

At a Term of The Supreme Court of the
State of New York, heard on the 28th 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

INDEX #908059-19

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.



Hon. Christopher P. Baker
Supreme Court Justice

Distribution List:

Charles E. Diamond, Chief Clerk

John H. Fisher, Esq.

Thomas A. Cullen, Esq.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

Caroline Melkonian, Individually and as the
Administratrix of the Estate of Michael Melkonian, **STIPULATION AND ORDER**

Plaintiff,

Index No.: 908059-19

vs.

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


Defendants.

Pursuant to the Court's videoconference held on May 28, 2020 with plaintiff's counsel, John H. Fisher, P.C. (John H. Fisher, of counsel) and defendants' counsel, Burke, Scolamiero & Hurd, LLP (Thomas A. Cullen, Esq. of counsel), ~~it has been stipulated among counsel for the plaintiff and defendants and ordered as follows:~~

- (1) Either party may conduct depositions in this case by remote means ("remote depositions"), as further described in the sections below.
- (2) Neither party will object to the use of a transcript from a remote deposition solely on the basis that the deposition was taken from a remote location—or on the basis that the witness was sworn under oath by someone at a remote location—provided that the transcript was generated by a duly licensed court reporter who also participated in the remote deposition.
- (3) Defendants and defendants' counsel may be in the same room during the defendants' depositions.

- (4) Plaintiff and plaintiff's counsel may be in the same room during the plaintiff's deposition and the depositions of the plaintiff's children, Maxwell Melkonian and Olivia Melkonian.
- (5) Other than the exceptions set forth in paragraphs 3 and 4 of this Stipulation and Order, each participant (i.e., lawyers, witness, parties and court reporter) will be in a different location from each other participant, and none will be permitted or required to travel to be in physical proximity to any other participant for the remote deposition.
- (6) The party noticing the deposition will select and be responsible for the videoconferencing platform (or service) for conducting that particular remote deposition.
- (7) Counsel will make a good faith effort to identify and exchange pre-marked exhibits that they anticipate using at a deposition by email or other secure digital means (e.g., Dropbox, Google Drive, etc.) no later than ~~30 minutes~~ ^{Three (3) BUSINESS DAYS} before the commencement of a remote deposition. However, this provision does not preclude counsel from introducing an exhibit at the deposition that was not exchanged beforehand, ^{unless good CASE IS shown.}
- (8) Pre-marked exhibits will be labelled with reference to the party who anticipates utilizing the exhibit (e.g., Defendant's Exhibit 1, Plaintiff's Exhibit 1, etc.).
- (9) Each participant (i.e., lawyers, witness, parties, and court reporter) will make reasonable efforts to participate in a test of the videoconferencing platform at least 24 hours before the date on which the remote deposition is to take place.

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- (10) While the remote deposition is being conducted, none of the participants may utilize private messaging to communicate with the witness whose remote deposition is being taken.
- (11) ~~Notwithstanding section 8 above, nothing in this order prohibits private messaging during a break in the remote deposition or while the parties are off the record.~~ 
- (12) Either party may make a recording (video, audio or both) of all or some of the remote deposition, provided that the party making the recording will transmit a copy of the full recording to the other party within ten business days after the completion of the remote deposition.
- (13) The videotaped deposition shall depict the witness in a waist-up shot, seated at a table. The parties further understand that due to technological and practical limitations, the videotape of a remote deposition may depict attorneys, court reporters, or individuals other than the witness.
- (14) The cost of videotaping or audio recording shall be borne by the party who has served the notice for the videotaped or audio recording of the deposition.
- (15) The use of the videotape recordings of depositions at the trial shall be governed by the provisions of the Civil Practice Law and Rules, and all other relevant statutes, courts rules and decisional law, relating to depositions and relating to the admissibility of evidence.
- (16) Otherwise as set forth in the foregoing sections of this order, a remote deposition will be conducted as otherwise provided in the CPLR and New York's Uniform Rules of Trial Courts.

Dated: JUNE 3, 2020

SO-ORDERED!



Hon. Christopher P. Baker

Distribution List:

Charles E. Diamond, Chief Clerk

John H. Fisher, Esq.

Thomas A. Cullen, Esq.
