Kamen v Lipkin
2007 NY Slip Op 34550(U)
August 2, 2007
Supreme Court, New York County
Docket Number: 109789/05
Judge: Stanley L. Sklar

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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LORNA L. KAMEN AND ROBERT M. KAMEN,

Plaintiffs,

Index No.: 109789/05

-against-

PAMELA R. LIPKIN, M.D., and GERALD D. GINSBERG, M.D.,

Defendants.

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Sklar, J.:

Orders to show cause 002 and 003 are consolidated for disposition.

In this medical malpractice action defendant, Dr. Pamela Lipkin, seeks an order (application 003) precluding plaintiffs from using for any purpose telephone records, produced by Verizon pursuant to a subpoena dated March 27, 2007 and returnable on April 5, 2007 seeking Dr. Lipkin's office's telephone records of June 24, 2004, the date of plaintiff's six plastic surgery procedures at Dr. Lipkin's office.

Dr. Lipkin also seeks an order precluding plaintiffs' counsel from contacting any non-parties whose telephone numbers were contained in those records, directing plaintiffs' counsel to produce an affirmation identifying all persons who have examined or reviewed the phone records produced by Verizon and directing plaintiffs' counsel to destroy or return to Dr. Lipkin's counsel all copies of the phone records produced by Verizon pursuant to the subpoena. Finally, Dr. Lipkin's counsel seeks a bill of costs pursuant to CPLR 8106.

The basis for this application is that plaintiffs' counsel failed to timely serve the subpoena which was at most returnable nine days after its service, thereby depriving Dr. Lipkin of the statutorily allowed time to object. Dr. Lipkin's counsel maintains that the subpoenaed records

are not relevant to any issue in the case, do not support plaintiffs' notion that defendants' whereabouts can be resolved through phone records, and contain the phone numbers of other patients, whose identities could be ascertained by plaintiffs' counsel through reverse phone directories. Defense counsel maintains that the ability to identify other patients would violate the doctor/ patient privilege because plaintiffs' counsel would then know that these individuals "consulted or were treated for plastic-surgical related conditions." See Gunn v. Sound Shore Medical Center, 5AD3d 435 (2d Dept., 2004).

Dr. Lipkin's application is supported by counsel for codefendent Dr. Gerald Ginsberg, who performed one of the six plastic surgery procedures, lifts of plaintiff's inner thighs, on June 24 at Dr. Lipkin's office. The essence of the action is that the inner thigh lifts were allegedly unnecessary and contraindicated, that an informed consent was not obtained for that procedure, and that it was incorrectly done.

Plaintiffs' counsel does not dispute that the subpoena was served on insufficient notice, and does not explain why. Their counsel however opposes the application on the grounds that the phone records are relevant, that the phone records breach no privacy right because on their face the records do not identify any patient by name, that Dr. Lipkin has not provided any evidence demonstrating that the approximately fifty calls were to other patients and thus implicate any privilege, and that one of those phone calls was to the plaintiff's cell phone at 12:59 p.m. on the day of the surgery.

Plaintiffs' counsel asserts that the record of the phone call from Dr. Lipkin's office to plaintiff on the day of the surgery is relevant because it would undercut Dr. Lipkin's claim as to when plaintiff allegedly arrived at the office on the day of the surgery and Dr. Ginsberg's

deposition testimony as to how much time he allegedly spent speaking with plaintiff, before the surgery including about the risks and benefits of the procedure. Specifically it is claimed by plaintiff in this case that she went to Dr. Lipkin's office on the day of the surgery and that Dr. Lipkin was to perform six plastic surgery procedures that day. Plaintiff claims that she was never told that another physician, Dr. Ginsberg, was to perform one of the procedures, lifts on plaintiff's inner thighs, and that she first learned of Dr. Ginsberg's involvement in that procedure well after it was performed. Plaintiff denies that she had any conversation with Dr. Ginsberg before the surgery.

