

#607
4/14/10

FILED
APR 16 2010
JUDGE JESSICA R. MAYER

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Third-Party George Garibaldi

MABLE ADAMS

Plaintiff,

v.

JOHNSON & JOHNSON COMPANY, et al.,
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO.: MID-L-6684-06 MT
Case No. 274
Civil Action

ORDER QUASHING SUBPOENA


THIS MATTER having been opened to the Court upon application by Porzio, Bromberg & Newman, P.C., attorneys for Third-Party George Garibaldi, and the Court having read and reviewed the moving papers submitted and any opposition thereto and for good cause having been shown;

It is on this 16th day of April, 2010,

ORDERED that the motion of Third-Party George Garibaldi to quash Plaintiffs' February 24, 2010 Subpoena Ad Testificandum and Duces Tecum is hereby granted; and it is

FURTHER ORDERED that Plaintiffs' February 24, 2010 Subpoena Ad Testificandum and Duces Tecum to Third-Party George Garibaldi is hereby quashed.

A copy of the within Order shall be ^{present for} served upon all counsel within 7 days from the date of entry.



JESSICA R. MAYER, J.S.C.
J.S.C.

The court made the attached findings of fact or reasons for its decision on April 16, 2010 as set forth in the memorandum of decision dated April 16, 2010.

~~The court set forth its findings of fact or reasons for its decision orally on the record on _____~~

This Motion was:

Opposed ✓

OPPOSED

Unopposed

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JESSICA R. MAYER, J.S.C.
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. Box 964
NEW BRUNSWICK, NEW JERSEY 08903-964

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS**

**Memorandum of Decision on the Motion to
Quash Plaintiffs' Subpoena Ad Testificandum and Duces Tecum**

Adams v. Johnson & Johnson, et al. [Docket No. L-6684-06 MT]

(In re: Risperdal/Seroquel/Zyprexa Litigation, Case No. 274)

For Defendants: Lauren E. Handler, Esq.

For Plaintiffs: Leslie LaMacchia, Esq.
Brian J. McCormick, Jr., Esq.

Dated: April 16, 2010

FILED
APR 16 2010
JUDGE JESSICA R. MAYER

Background

Plaintiffs' counsel in this mass tort litigation seeks to depose a non-party fact witness, George Garibaldi, M.D. ("Dr. Garibaldi"), a former employee of Defendant Janssen Pharmaceutical Products ("Defendant" or "Janssen"). Plaintiffs' counsel maintains that they have properly served Dr. Garibaldi with a *Subpoena Ad Testificandum and Duces Tecum* ("subpoena") compelling his appearance at a videotaped deposition that was to be held on March 30 and 31, 2010 in the Florham Park, New Jersey office of Drinker, Biddle & Reath, LLP. On March 30, 2010, Defendant filed this motion to quash Plaintiffs' subpoena.

Counsel for Dr. Garibaldi requested oral argument in connection with the motion to quash Plaintiff's subpoena. Consistent with Rule 1:6-2(c) and Rule 1:6-2(d), because the motion was addressed to a pre-trial discovery issue, the court advised that the matter would be decided on the papers without oral argument.

Statement of Facts

Dr. Garibaldi was employed by Janssen from 2001 until October 2006. During that time he worked on Risperdal®, the pharmaceutical that is subject of this litigation. Currently, Dr. Garibaldi is employed by Hoffman-LaRoche ("HLR") in Basel, Switzerland. (March 29, 2010 Certification of George Garibaldi, M.D. ("Garibaldi Cert.") at ¶ 2).

Before April 2007, Dr. Garibaldi was a resident of New Jersey and lived at a property he owned (and still owns) in North Bergen, New Jersey. (Id. at ¶ 3). In April 2007, Dr. Garibaldi moved to Switzerland upon being assigned to HLR's offices in Basel, Switzerland. (Id. at ¶¶ 2, 4). Since relocating, Dr. Garibaldi moved out of his former residence in North Bergen, New Jersey, and took all of his belongings with him. (Id. at ¶¶ 2-5). Dr. Garibaldi is a legal resident of the Swiss Confederation. (Id. at ¶ 6), possesses a Swiss drivers license, (Id. at ¶ 12), is permitted to designate a foreign tax home on his federal income taxes, and, in the calendar years 2008 and 2009, spent at least 300 days in Switzerland (Id. at ¶ 11).

In addition to his North Bergen property, Dr. Garibaldi owns a house in Cliffside Park, New Jersey, where his estranged wife and son have lived since August 2008.¹ (Id. at ¶ 8). A tenant now occupies the North Bergen property. (Id. at ¶ 7). Dr. Garibaldi never lived at the

¹ The Bergen County Master Property report lists Dr. Garibaldi and his estranged wife as joint owners of the property. (See Certification of Leslie LaMacchia in Support of Plaintiff's Response in Opposition to Non-Party George Garibaldi's Motion to Quash ("LaMacchia Cert."), Exhibit F).

