

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

**FILED AND  
ENTERED ON  
DATE  
January 5, 2005  
WESTCHESTER  
COUNTY CLERK**

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MIRIAM OSBORN MEMORIAL HOME ASSOCIATION,

Petitioner,

Index No: 17175/97  
18077/98  
16567/99  
16113/00  
16626/01  
18115/02  
16987/03

**-against-**

THE ASSESSOR OF THE CITY OF RYE, THE  
BOARD OF ASSESSMENT REVIEW OF THE CITY  
OF RYE, AND THE CITY OF RYE,

Respondents,

**DECISION & ORDER**

-and-

THE RYE CITY SCHOOL DISTRICT,

Intervenor-Respondent.

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DICKERSON, J.

**MOTION TO PRECLUDE EVIDENCE OF RESIDENT MEDICAL CONDITION DURING STAY**

The Respondent-Intervenor, The Rye City School District  
[ " the School District " ], seeks an Order precluding the Petitioner,  
the Miriam Osborn Memorial Home Association [ " The Osborn " ] from  
introducing at trial evidence of " the health status of The Osborn's

residents during their stay at The Osborn "1. Evidently, The Osborn intends to introduce such evidence at trial to " refute respondents' contention that Sterling Park residents are uniformly ' healthy ' and to establish, to the contrary, that these residents are by and large medically frail and in need of the health care and support services offered by The Osborn "2.

### **The Scope Of Item No. 3**

Notwithstanding the fact that discovery has been completed long ago and that the parties agreed on February 17, 2004 that " they were ready for trial "3, the parties once again find themselves in a discovery dispute4, this time over the scope of Item No. 3 in the School District's Revised Notice Of Discovery And Inspection dated July 30, 2003 [ " Item No. 3 of the Revised D&I " ] which demands production of " 3. The files maintained by The Osborn Marketing Department for all Applicants or prospective applicants to The Osborn referenced at pp. 86:23, 144:18-145:9 and 147:8-17 of the Bush Deposition "5.

### **Prior Orders, Affidavits And Deposition Testimony**

The nature of the documents sought in Item No. 3 of the Revised D&I was addressed in two prior Orders by Justice Rosato, one filed on July 25, 20036 and a subsequent Order filed on August 14, 20037 and the

underlying Affidavits of Mark R. Zwerger<sup>8</sup>, Robert A. Weiner<sup>9</sup> and Peter G. Bergmann<sup>10</sup>. Also of relevance herein are a few pages<sup>11</sup> of the deposition of Ruth Bush, The Osborn's former Marketing Director, and the Affidavit of Dr. William Martimucci<sup>12</sup> submitted earlier in support of The Osborn's summary judgment motion which was denied<sup>13</sup>.

#### **Documents Produced By The Osborn**

In response to Item No. 3 of the Revised D&I and the Orders of Justice Rosato The Osborn produced " " medical records submitted at the time of a resident's application " "<sup>14</sup> for admission which included redacted documents entitled " Medical Information " and " Physical Examination "<sup>15</sup>. Such documents do not, necessarily, reveal a resident's medical condition after acceptance and during his or her stay at The Osborn.

#### **The Contentions Of The Parties**

It is the contention of the School District that The Osborn was ordered by Justice Rosato to produce, and should have produced, in response to Item No. 3 of the Revised D&I [ and in addition to the redacted copies of " Medical Information " and " Physical Examination " forms already produced and discussed above ] all " medical records regarding the health status of The Osborn's residents during their stay

at The Osborn " <sup>16</sup>, e.g., records <sup>17</sup> upon which Dr. Martimucci relied in making various assertions <sup>18</sup> in his affidavit submitted in support of The Osborn's summary judgment motion <sup>19</sup>. The Osborn contends, however, that all that Item No. 3 of the Revised D&I called for was the medical records which were part of the residents' application maintained by The Osborn Marketing Department and discussed in the Ruth Bush deposition at " pp. 86:23, 144:18-145:9 and 147:8-17 ", i.e., the " Medical Information " and " Physical Examination " forms, redacted copies of which were produced <sup>20</sup>.

### **The Decision**

After careful consideration of all of the papers submitted herein and the plain meaning of the language of Item No. 3 of the Revised D&I [ and not what the School District understood <sup>21</sup> the language to mean or interpreted <sup>22</sup> the language to mean ] the Court must deny the application of the School District to preclude The Osborn from introducing evidence at trial regarding the health status of its residents at the time of their application and during their stay at The Osborn. The two Orders of Justice Rosato refer only to medical records which were part of a residents' application [ redacted copies of which were produced ] and not to any medical records " regarding the health status of The Osborn's residents during their stay at The Osborn ".

Dated: January 5, 2005  
White Plains, N.Y.