Dr. Lipkin claimed at her deposition that before the date of the surgery plaintiff had been advised that Dr. Ginsberg would be performing the thigh lift and that plaintiff had a consultation with Dr. Ginsberg before the day of the surgery. See Lipkin EBT pp 89-93; But see Ginsberg EBT pp 23 - 24, 173. Dr. Lipkin testified that on the day of surgery plaintiff arrived at her office between 10:30 and 11:00 am (see Lipkin EBT pp 96-97), she spoke to the patient, that then Dr. Ginsberg did (Id p 99) and that he saw her for 45 minutes to an hour (Id106; Ginsberg EBT p 25). According to Dr. Lipkin the anesthesiologist then spoke to the patient. Lipkin EBT p. 129. The nurse anesthetist, Robert Foster, testified that he wrote 1:00 p.m. on the chart and that that was time of arrival, which meant that that was the first time he went to see the patient (Foster EBT p. 72), that he spent about 30 minutes with the patient preoperatively and started the anesthesia at 1:30 p.m. (Id 70).

According to plaintiffs' counsel, it is plaintiffs' position that on the day of the surgery a phone call was placed to plaintiff's cell phone by Dr. Lipkin, who left a message advising her that she was waiting for her to arrive at her office. Plaintiffs' counsel maintains that therefore

plaintiff arrived at some time after 1 p.m. that date. Since Dr. Lipkin's records show that plaintiff was put under sedation at 1:30 p.m., plaintiffs argue that Dr. Lipkin's and Dr. Ginsberg's claim that he spoke to plaintiff about the thigh lift and the risks and benefits of that procedure for 45 minutes to one hour before plaintiff was taken to the operating room is necessarily false. Thus, plaintiffs' claim that the phone call to plaintiff's cell phone is relevant.

As to the records of the phone calls made by Dr. Lipkin's office during the six surgical procedures, which occurred over about six and a half hours, the last of which ended at 6:25 p.m. (See Foster EBT p. 46), plaintiffs' counsel evidently claims that they are relevant because apparently they will support plaintiff's claim that when she arrived at Dr. Lipkin's office after 1 p.m. she (plaintiff) signed the consent to surgery form (which only mentioned Dr. Lipkin by name and was only signed by Dr. Lipkin as the "surgeon") at the reception desk in front of Dr. Lipkin's receptionist, Renee (see affirm opp., ¶ 40) instead of having signed it in the treatment room in the presence of Dr. Lipkin and Ginsberg after an alleged lengthy discussion as is claimed by Dr. Lipkin (EBT p.111; see also Ginsberg EBT pp. 120 - 121).

Plaintiffs' counsel asserts that defendants contended that the receptionist, "Renee," who no longer works for Dr. Lipkin, was not in the office on the day of the surgery. Plaintiffs' counsel apparently claims, and this is not at all clear, that since there were 28 phone calls, including one long-distance call, made from the office during the surgery which was performed by Dr. Lipkin and Dr. Ginsberg with the participation of Robert Foster and a William Murphy, an operating room technician, this means that Renee was present on the day of the surgery to make calls, which would support plaintiff's claim that she signed the consent form in the reception area in front of Renee rather than after the alleged conversation with Dr. Ginsberg.

Plaintiffs' counsel also asserts that the jury is entitled to know which "of the four individuals present" at the surgery made each of the 28 calls but does not state why that would be relevant. Plaintiffs' counsel, who has not served a cross motion, seeks from Dr. Lipkin her Verizon records which might show the lengths of the 28 calls during the course of the six procedures.

In reply Dr. Lipkin's counsel reiterated that the Verizon records are irrelevant and that plaintiffs have no right to disrupt the physician/ patient relationship of non-party patients. In addition, as to the request contained in plaintiffs' opposition papers for additional Verizon records, defense counsel asserts that this request must be denied since no discovery demand was ever served seeking such records.

At oral argument plaintiffs' counsel represented that the subpoenaed Verizon records had not been disseminated to anyone outside counsel's office.

Application 003 is decided as follows:

Within ten days of service of a copy of the order to be settled hereon with notice of entry plaintiffs' counsel is directed to destroy the subpoenaed records and any copies that have been made of them by the firm or its agents. Within ten days of service of a copy of the order to be settled hereon with notice of entry defense counsel is directed to serve on plaintiffs' counsel a copy of the subpoenaed records with all calls, except for the 12:59 p.m. call made to plaintiff's cell phone, redacted.