Cliffside Park address, nor has he ever spent a night there. (Id. at ¶ 9). When Dr. Garibaldi travels to New Jersey, he stays in a hotel. (Id. at ¶ 10).

Previously, Plaintiffs' counsel attempted to serve Dr. Garibaldi personally with a subpoena at the Cliffside Park house where his estranged wife and son live. Although Dr. Garibaldi owns that house with his estranged wife, he has never lived there. (Id. at ¶ 9).² On February 24, 2010, plaintiffs' counsel attempted to serve Dr. Garibaldi personally by handing him a *Subpoena Testificandum and Duces Tecum* while he was attending a conference in the District of Columbia. (See Subpoena Testificandum and Duces Tecum and Plaintiffs' Fourth Amended Notice of Videotaped Deposition of George M. Garibaldi, attached to Certification of Michelle Molinaro Burke, Esq. ("Molinaro Burke Cert."), Exhibit 1). The Notice of Deposition attached to the subpoena calls for a videotaped deposition and production of documents on March 30 and 31, 2010 in the Florham Park, New Jersey office of Drinker, Biddle & Reath, L.L.P. (Ibid.)

Relevant Law

Rule 4:14-7 provides that "[t]he attendance of a witness at the taking of depositions may be compelled by subpoena, issued and served as prescribed by R. 1:9 insofar as applicable"

R. 4:14-7(a). Rule 1:9 requires that "[s]ervice of a subpoena . . . be made by delivering a copy thereof to the person named," R. 1:9-3, and must be served ". . . any place within the State of

² While Plaintiffs' counsel's stated in the opposition brief that information from a Cliffside Park neighbor of Dr. Garibaldi's estranged wife and son indicates that he still lives there, Plaintiffs' counsel has not submitted a sworn affidavit from the neighbor. The neighbor's statements are in the form of inadmissible hearsay. Further, the court is not convinced simply on the basis of the neighbor's assertions that Dr. Garibaldi is, in fact, a resident of the Cliffside Park property.

Nor is the court persuaded by the neighbor's hearsay statement. It is common for married, but separated, people to refer to their spouse and their spouse's items, such as "my husband's car." It is also the court's experience that married, but separated, people visit their spouse's new location or residence when engaged in parenting time on behalf of a minor child—especially if the non-custodial parent resides in another state or, as in this case, a foreign country. Thus, the court would not read anything into the neighbor's alleged statements related to Dr. Garibaldi even if accompanied by an affidavit or certification.

New Jersey.” R. 1:9-4 (“A subpoena requiring the attendance of a witness at a hearing in any court may be served at any place within the State of New Jersey”).

Rule 4:14-7 provides two separate procedures for the taking of a fact witness’s deposition – one for New Jersey residents and another for nonresidents who are “subpoenaed within this State.” R. 4:14-7(b)(1). The rule does not outline procedures for persons who fail to fall within these two categories. The Rule states:

A **resident of this State** subpoenaed for the taking of a deposition may be required to attend an examination only at a reasonably convenient time and only (A) in the county of this State in which he or she resides, is employed or transacts business in person; or (B) at a location in New Jersey within 20 miles from the witness's residence or place of business; or (C) at such other convenient place fixed by court order. A **nonresident of this State subpoenaed within this State** may be required to attend only at a reasonably convenient time and only in the county in which he or she is served, at a place within this State not more than 40 miles from the place of service, or at such other convenient place fixed by court order. The party subpoenaing a witness, other than one subject to deposition on notice, shall reimburse the witness for the out-of-pocket expenses and loss of pay, if any, incurred in attending at the taking of depositions.

[R. 4:14-7(b)(1) (emphasis added).]

The Rule does not set forth the procedures for the taking of depositions of non-residents subpoenaed outside of the state. Ibid.; see also King v. Hochberg, 17 N.J. Super. 533 (Ch. Div. 1952) (stating that no known authority exists for the proposition that a New Jersey court can “compel the examination of foreign witnesses not served with subpoena within this state”).

Rule 4:11-5 provides procedures for the deposition of a non-party witness who is outside the State of New Jersey either: “(a) on notice pursuant to R. 4:14-2, or, in the case of a foreign country, pursuant to R. 4:12-3; or (b) in accordance with a commission or letter rogatory issued by a court of this state, which shall be applied for by motion on notice; or (c) in any manner stipulated by the parties.” R. 4:11-5; see also Pressler, Current N.J. Court Rules, comment 1.1

on R. 4:11-5 (“If the deposition witness is not a party, the notice technique will result in the availability of witness-appearance compulsion only if the sister state has a procedure, by rule or statute, similar to R. 4:11-4, which authorizes the foreign court to issue a deposition subpoena on petition in aid of foreign litigation. If it does not and if the witness is not a party, witness attendance of an out-of-state deposition can be compelled only by the issuance in this state of a commission or letter rogatory”); Pressler, Current N.J. Court Rules, comment 1.3 on R. 4:11-5 (“With respect to the commission or letter rogatory, the rule simply incorporates the procedural provision of R. 4:12-3, which provide for this technique in respect to depositions to be taken in foreign countries”). Thus, where a witness is located in another jurisdiction, this court may enter an Order, upon motion by a party, seeking the issuance of a subpoena by the court of that jurisdiction.