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THOMAS A. DICKERSON  
JUSTICE SUPREME COURT

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## ENDNOTES

1. Letter of Robert A. Weiner dated December 2, 2004 at p. 1 [ " Weiner Ltr I " ]. See also Letter of Robert A. Weiner dated December 16, 2004 at p. 1 [ " Weiner Ltr II " ]( " My December 2, 2004 letter was neither an application ro compel production of documents nor an application seeking permission to obtain discovery. Rather, my December 2 letter is an application seeking enforcement of Justice Rosato's discovery orders and holding The Osborn to the choice that it knowingly made when it determined not to produce medical records regarding the health status of its residents during their stay at The Osborn " ) and Letter of Robert A. Weiner dated December 28, 2004 [ " Weiner Ltr III " ] at p. 4.
2. Letter of Peter G. Bergmann dated December 13, 2004 at p. 6 [ " Bergmann Ltr I " ].
3. Trial is scheduled for February 14-18, 28, 2005 and March 1-11, 2005.
4. See Miriam Osborn Memorial Home Association v. Assessor of the City of Rye, 4 Misc. 3d 1009 (A), 2004 WL 1656500 ( West. Sup. 2004 )( " Not Ready For Trial. After more than 5 years of contentious litigation these proceedings were declared ready for trial on January 6, 2004...On February 17, 2004 this Court held a conference during which all parties agreed they were ready for trial...Thirty days later, however, the School District complained that, among other things, the Osborn had failed to complete Court ordered discovery and failed to serve and file income and expenses statements..." ).
5. Ex. A to Bergmann Ltr. I.
6. Ex. B to Weiner Ltr I.
7. Ex. F to Weiner Ltr I.
8. Ex. C to Weiner Ltr I ( Affidavit of Mark R. Zwerger sworn to August 5, 2003 ( " Zwerger Aff " )).
9. Ex. D to Weiner Ltr I ( Corrected Affidavit of Robert A. Weiner sworn to August 13, 2003 ( " Weiner Aff " )).
10. Ex. E to Weiner Ltr I ( Reply Affidavit of Peter G. Bergmann sworn to August 13, 2003 ( " Bergmann Aff " )).

11. Letter of Peter G. Bergmann dated December 17, 2004 at Ex. A [ " Bergmann Ltr II " ].
12. Affidavit of William Martimucci, M.D., sworn to September 4, 1998 { " Martimucci Aff " } at Ex. A to Weiner Ltr I.
13. See Miriam Osborn Memorial Home Association v. Assessor of the City of Rye, 275 A.D. 2d 714, 713 N.Y.S. 2d 186 ( 2d Dept. 2000 ).
14. Bergmann Ltr II at p. 2.
15. Ex. B to Bergmann Ltr II.
16. Weiner Ltr I at p. 1.
17. Martimucci Aff at para. 2 ( " my staff and I reviewed the residents' medical records and compiled chronological and medical profiles " ).
18. Martimucci Aff at paras. 3-7 ( " The first startling fact revealed in our review is just how old Sterling Park residents are...The next salient fact is how infirm the Sterling Park residents are. ( The residents suffer ) from a number of medical conditions, some not serious, but many indeed medically significant. For instance, there were six recorded episodes of myocardial infarction...with many other residents suffering from some form of heart disease. As another example, there were fourteen occurrences of cancer...On average, each Sterling Park resident had 2.66 diagnoses...Sterling Park residents, as a whole, are not ' well ' elderly. ( And ) are more compromised medically than the elderly population in the community at large " ).
19. See Weiner Aff at paras. 63-68. See also Weiner Ltr II at pp. 4-5 and Weiner Ltr III at p. 2-3.
20. Bergmann Ltr I at pp. 1-2 ( " at no time during the protracted and expansive discovery in this case has the School District ever requested or has the Court ordered The Osborn to produce ' all medical records in its possession ' or any ' medical records during residents' stay ' at The Osborn. Moreover, The Osborn did in fact produce every single page of medical records-numbering in the thousands-contained in ' [t]he files maintained by The Osborn Marketing Department of all applicants or prospective applicants to The Osborn '...The only resident ' medical records ' responsive to the Revised D&I were the medical

forms and physician examination forms completed at the time of application and kept in the Marketing Department files..." ); See also Bergmann Ltr II at p. 1 ( " Neither Justice Rosato ever ordered nor did the Rye City School District ever request The Osborn to produce ` medical records regarding the health status of its residents during their stay at The Osborn...All that Ms. Bush said with regard to ` medical records ` is that the resident application files maintained by the Marketing Department include a ` medical ` that is completed by the applicant at the time of application. There is nothing from Ms. Bush's deposition testimony to suggest that The Osborn's Marketing Department ( of all places ) would somehow be the custodian of resident medical records generated at any point subsequent to a resident's application or at any time during a resident's stay at The Osborn " ).

21. Weiner Ltr III at p. 1 ( " I understood Ms. Bush's testimony to be saying that all medical files relating to a resident were included in the Marketing Department's files and based upon my understanding, I drafted the Document Request to obtain copies of all medical records relating to the health status of The Osborn's residents " ).

22. Weiner Ltr III at p. 3 ( " the School District interpreted Request No. 3 to require production of all medical records regarding the health status of The Osborn residents, not just the medical forms attached to the Confidential Data Application " ).