Plaintiffs' counsel is directed not to contact any non-party whose telephone information was obtained via the March 27, 2007 subpoena and they are directed to so instruct any of their agents, servants and employees who may have had access to the Verizon records. Except for the

record of the 12:59 p.m. phone call to plaintiff's cell phone, plaintiffs are precluded from using for any purpose, any Verizon records obtained via the March 27, 2007 subpoena or information obtained indirectly through any of those records obtained via the March 27 subpoena.

Clearly the record of the call made to plaintiff at 12:59 p.m. is relevant because the timing of the call may bear on whether plaintiff saw Dr. Ginsberg preoperatively on the day of the surgery, was aware that he was going to perform the inner thigh lift and whether he obtained an informed consent to that procedure on the day of surgery. However plaintiffs have not demonstrated at this juncture in the litigation that the other records are relevant.

There is no claim in the opposition papers that any phone calls which were made on the 24th prior to the commencement of the surgeries are relevant, and it would be difficult to envision how they could be relevant since assuming *arguendo* that the only people in the office before the surgery were Dr. Lipkin, Dr. Ginsberg, Foster and Murphy, any of these individuals could have been making calls prior to the surgery since their deposition testimony was to the effect that they were not all with plaintiff at the same time before the surgeries commenced. Moreover, it is plaintiff's claim that she did not arrive until after 1 p.m.

Plaintiffs' counsel has also failed to establish the relevancy of the parts of the phone records which show calls made during the different surgeries performed by Drs Lipkin and Ginsberg because contrary to plaintiffs' counsel's assertion (see Herman aft. ¶ 49) the deposition testimony does not support the claim that Renee or another receptionist was not in the office that day. See e.g. Lipkin EBT pp98, 162-163; see also Foster EBT pp13, 27-28, 56-57; Murphy EBT p52-58 Nor does plaintiffs' counsel claim that the deposition testimony was to the effect that no one other than Dr. Lipkin, Dr. Ginsberg, Foster and Murphy was in the office on June 24.

If plaintiffs' counsel wanted to learn the names of the individuals who worked at Dr. Lipkin's office at that time in issue, counsel could have sought their names and last known addresses from Dr. Lipkin, who presumably could have ascertained such information from inter alia W-2s and 1099 forms issued by her or what is evidently her corporation. The plaintiffs' counsel could have sought to depose for example, "Renee," to ascertain whether she was in the office on the day in issue, Dr. Lipkin's practice with respect to having a patient sign a consent form and whether Renee saw the plaintiff sign the consent form at the reception desk.

In any event the only claim as to the actual performance of the surgery is that the thigh lift was not performed correctly. See bill of particulars as to Dr. Lipkin. All six procedures combined took about six and a half hours. There is no claim that the other procedures performed by Dr. Lipkin were negligently done. The only physician who performed the thigh lift was Dr. Ginsberg, who could not recall whether Dr. Lipkin was present in the operating room during the entire time he performed the thigh lift procedure (see Ginsberg EBT p.22), which began several hours after Dr. Lipkin performed the eyebrow, face and neck lift (see Foster EBT p. 23, 43). Dr. Ginsberg testified that after he performed the inner thigh lift he would have left the operating room to go to the bathroom or have something to eat. EBT p. 86; see also Foster EBT pp. 21-25 That someone may have left the operating room while Dr. Ginsberg performed the thigh lift or that Dr. Ginsberg may have left the operating room before or after his portion of the surgery and made phone calls is not relevant to whether the surgery was properly performed by Dr. Ginsberg.

To the extent that plaintiffs via their opposing papers seeks other Verizon records to establish the lengths of calls, that request is denied, since besides failing to demonstrate relevancy, plaintiffs never served a discovery demand for those additional records and did not

serve a motion or cross motion for such relief.

This leaves application 002. Plaintiffs seek an order directing Murphy and Foster to appear for a further session of their depositions to testify about conversations they had with Dr. Lipkin's counsel and to answer questions which were blocked at their depositions. Plaintiffs further seek an order directing Dr. Lipkin's counsel to pay for those further depositions and for the costs of having to prepare the instant application.

