Acosta v Didonato
2020 NY Slip Op 30643(U)
January 29, 2020
Supreme Court, Bronx County
Docket Number: 27351/2017E
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 19A

----------X

MIRNA ACOSTA, as Parent and Natural Guardian of S.A.L., an infant,

Plaintiff

Index №. 27351/2017E

-against-

Hon. GEORGE J. SILVER
Justice Supreme Court

DONNA DIDONATO, as Executrix of the Estate of GREGORY KLIOT, M.D., deceased, BORO PARK OBSTETRICS AND GYNECOLOGY, PC and NEW YORK PRESBYTERIAN HOSPITAL

Defendants

----------X

The following papers numbered 1 to 3 were read on this motion to **COMPEL** (Seq. №. 002):

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1
Opposition - Exhibits and Affidavits Annexed	No(s). 2
Reply - Exhibits and Affidavits Annexed	No(s). 3

GEORGE J. SILVER, J.S.C.:

With the instant motion, plaintiff MIRNA ACOSTA ("plaintiff"), as the mother and natural guardian of S.A.L., moves to compel the deposition of Arie Schwartz, M.D. ("Dr. Schwartz"), a former employee of defendant BORO PARK OBSTETRICS AND GYNECOLOGY, P.C. ("Boro Park). Defendants oppose the application, and cross-move for a protective order, arguing that Dr. Schwartz's non-party deposition is unnecessary. To that end, defendants seek an order quashing plaintiff's subpoena, and ask that the court award costs and fees associated with defendants' cross-motion and opposition.

BACKGROUND

The allegations in this case as against the now deceased defendant Gregory Kliot, M.D. ("Dr. Kliot"), and Boro Park (collectively, "defendants"), focus on alleged obstetrical mismanagement of plaintiff considering her history of premature labor. S.A.L. was delivered at twenty-seven (27) weeks' gestation at codefendant New York Presbyterian Hospital. Plaintiff contends that defendants' treatment of plaintiff was fell outside the ambit of appropriate obstetrical care, proximately causing injury to S.A.L.

In contrast, defendants argue that S.A.L's birth was not the result of premature labor, but rather was due to bleeding from placenta previa, an unrelated condition where the placenta covers the cervical opening. As such, defendants contend that even if they neglected to take appropriate

steps to lessen the likelihood of plaintiff going into premature labor, such alleged departures would not be causally connected to plaintiff's delivery or S.A.L's alleged injuries.

On or about September 4, 2019, plaintiff served Dr. Schwartz, a non-party who is no longer affiliated with Boro Park, with a subpoena to testify. Upon being assigned to provide a courtesy defense to Dr. Schwartz (as there is no insurance), defendants sent a letter to plaintiff's counsel on September 5, 2019. In this letter, defendants advised plaintiff's counsel of various procedural and substantive deficiencies within the subpoena. Defendants further stated that unless the subpoena was withdrawn, Dr. Schwartz would have no alternative but to bring a motion to quash.

To date, defendants have not received a written response to the September 5, 2019 letter. In the interim, the parties appeared for a compliance conference on September 18, 2019. At that conference, plaintiff's counsel stated that plaintiff was holding the deposition of Dr. Schwartz "in abeyance." The conference order that was issued on that date did not make any provision for Dr. Schwartz's deposition or set a date for the deposition of an institutional witness from Boro Park.

Between September 18, 2019 and the date of the next compliance conference, October 23, 2019, plaintiff's counsel did not contact defendants' counsel with respect to the subpoena. At the October 23, 2019 conference, plaintiff once again stated that Dr. Schwartz's deposition was being held "in abeyance." The stipulation issued at that conference once again did not make any provision for Dr. Schwartz's deposition and set an on-or-before date of December 12, 2019 for the deposition of a not-yet-designated institutional witness from Boro Park.

Thereafter, plaintiff filed the instant motion to compel Dr. Schwartz's non-party deposition. Defendants opposed the application be way of cross-motion.

DISCUSSION

A party cannot be compelled to produce a nonparty witness, even if it hired the witness as a consultant (*Doomes v. Best Tr. Corp.*, 303 AD2d 322, 322–23 [1st Dept 2003]). And typically, absent an agreement to depose experts, a party may only be compelled to produce their experts to testify as fact witnesses under "special circumstances" (*Taft Partners Dev. Group v. Drizin*, 277 AD2d 163, 163 [1st Dept 2000]).

