

Miano v Wing

2018 NY Slip Op 34245(U)

November 19, 2018

Supreme Court, Westchester County

Docket Number: Index No. 53224/2018

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

-----X
ANTONIETTA MIANO,

Plaintiff,

DECISION & ORDER

-against-

Index No. 53224/2018
Motion Date: November 19,
2018

Seq # 2

MARIA WING, M.D., STEPHANIE SIMS, M.D.,
WHITE PLAINS HOSPITAL, WHITE PLAINS
HOSPITAL PHYSICIAN ASSOCIATES, and
NORTHRIDGE MEDICAL ASSOCIATES,

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on this motion by plaintiff pursuant to CPLR § 3103(a) and CPLR § 2304, for a protective order quashing the subpoena served by defendants, Maria Wing, M.D. and Maria Wing, M.D., P.C., s/h/a Northridge Medical Associates, upon non-party Lucia Miano Sanna; pursuant to CPLR § 3103(a) and CPLR § 2304, for a protective order modifying the non-party subpoena so that the non-party deposition occurs after the depositions of the parties; pursuant to CPLR § 3103(a), for a protective order holding that the defendants, collectively, have waived the deposition of Lucia Miano Sanna if/when she becomes the representative of Mrs. Miano's estate; and for an order granting such other and further relief as to this Court seems just and proper.

Order to Show Cause - Affirmation in Support - Exhibits A-L
Affirmation in Opposition- Exhibits A-C
Supplemental Affirmation in Opposition

Upon the foregoing papers and the proceedings held on November 19, 2018, this motion is determined as follows:

On or about March 8, 2018, plaintiff commenced this medical malpractice action against defendants alleging that defendants failed to timely diagnose and treat plaintiff's renal cancer. Plaintiff's carcinoma has since metastasized and her cancer is terminal.

On April 12, 2018, defendants White Plains Hospital (“WPH”) and White Plains Hospital Associates (“WPHPA”) filed their Answer. On April 13, 2018, defendants, Maria Wing, M.D. (“Wing”) and Stephanie Sims, M.D. (“Sims”) filed their Answers. On July 11, 2018, defendant Maria Wing M.D., P.C., s/h/a Northridge Medical Associates (“Wing P.C.”) filed its Answer. A preliminary conference has been held and plaintiff has been deposed.

Plaintiff now moves to quash the non-party subpoena served by defendants Wing and Wing P.C. (collectively, “Wing”) upon plaintiff’s daughter, Lucia Miano Sanna (“Sanna”) and for related relief. Plaintiff argues, inter alia, that the subpoena was not properly served upon her counsel, is facially deficient and that such deposition should await the completion of defendants’ depositions. Plaintiff further states that a Compliance Conference was held before the assigned Court Attorney-Referee on October 16, 2018 and Wing’s request to depose Sanna prior to defendants’ deposition was denied.

In opposition, defendant Wing does not dispute that the request was addressed at the Compliance Conference but argues, inter alia, that the deposition of Sanna should be conducted prior to defendants’ deposition because Sanna has information regarding the plaintiff’s treatment.

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” (*Merkos L’Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

To obtain nonparty discovery, a party must show only that the nonparty discovery is “material and necessary” to the prosecution or defense of the action. CPLR 2304, however, provides that a court may quash or modify a subpoena where the material demanded is not relevant to the issues in the action. On a motion to quash a subpoena, the movant has the burden of demonstrating that the subpoena lacks relevancy or factual basis (*In re Out-of-State Subpoena issued by New York Counsel for State of Cal. Franchise Tax Bd.*, 33 Misc3d 500, 511 [Sup Ct, Westchester County 2011], *affd Hyatt v State Franchise Tax Bd.*, 105 AD3d 186 [2d Dept 2013]). A nonparty subpoena should be quashed “where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*In re Kapon v Koch*, 23 NY3d 32 [2014]; *Ferolito v Arizona Beverages USA*, 119 AD3d 642 [2d Dept 2014]). The one seeking to quash the subpoena has the burden of demonstrating the subpoena should be vacated under the circumstances (*Ferolito v Arizona Beverages USA*, at 643.).