Pursuant to a "so-ordered" stipulation dated March 1, 2007, contained in the County Clerk's file Dr. Lipkin agreed to produce Foster and Murphy for deposition on specified dates and to provide plaintiffs' counsel with a copy of each of their billing and medical records before their deposition dates. Thus they were produced by Dr. Lipkin's counsel at defense counsel's office for deposition without the need for plaintiffs to subpoena them.

It is conceded by both Dr. Lipkin's counsel and plaintiffs' counsel that Foster, the anesthetist used by Dr. Lipkin for plaintiff's procedures, was an independent contractor who was not employed by Dr. Lipkin (See Herman reply aff. ¶ 20; Adams aff. in opp. ¶¶ 10, 15, FN 1), and Foster, who was paid for his services by plaintiff's check (See Foster EBT pp 49-53), essentially testified as much (See Foster EBT pp 12-13). The deposition testimony reveals that Murphy, Dr. Lipkin's operating room technician, was claimed to be a self-employed individual who received 1099's. See Murphy EBT pp 7, 20; Lipkin EBT p 19 It is not clear on the record presented whether Foster and Murphy were technically retained as independent contractors for Dr. Lipkin or for one of several corporations which she may have controlled at the time in issue. See generally Lipkin EBT pp 31-38, 164-166 Dr. Lipkin testified that in 2004 she was practicing under the name 905 Fifth Avenue Associates and did not know whether she was also practicing

under her own name, was not sure whether she was employed by 905 Fifth Avenue Associates, Inc., thought she owned shares of its stock but was not sure who owned that corporation and could not remember if anyone other than herself or an accountant signed checks for that entity. It appears that said entity issued checks to Dr. Ginsberg for the services rendered to the plaintiff (Lipkin EBT pp 31 - 34). Dr. Lipkin testified that payroll was "sometimes" paid out of that corporation's account. Id 33 Also it seems that plaintiff paid for the surgery via credit card and that the receipt for that payment was from that corporation. Id pp 36-38 None of corporations is a party to this action.

Murphy, who had worked with Dr. Lipkin since about 1992, at the time in issue worked for several other plastic surgeons as well, spending thirty or forty percent of his time with Dr. Lipkin's office (Murphy EBT p 11), where he was paid an hourly rate (Id p 22), assisting Dr. Lipkin with "maybe fifty or sixty cases a year" (Id p 20), although as of March 21, 2007 he had already assisted Dr. Lipkin with about twenty-five procedures that year. Murphy was never paid by the patient Id 20-21. Murphy at the time in issue had a key to Dr. Lipkin's office (Id 45) and still had keys to the office at the time of his March 2007 deposition (Id 41). Since September 2006 Murphy in addition to serving as the operating room technician at Dr. Lipkin's office was serving as that office's receptionist two days a week for which he was paid the same hourly rate. Id 63-64 Murphy testified that after his work assisting Dr. Ginsberg during plaintiff's thigh lift he (Murphy) was not paid by Dr. Ginsberg. Id 43

Both plaintiffs' counsel and Dr. Lipkin's counsel take the position on this motion that Murphy was an independent contractor who was not employed by Dr. Lipkin. See Kassim aff. ¶¶ 2, 3; Richter aff. ¶ 4; Adams aff. ¶ 10; Herman reply aff. ¶ 4 Neither plaintiffs nor Dr. Lipkin

claim that Murphy or Foster were apparent or ostensible agents or defacto employees of Dr. Lipkin. It is undisputed that plaintiffs are not claiming that Foster or Murphy was negligent with respect to the care rendered to plaintiff See Richter aff. ¶¶ 3, 7

At his deposition (p 65) Foster testified that he had never discussed the lawsuit with Dr. Lipkin and that he had learned about a month and a half before his deposition that his presence would be required at a deposition. He further testified that on the Thursday before his deposition he had looked at the anesthesia records and the history and physical for the surgical procedures at Dr. Lipkin's counsel's office (Id 8-9) and at the operative note (Id 67) when he met with Catherine Richter, the attorney who was representing Dr. Lipkin at Foster's deposition. When plaintiffs' counsel asked what Foster had discussed with Richter, she objected on the ground that those conversations were privileged because she was acting as Foster's counsel, including at his deposition. Id 67-68 Plaintiff's counsel did not challenge that assertion at Foster's deposition or make inquiry of Foster in an effort to refute Richter's claim that she was representing Foster.