Here, plaintiff's motion fails both procedurally and on its substance. Procedurally, the court denies the application due to plaintiff's failure to engage in good faith efforts to resolve this dispute before engaging in motion practice (22 NYCRR §202.7[c]). Indeed, not only did plaintiff fail to respond to the September 5, 2019 letter, but plaintiff twice represented that Dr. Schwartz's deposition would be held "in abeyance," the second time just one week before the instant motion was served. Plaintiff's filing of the instant motion to compel, without warning or further communication, evinces bad faith sufficient to merit the denial of the motion.

On its substance, plaintiff's motion must also fail because plaintiff's subpoena itself is facially deficient. To be sure, it is well-established that a subpoenaing party must state, either on the face of the subpoena or in a notice accompanying it, the circumstances or reasons that the disclosure is sought (*Matter of Kapon v. Koch*, 23 NY3d 32, 39 [2014]). The subpoena here does

neither, and thus fails to appropriately apprise Dr. Schwartz of the reason why plaintiff intends to depose him.

In addition, the testimony sought from Dr. Schwartz is utterly irrelevant to the liability issues in this case (*see Kapon*, 23 NY3d at 38-39, *supra*, *citing Anheuser-Busch, Inc. v. Abrams*, 71 NY2d 327 [1988][holding that an application to quash should be granted where the futility of the process to uncover anything legitimate is obvious or where the information sought is utterly irrelevant to any proper inquiry]). Indeed, the Boro Park records reflect that Dr. Schwartz saw plaintiff on a single occasion when she was less than nine (9) weeks pregnant; the remaining treatment rendered at Boro Park, which continued into week twenty-four (24) of the pregnancy, was furnished by Dr. Kliot, who was separately insured and whose estate has appeared as a defendant in this lawsuit.

It is axiomatic that Dr. Schwartz's single encounter with plaintiff is so fleeting that it does not warrant the burdensome task of compelling Dr. Schwartz to appear for a non-party deposition. Indeed, the prenatal care rendered at Boro Park does not appear to be causally connected to plaintiff's delivery or the injuries alleged to have been sustained by S.A.L. Plaintiff states that plaintiff wishes to depose Dr. Schwartz to (1) obtain "information generally regarding the care provided to patients at [Boro Park]"; (2) to ascertain "protocols regarding the treatment and referral of high-risk patients"; (3) to "interpret[ ] Dr. Kliot's handwriting"; and (4) to learn about "any discussions [Dr. Schwartz] ever had with Dr. Kliot regarding Mirna Acosta." None of these stated rationales are sufficient to warrant the production of Dr. Schwartz. Indeed, even if plaintiff is entitled to discovery on these issues, a deposition of Dr. Schwartz does not appear to be the least restrictive way for plaintiff to obtain the information sought. To be sure, the information plaintiff seeks could more appropriately and practically be sought by serving discovery demands to Boro Park, such as for any applicable protocols; and, should it be deemed necessary, by requesting an affidavit from Dr. Schwartz as to whether he recalls any discussions with Dr. Kliot concerning plaintiff.

Ultimately, this court sees great value in limiting the scope of disclosure here so as to prevent unreasonable annoyance, expense, and prejudice (CPLR §3103[a]). Forcing Dr. Schwartz, a non-party physician with little connection to the facts at issue, to take a day off from his practice—to his financial detriment—is inappropriate under the circumstance. Rather, as suggested by the court, plaintiff may seek disclosure of the information sought through Dr. Schwartz's deposition by the means articulated above.

Finally, the imposition of a financial sanction against plaintiff is unwarranted since plaintiff's making of the instant application does not amount to "frivolous conduct" (22 NYCRR §130-1.1[a]).

For the foregoing reasons, it is hereby

ORDERED that plaintiff's application is denied in its entirety; and it is further

ORDERED that defendants' cross-motion is granted insofar as plaintiff's subpoena is quashed; and it is further

ORDERED that defendants' cross-motion is otherwise denied insofar as an award of costs and fees for defendants' cross-motion is unwarranted; and it is further

ORDERED that the parties are directed to appear for a conference before the court on March 25, 2020 at 9:30 AM at the courthouse located at 851 Grand Concourse, Room 600 (Part 19A).

This constitutes the decision and order of the court.

Dated: 1-29-20

George J. Silver

HON. GEORGE J. SILVER