defendants Ashikari sufficiently demonstrated that the recut of one of the pathological slides of plaintiff Leticia Bolorin is relevant to the allegations of malpractice. Since plaintiffs’ counsel consented to the recut of one of Ms. Bolorin’s pathological slides in possession of the nonparty, Mount Sinai Hospital, and all parties agreed to exchange and share such recut for examination, the oral application of defendant Ashikari is granted (*see, Shanahan v Bambino*, 271 AD2d 519 [2d Dept 2000]).

Accordingly, it is

ORDERED that, the branch of plaintiffs’ motion for an order pursuant to CPLR § 3124 directing defendant Hudson Valley Hospital Center *a/k/a* New York-Presbyterian/Hudson Valley Hospital to provide access to plaintiffs for an expert review of all pathology slides, samples and other relevant tissues taken from plaintiff, Leticia Bolorin, during her September 8, 2014 operation is granted to the extent that plaintiffs’ attorneys are permitted to have access to and examine the pathology slides, samples and other relevant pathologic tissues taken of plaintiff Leticia Bolorin at defendant hospital HVHC within thirty (30) days of the date of this order, and if such examination is not so completed within thirty (30) days of the date of the order herein, such examination shall be waived; and it is further

ORDERED that, the application made by counsel for defendants Ashikari at oral

argument is granted. Plaintiffs shall provide an appropriate authorization permitting defense counsel to obtain a recut of one of the pathological slides of plaintiff Leticia Bolorin within five (5) days currently in possession of nonparty Mount Sinai Hospital. The parties shall exchange such slide which has been recut so that each party has an opportunity to examine such slide and such examination shall be complete within thirty (30) days of the date of this order or such examination shall be waived; and it is further

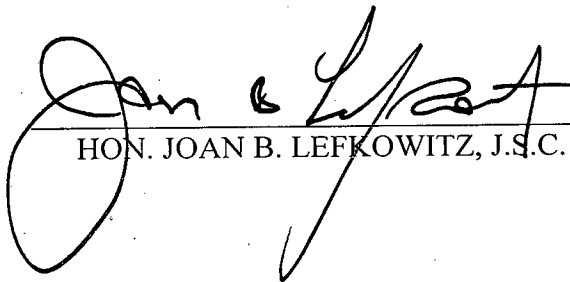
ORDERED that, any applications not addressed in the foregoing are denied; and it is further

ORDERED that, counsel for the parties are directed to appear for a conference in the Compliance Part of this Court, Courtroom 800, on December 7, 2018, at 9:30 a.m., and this matter shall be certified ready for trial, and a trial readiness order shall issue; and it is further

ORDERED that, plaintiffs shall serve a copy of this order with notice of entry upon defendants within seven (7) days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 5, 2018



HON. JOAN B. LEFKOWITZ, J.S.C.

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