At Murphy's March 21, 2007 deposition, Sally Kassim from defense counsel's office appeared for Dr. Lipkin. Between two questions she whispered into Murphy's ear. At that point, Glenn Herman from plaintiffs' counsel's office asked Murphy to reveal what had been whispered to him. Murphy EBT p 16 Kassim objected indicating that her firm had produced Murphy for the deposition, was representing him at the deposition and that the attorney/ client privilege was the basis for the objection. Id pp 16-17 Herman then asked Murphy whether he had obtained Kassim or her firm to be his attorney, and Kassim instructed Murphy not to answer. Herman then interjected that for the attorney/client privilege to apply Murphy had to prove it. So Herman then asked Murphy again whether Kassim or her firm represented him at the proceeding. Kassim

blocked the question. Herman asked that it be marked for a ruling.

Similarly, following a break in the deposition Herman asked Murphy whether he had discussed his testimony with Kassim during the break. Kassim blocked the question on the basis of the attorney/ client privilege. Herman stated that a witness could not discuss their testimony with counsel in the middle of a deposition and that therefore his question to Murphy was appropriate. Kassim directed Murphy not to answer, and Herman asked that it be marked for a ruling.

Murphy testified that he had learned from a phone call from Richter about a month and a half before that he would be deposed. Id 17-18 When asked what he had learned from Richter, about "this proceeding,"evidently from the phone call, Kassim objected and indicated that she was going to assert the attorney/client privilege for any conversations between Murphy and her law firm. Id 18 Murphy also testified that he was unaware whether Dr. Lipkin knew he was going to be deposed, did not discuss it with her, never told Dr. Lipkin that he was going to her counsel's office, and was never told by Dr. Lipkin that she had been deposed. Id pp 31-32 Murphy claimed that he learned of the lawsuit when he first spoke to Richter and that Dr. Lipkin never told him he might be a witness. Id 37 Murphy further testified that he met with Richter for about one and a half hours at Dr. Lipkin's office about three weeks before this deposition, that he did not know who had arranged that meeting, that Dr. Lipkin was not present, and that he did not review documents or photos during that meeting. Id 38-41 No specific question was posed regarding any conversations that transpired during that meeting. Murphy was also asked whether he had met with Kassim on the morning of the deposition. Id 61 Murphy answered that he had for about forty minutes and that he had seen no documents or photos that morning. Id 61 No

specific question was put to Murphy about his discussions with Kassim that morning before the deposition.

Plaintiffs' counsel now seeks a further deposition of Foster so that he can respond to the question of what he discussed with Richter the Thursday before his deposition. A further deposition of Murphy is sought to compel him to respond to the "blocked" questions regarding his conversations with Dr. Lipkin's counsel (See order to show cause at ¶ 2). Plaintiffs' counsel's moving affirmation refers to the blocked questions about what defense counsel whispered in his ear during the deposition, the questions regarding whether he obtained Kassim as his counsel and whether she represented him at the proceeding, whether Murphy had discussed his testimony with Kassim during the break and what Murphy had learned about the case from Richter. Plaintiffs' counsel also wants to depose Murphy regarding his conversations with Richter during his one and a half hour meeting with her and with Kassim on the morning of the deposition before it commenced. See Herman aff of April 16, 2007 ¶¶ 54-56

Plaintiffs' counsel maintains that Murphy and Foster have failed to establish that there was an attorney/ client relationship between each of them and Dr. Lipkin's counsel and that there can be no attorney/client privilege because they did not initiate contact with counsel for the purpose of seeking legal advice; rather counsel contacted them. Plaintiffs further maintain that there has been no showing there were confidential communications made for the purpose of obtaining legal advice or services. Herman asserts that an attorney cannot represent a non-party witness merely for the purpose of coaching that witness in an effort to prevent the truth from emerging. Plaintiffs' counsel also asserts that even if the attorney/ client privilege existed, that privilege would not extend to conversations in the middle of the deposition or during breaks.