Rule 4:9-2 provides that “the court on motion made promptly may quash or modify [a] subpoena or notice if compliance would be unreasonable or oppressive” R. 4:9-2.

Analysis

Here, Dr. Garibaldi was never properly served with the subpoena because he was not served “within the State of New Jersey,” as required by R. 1:9-4 (“A subpoena requiring the attendance of a witness at a hearing in any court may be served at any place within the State of New Jersey”). Although the language in R. 1:9-4 applies to “a hearing in any court,” the court does not read the Rule as strictly limited to in-court appearances. It would be illogical and overly-restrictive to read the Rule as strictly as suggested by Plaintiffs’ counsel as R. 1:9

provides no other procedures for hearings conducted outside the courthouse. Thus, the court reads the Rule to apply to depositions as well as “a hearing in any court.”³

Dr. Garibaldi was not personally served in New Jersey. Service to the house owned by Dr. Garibaldi in Cliffside Park was not effectual because he never resided there. Mere ownership of property does not equate with residency.⁴ Dr. Garibaldi owns several homes and cannot be said to reside at every house that he owns and pays taxes. According to his sworn affidavit, Dr. Garibaldi resides in Switzerland. No affidavit or certification to the contrary was presented to the court. Furthermore, personal service of the subpoena upon Dr. Garibaldi in Washington, D.C does not qualify as service “within the State of New Jersey.”

The Rule governing the procedures for taking a deposition of a fact witness in New Jersey is also instructive. Rule 4:14-7 provides for only two kinds of depositions that can be taken in New Jersey – that of a New Jersey resident and that of a “nonresident of this State subpoenaed within this State.” R. 4:14-7(b)(1).

Dr. Garibaldi’s subpoenaed deposition does not fall into the category of an in-state deposition, as he is not a New Jersey resident. As discussed above, Dr. Garibaldi does not reside

³ Further, the court anticipates that Dr. Garibaldi’s videotape deposition would ultimately form the basis for use at trial as the court expects Dr. Garibaldi may not be an “available” witness at the time of trial. See N.J.R.E. 804(a)(4); R. 4:16-1(c).

⁴ Plaintiffs’ counsel also mentions the fact that Dr. Garibaldi remains registered to vote in the New Jersey and currently files New Jersey State income taxes. Because Dr. Garibaldi is a citizen of the United States, he retains the right to vote in elections held in the United States. The fact that Dr. Garibaldi is still registered to vote in New Jersey does not prove New Jersey residency. Dr. Garibaldi’s 2005 Voter Registration record indicates that he resides at the North Bergen property. (See LaMacchia Cert., Exhibit D). Plaintiffs’ counsel does not contend that Dr. Garibaldi resides at the North Bergen house; counsel asserts that Dr. Garibaldi resides at the Cliffside Park property. Thus, Dr. Garibaldi’s 2005 Voter Registration record does not accurately reflect his current place of residency. Further, since moving to Switzerland, Dr. Garibaldi has voted from the United States Embassy in Bern, Switzerland. Were Dr. Garibaldi considered a New Jersey resident, he would have been required to vote via absentee ballot. Thus, Dr. Garibaldi’s Voter Registration record does not prove that he is a resident of New Jersey.

Also, the fact that Dr. Garibaldi files a New Jersey State income tax form supports a conclusion that Dr. Garibaldi owns/rents property and, thus, collects income from his Cliffside Park house. It is undisputed that Dr. Garibaldi owns property in New Jersey. However, mere ownership of property in New Jersey does not prove residency.

in the Cliffside Park property that he owns. Indeed, Dr. Garibaldi does not reside in any house in New Jersey. Dr. Garibaldi resides in Switzerland, where he spends more than three quarters of his time. Under the New Jersey Court Rules, Dr. Garibaldi must have been served within New Jersey to be required under this State's subpoena power to appear at a deposition within the State.

Plaintiffs' counsel has several options for compelling Dr. Garibaldi's deposition in another state or country. These options are discussed above. See R. 4:11-5 (providing procedures for the deposition of a non-party witness who is outside of New Jersey pursuant to R. 4:14-2, R. 4:12-3, via commission or letter rogatory, or by stipulation of the parties). Alternatively, Plaintiffs' counsel can continue to pursue relief in the Federal Court under alternative legal means.

Conclusion

Because Plaintiffs' counsel failed to serve Dr. Garibaldi properly with a subpoena pursuant to the New Jersey Court Rules, Defendant's motion to quash or the subpoena is GRANTED.



JESSICA R. MAYER, J.S.C.