

<b>Melkonian v Albany Med. Ctr.</b>
2020 NY Slip Op 32905(U)
June 3, 2020
Supreme Court, Albany County
Docket Number: 908059-19
Judge: Christopher P. Baker
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At a Term of The Supreme Court of the State of New York, heard on the 28<sup>th</sup> day of May 2020, at the Hazlett Building, 203 Lake Street, Elmira, New York.

**PRESENT: HON. CHRISTOPHER P. BAKER  
SUPREME COURT JUSTICE**

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ALBANY

Caroline Melkonian, Individually and as the Administratrix of the Estate of Michael Melkonian,

Plaintiff,

vs.

**DECISION & ORDER**

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Albany Medical Center, Albany Medical Center Hospital, Claudwardyne Alexis Thevenin, D.O., and Carla Graichen, M.D.,

Defendants.

**CHRISTOPHER P. BAKER, JSC**

**FINDINGS OF FACT**

In an order to show cause dated May 18, 2020, plaintiff seeks, *inter alia*, an Order compelling defendants to comply with outstanding discovery demands, and more importantly, to compel that depositions of defendants proceed via videoconferencing given the current COVID-19 Pandemic.

By way of background, plaintiff commenced this action on or about November 19, 2019 seeking to recover damages for alleged medical malpractice due to defendants' alleged failure to timely and properly treat decedent for acute coronary syndrome. On February 27, 2020, The Court held a Preliminary Conference, wherein a scheduling Order was established which required that all discovery, including depositions, were required to be completed on or before August 28, 2020. Thereafter, on April 15, 2020, plaintiff's counsel requested a conference with The Court to assist in the scheduling of remote depositions, and forwarded a proposed Order outlining protocols and procedures to be followed during the examinations. Given defendants' objection to remote depositions, a conference was held on April 20, 2020, whereby counsel for defendants was to advise, within fourteen (14) days, whether his client would consent to remote

depositions. If not agreed to, plaintiff was directed to make application, on notice. Thus, this present order to show cause was brought.

At oral argument, The Court primarily resolved the discovery issues, which will be enumerated in separate decretal paragraphs below. Thus, the proposed Order submitted on June 1, 2020 by plaintiff's counsel concerning said discovery matters will not be executed by The Court.

Turning to the issue of remote depositions of defendants, given The Court's reading of Administrative Order 88/20, dated May 2, 2020, and taking into account counsel for defendants contention that videoconferencing of examinations results in witnesses essentially forfeiting their right to the presence of counsel, a compromise was proposed. The Court suggested that in order to facilitate both the prosecution of this matter and to address the concerns of defendants, that depositions should be conducted remotely, with the right of defense counsel to be personally present with the witness during his/her examination. While it appeared at oral argument that this issue had been settled based on these terms (along with certain procedural protocols to be negotiated by counsel), defendant now objects to remote depositions.

### CONCLUSIONS OF LAW

Administrative Order 88/20, issued by Chief Administrative Judge Lawrence Marks on May 2, 2020, reads, in pertinent part:

- "A. The court shall not order or compel, for a deposition or other litigation discovery, the personal attendance of physicians or other medical personnel (including administrative personnel) who perform services at a hospital or other medical facility that is active in the treatment of COVID-19 patients . . .
- B. The provisions of Paragraph A are authorized on a temporary basis, and will be reviewed and circumscribed promptly at the conclusion of the COVID-19 public health emergency."

Notwithstanding defendants' position, The Court holds that when viewed in the totality of the circumstances, the plain meaning of the term "personal attendance" within Administrative Order 88/20, is unambiguous and clear that said medical personnel can and should appear for depositions remotely through videoconferencing technology in lieu of being physically present at a "traditional" setting for an examination. Likewise, Administrative Order 88/20 acknowledges the implicit hardship during these unprecedented times that would involve mandating medical personnel personally appear at a law office to be deposed. Moreover, requiring depositions to be conducted by remote electronic means is neither novel nor without legal authority, or beyond The Courts authority pursuant to CPLR § 3103 (a). See, Feng Wang v. A & W Travel, Inc., 130 A.D.3d 974; Yu Hui Chen v. Chen Li Zhi, 81 A.D.3d 818; Gabriel v. Johnston's L.P. Gas Service, Inc., 104 A.D.3d 1262. Any claims of prejudice by defendants have been alleviated by the prerequisite that counsel will be permitted to be personally present with the witness at the

remote examination as allowed pursuant to CPLR § 3113 (c).

Upon review of the proposed Order that pertains to how the remote examinations will proceed, and in conformity with CPLR § 3113 (d), and with amendments made by The Court, it is hereby being simultaneously executed with this Decision and Order and shall be incorporated therein.

It is therefore,

**ORDERED**, defendant shall supply to plaintiff, within thirty (30) days of Entry of this Decision and Order, surveillance video of the Emergency Department as requested and detailed in a previously issued preservation letter; and it is further

**ORDERED**, that defendant shall supply to plaintiff, within thirty (30) days of Entry of this Decision and Order, documentation and/or information pertaining to staffing ratios between nurses and patients, as well as physicians and mid-level providers at the Emergency Department, as requested in plaintiff's April 6, 2020 supplemental discovery demand; and it is further

**ORDERED**, defendant shall supply to plaintiff, within thirty (30) days of Entry of this Decision and Order, a certified copy of decedent's medical chart/records, with plaintiff reserving her right to bring future application for either an in-person or remote inspection of the medical chart/records in the possession of Albany Medical Center, upon a good faith basis that the records that were provided are incomplete; and it is further

**ORDERED**, defendant shall supply to plaintiff, within thirty (30) days of Entry of this Decision and Order, an index of defendant's policies for patients presenting with chest pains to the Emergency Department, with plaintiff reserving her right to bring future application for either an in-person or remote inspection of the index of said policy/protocols in the possession of Albany Medical Center, upon a good faith basis that the document(s) that were provided are incomplete; and it is further

**ORDERED**, defendant shall supply to plaintiff, within thirty (30) days of Entry of this Decision and Order, a schematic or drawing of the Emergency Department, if it exists, with defendants reserving their right to assert any and all objections to their production; and it is further

**ORDERED**, that plaintiff's application for an Order permitting remote electronic depositions of defendants is hereby **granted** as reflected above; and it is further

**ORDERED**, that in light of the Seventh Amended Administrative Order of the Third Judicial District, the deadline to complete said depositions has been extended to November 26, 2020.

This shall constitute the Decision and Order of The Court.

ENTER

Dated: June 3, 2020.



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Hon. Christopher P. Baker  
Supreme Court Justice

Distribution List:

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John H. Fisher, Esq.

Thomas A. Cullen, Esq.



06/10/2020