Dr. Lipkin's counsel, purporting to also represent Murphy and Foster, opposes plaintiffs' application. The opposition papers, which notably do not contain affidavits from Murphy or Foster, include the affirmations of Kassim, Richter and Martin Adams, the latter of which is based on "information and belief." Richter states that she met with Foster on the day of his EBT and that he worked as an independent contractor for Dr. Lipkin. Richter also asserts that plaintiffs are not claiming that Foster was negligent, that the pre-deposition statements made by Foster to her concerned his work as an independent contractor for Dr. Lipkin, that Foster "was seeking legal advice from [her] with respect to representing him" at his EBT and that Foster "was aware that the legal context of his communication to [her] was that of a client to his attorney" as were her statements to him.

As to Murphy, Richter states that she met with him on February 27, 2007 "in preparation for his" EBT and then essentially reiterates the statements she made with respect to Foster. Kassim adds that she met with Murphy on the EBT date "in preparation for his" EBT, that he was an independent contractor for Dr. Lipkin, that his statements to her (Kassim) "covered matters within the scope of [his] work as an independent contractor, that Murphy "was seeking legal advice from [her] with respect to representing him at his non-party deposition and that he "was aware that the legal context of his communication to [her] was that of a client to his attorney."

Adams adds that his firm's "representation of, and communications with the non-party witnesses were designed to promote the rendition of legal services to defendant LIPKIN in the defense of this lawsuit." Adams then goes on to state that communications between attorney and a client's agent or representative are privileged if those "communications are intended to

facilitate the provision of legal services by the attorney to a client." Adams further points to case law holding that the attorney/client privilege applies to confidential communications between the City of New York's counsel and employees or former employees selected by the City to be its witnesses at a deposition, [See Rudovic v City of New York, 168Misc2d58 (Sup. New York, 1996)] and that communications by a corporate defendant's employees to the corporation's counsel were privileged [See Upjohn v United States, 449US383 (1981)]. Adams asserts (aff. at fn 1) that the principles set forth in Upjohn apply to independent contractors. Adams also requests a hearing if I should find that plaintiffs have raised an issue of fact.

In reply plaintiffs' counsel notes the absence of any affidavit from Murphy and Foster attesting to counsels' assertions that Murphy and Foster were seeking legal advice and points to the fact that Murphy was blocked from answering the question of whether he had retained defense counsel. Plaintiffs' counsel also observes that Foster and Murphy were independent contractors, not agents or employees of an entity. Plaintiffs' counsel further observes that there is no indication as to who is paying for defense counsel's alleged representation or whether the non-party witnesses would have agreed to representation if they had to pay. Plaintiffs' counsel also points to 22 NYCRR §221 which in essence bars an attorney from interrupting a deposition to communicate with a witness unless all parties consent or the communication is to determine whether a question should not be responded to on certain grounds. Plaintiffs' counsel maintains that federal guidelines, which permit other counsel to make inquiry as to any private conferences during an EBT or during a break to ascertain if there has been any witness coaching, should apply here.

At oral argument defense counsel claimed that Dr. Lipkin's insurance carrier called the

firm and informed the firm that it was representing Foster and Murphy.

The branch of plaintiffs' motion which seeks a further EBT of Foster and Murphy to compel them to answer the blocked questions, and to permit plaintiffs' counsel to inquire of Murphy with respect to the pre-deposition meetings with defense counsel[1], and to ask them any relevant, non-privileged follow-up questions is granted.