A motion to quash may be made on behalf of a non-party witness by the witness or the witness' lawyer, or by one of the parties or a party's lawyer (*McDaid v Semegran*, 16 Misc 3d 1102(A) [Sup Ct 2007]; *In re MacLeman*, 9 Misc 3d 1119(A) [Sur Ct, Westchester County 2005] [additional citations omitted]. Moreover, the notice requirement of CPLR 3101(a)(4) obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, "the circumstances or reasons such disclosure is sought or required" (*Kapon v Koch*, 23 NY3d 32, 39 [2014]).

Generally, a subpoena is facially defective when it neither contains, nor is it accompanied by adequate notice stating the circumstances or reasons the disclosure was sought or required as mandated by CPLR 3101(a) (4) (*Matter of American Express Prop. Cas. Co. v Vinci*, 63 AD3d 1055 [2d Dept 2009]). The notice obligation is required to apprise a stranger to the litigation of the circumstances or reasons the requested disclosure is sought (*In re Kapon v Koch*, 23 NY3d 32 [2014]).

As to the order of depositions, after a defendant has served an answer, the party who first notices a deposition gets priority. However, the order of priority established in CPLR 3106 may be varied by the court under its protective order powers (see, Siegel, NY Prac § 354, at 442).

Here, there is no dispute that Sanna's testimony is "material and necessary" to the prosecution and defense of the action (*In re Kapon v Koch*, 23 NY3d 32 [2014]). Moreover, Plaintiff's argument regarding the deficiency of the subpoena is not compelling. Sanna was served with a subpoena by personal service as well as the order to show cause. Given the information provided in the motion and her relationship to plaintiff, it would be inefficient and a waste of resources to require defendants to serve another subpoena on Sanna (*Velez v Hunts Point Multi-Serv. Ctr., Inc.*, 29 AD3d 104 [1st Dept 2006]). Further, plaintiff has agreed to voluntarily produce Sanna for a deposition following the completion of defendants' depositions.

However, the Wing defendants' position that Sanna's deposition must be taken before the defendants' depositions is without merit and appears to be advanced in an attempt to delay the defendants' depositions. The Wing defendants have not demonstrated that plaintiff was unable to provide complete testimony regarding her treatment. Plaintiff is entitled to a preference in this action and this Court will not permit any further delays. Under the circumstances presented, this Court will issue a protective order to prevent abuse of the disclosure process and stay Senna's deposition until the completion of defendants' depositions (see *Scalone v Phelps Memorial Hospital Center*, 184 AD2d 65 [2d Dept 1992]). The Court cautions all defendants to appear for their depositions as previously ordered and that no adjournments shall be granted.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

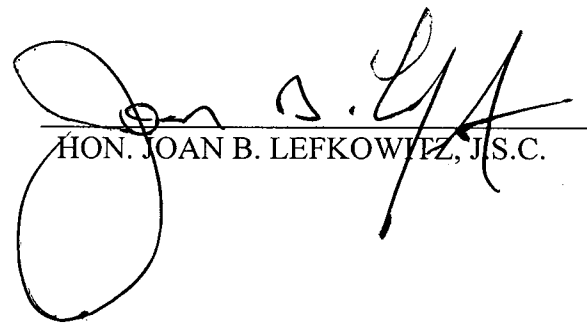
Accordingly, it is

ORDERED that plaintiff's motion is granted to the extent that the deposition of non-party Senna is stayed pending the completion of defendants' depositions; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order on all parties with notice of entry within five (5) days of entry; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on November 26, 2018, at 9:30 a.m.

Dated: White Plains, New York
November 19, 2018



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

To All Counsel Via NYSCEF

cc: Compliance Part Clerk