As the Court of Appeals has held, no attorney/ client privilege exists unless such a relationship has been established, and the burden of proving the existence of the privilege is on the party asserting it. Matter of Priest v Hennessy, 51NY2d62, 68-69; See also Nassau County Grand Jury, 4NY3d665, 679; People v Osorio, 75NY2d80, 84 The privilege "protects confidential communications between a lawyer and client relating to legal advice sought by the client." Nassau County Grand Jury, supra at 678; Hoopes v Carota 74NY2d716, 717; People v O'Connor, 85AD2d92 (4th Dept., 1982) The privilege will apply when communications are from the lawyer to the client when they are "made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." Rossi v Blue Cross, 73 NY2d588, 593 The privilege "enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's "wishes." Osorio, supra at 84 The privilege "depends on whether the client had a reasonable expectation of confidentiality under the circumstances." Ibid

While whether one pays a fee for legal services is not necessarily dispositive on the issue

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[1]While plaintiffs' counsel did not inquire at Murphy's EBT as to the conversations with Richter and Kassim before his EBT, this may have been due to defense counsel's statement at the EBT that she would assert the attorney/client privilege for any questions about conversations between Murphy and her firm.

of whether a privilege exists (See O'Connor, supra at 95), Dr. Lipkin's counsel has failed to meet counsel's burden of establishing that Foster and Murphy engaged defense counsel for the purpose of seeking legal advice; nor has defense counsel established that any communication made by them to Foster or Murphy were for the purpose of rendering legal services to them, such as protecting their interests at their examinations before trial. Indeed as previously noted Adams stated in his affirmation (aff ¶ 12) that their services were "designed to promote the rendition of legal services to" another...namely Dr. Lipkin. Also since defense counsel acknowledged in their affirmations that this case does not involve any claim that Foster or Murphy were negligent it is unclear why they would seek the services of counsel. Absent an appropriate affirmative statement to the contrary from Foster or Murphy, it is difficult to imagine how Foster and Murphy could have thought that anything they said to Dr. Lipkin's counsel would be kept confidential because counsel was there to serve Dr. Lipkin. Defense counsel's conclusory assertions, unsupported by the affidavits of their alleged clients, are inadequate to establish the existence of the privilege. See Priest supra at 70 Moreover even if the privilege did apply it was impermissible to block the question posed to Murphy of whether he had assented to use Kassim or her firm to be his attorney. See Hoopes supra at 717

The cases relied upon by defense counsel are inapposite because they involved counsel's representation of an entity rather than a person, and counsel's communications with employees or former employees of that entity (see Upjohn, supra, Radovic, supra) or involved communications between a party's counsel and either the counsel's representative or the client's representative to facilitate the rendering of legal services by the attorney [See Golden Trade S.r.L. v Lee Apparel Co., 143F.R.D.514 (SDNY, 1992)]. Defense counsel does not purport to represent a corporation,

there are no corporate defendants in this case, and Foster and Murphy are concededly independent contractors and are not claimed to be de facto employees or de facto or ostensible agents of Dr. Lipkin. Also neither Foster nor Murphy was acting as Dr. Lipkin's representative to facilitate the providing of legal services to Dr. Lipkin.

Here, where Dr. Lipkin's counsel has failed to establish the existence of an attorney/ client relationship between the law firm and Foster and Murphy, it is apparent that Foster and Murphy were simply deposed as non-party witnesses and as such their conversations with Dr. Lipkin's counsel are not privileged. See Hudson Valley Marine, Inc., 30AD3d377 (2d Dept, 2006); Bergmann v Manes, 141 AppDiv102 (2d Dept, 1910); see also Yemeni v Goldberg 12Misc3d1141 (Sup. Nassau Cty, 2006) The blocked questions regarding conversations between Dr. Lipkin's counsel and these non-party witnesses, bear on the witness' credibility and are the proper subject for inquiry. See Bergmann, supra at 103

Accordingly, the motion is granted to the extent that a further deposition of Foster and Murphy is ordered so that they may answer the blocked questions, and plaintiff's counsel may inquire about Murphy's pre-deposition conversations with defense counsel and ask any relevant, non-privileged follow-up questions. However in the exercise of my discretion I decline to order Dr. Lipkin's counsel to pay plaintiffs' costs for the further deposition. If plaintiffs ultimately succeed in the action expenses incurred may be taxed as disbursements pursuant to CPLR§8301. Also, in the exercise of my discretion both applications for motion costs (See CPLR§8106, §8202) are denied.

Settle order.

Dated: August 1, 2007
60 Centre Street
New York, NY

J.S.C.