

**Staten Is. Univ. Hosp. v Comprehensive
Habilitation Servs., Inc.**

2007 NY Slip Op 30040(U)

March 21, 2007

Supreme Court, Richmond County

Docket Number: 0011750

Judge: Judith N. McMahon

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

-----X

STATEN ISLAND UNIVERSITY HOSPITAL,

Plaintiff,

McMAHON

- against-

**COMPREHENSIVE HABILITATION
SERVICES, INC. and PETER MAGARO,
Defendants.**

-----X

DCM PART 5

Present:

HON. JUDITH N.

DECISION AND ORDER

Index No. 11750/2000

Motion No. 001

The following papers numbered 1 to 3 used on this motion this 20th day of February, 2007.

	Papers Numbered
Notice of Motion (Affirmation in Support) _____	1
Order to Show Cause _____	
Affirmation in Opposition _____	2
Affirmation in Reply _____	3
Other Papers _____	

The plaintiff Staten Island University Hospital ("SIUH") commenced the instant action to recover damages for breach of contract, unjust enrichment and negligent misrepresentation. On July 1, 1994, the parties entered into a contract providing that defendant Comprehensive Habilitation Services ("CHS") would provide management services at part- time outpatient clinics operated by SIUH. Defendant Peter Magaro was the Chief Executive Officer of CHS. In September, 1998, the relationship was terminated.

In September, 1999, SIUH entered into a settlement agreement with the New York State Attorney General to resolve allegations that from January 1, 1994 through August 31, 1998, SIUH had over billed the State Medicaid program for outpatient services provided at

its part- time clinics. SIUH agreed to pay approximately \$45,000,000 to the State.

In May, 2000, SIUH commenced this action alleging that it is entitled to recover \$2,500,000 it paid to CHS for services that were not reimbursable by Medicaid.

In May, 2005, SIUH entered into a second settlement agreement with the New York State Attorney General to resolve allegations that SIUH had “unlawfully obtained Medicaid reimbursement by falsely billing Medicaid for services in 21 clinics operated by CHAPS Community Health Services, Inc.” from January, 1999 to September, 2002. SIUH agreed to pay the State \$76,500,000.

In June, 2006, the defendants interposed an answer with counterclaims. The counterclaims asserted that SIUH’s fraudulent and/or negligent billing practices harmed CHS’ reputation in the health care community in the amount of \$30,000,000.

On August 3, 2006, SIUH produced Alfred Cancelleri, the former Vice President of Internal Audit, who retired in September, 2005, for deposition. On October 27, 2006, SIUH produced Alfred Glover, the former Chief Operating Officer of SIUH, who retired in June, 2005, for deposition. During the course of both depositions, SIUH’s counsel directed the witnesses not to answer questions relating to the 2005 Settlement Agreement.

The defendants now move pursuant to CPLR 3124 to compel SIUH to produce Cancelleri and Glover for continued depositions to answer the questioned blocked by counsel during the initial depositions. The defendants also demand six documents requested in a letter dated October 5, 2006, which SIUH refused to produce because they “were submitted after the CHS/SIUH relationship terminated” or because they “contain confidential Hospital

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information". Finally, the defendants request legal fees, costs and disbursements incurred in association with this motion.

In support of their motion, the defendants contend that under both CPLR 3101(a) and Part 221 of Uniform Rules Relating to the Conduct of Depositions an attorney may not object to a question based on relevance. In any event, the questions were relevant because they establish a continuing course of fraudulent and/or negligent conduct by SIUH dating back to 1994.

In opposition, SIUH asserts that questions regarding the 2005 Settlement Agreement are not relevant as it is not seeking to recover from the defendants any money paid pursuant to this agreement. Additionally, SIUH alleges that the 2005 Settlement Agreement is not material and necessary to the prosecution of the defendants' counterclaims as that agreement was entered seven years after the relationship between SIUH and the defendants was terminated.

The CPLR directs that there shall be "full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." CPLR 3101(a). The test is one of usefulness and reason (*see, Allen v. Crowell-Collier Publications, Co., 21 NY2d 403, 406 [1968]; Mann v. Cooper Tire Co., 33 AD3d 24, 29 [1st Dept. 2006]*). Section 3101(a) embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise (*see, Delta Financial Corp. v. Morrison, ___ Misc3d ___, 2007 WL 283039, 2007 NY Slip. Op. 27030 [Sup. Ct. Nassau County Jan. 26, 2007]*). Parties are entitled to ask broad questions at depositions

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in an effort to ascertain the truth and to flush out the relevant issues that may assist them in the prosecution or defense of their action (*see*, **Seaman v. Wyckoff Heights Medical Center, Inc.**, 8 Misc3d 628, 632 [Sup. Ct. Nassau County 2005]). The structure of CPLR Article 31 “envisages a maximum disclosure of facts with a minimum of supervision” (**Wiseman v. American Motors Sales Corp.**, 103 AD2d 230, 232 [2d Dept. 1984]), to “create an environment conducive to open, expansive disclosure during the taking of the deposition” (**Mora v. St. Vincent’s Catholic Med. Ctr.**, 8 Misc3d 868 [Sup. Ct. New York Cty 2005]).

On October 1, 2006 a new Part 221, entitled “Uniform Rules for the Conduct of Depositions” became effective. Section 1 of the Rule provides that every objection raised during an deposition shall be stated succinctly. Section 2 provides that the proper procedure for a deposition is to permit the witness to answer all questions subject to objections pursuant to CPLR 3115 (b), (c) and (d), except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) if the question is plainly improper and would, if answered, cause significant prejudice to any person, and “[a]n attorney shall not direct a deponent not to answer except as provided in CPLR 3115 or this subdivision”.

In this case, at the deposition as well as in opposition to this motion, SIUH objected to the line of questioning regarding the 2005 Settlement Agreement on the grounds of relevance. However, contrary to SIUH’s argument, it cannot be said at this early stage of discovery (although this case was commenced in 2000, CHS did not answer until June, 2006), that these questions are irrelevant. The defendants have adequately explained that the 2005 Settlement

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Agreement may be relevant to establish a continuing course of fraudulent conduct on behalf of SIUH. Such testimony may be admissible to prove that SIUH, not CHS, was the culpable party. It is noted that SIUH has not asserted that any of the blocked questions implicated the its constitutional rights or a privilege recognized in law (*see*, Roggow v. Walker, 303 AD2d 1003 [4th Dept. 2003]; Mora v. St. Vincent's Catholic Med. Ctr, 8 Misc.3d 868 [Sup. Ct. New York County 2005]).

This ruling does not prevent SIUH from objecting at trial to the admission of such testimony as irrelevant as “the scope of questioning and testimony which may be elicited at a deposition may be more extensive than that which may be admissible at trial” (New Rules on Conducting Depositions, Robert s. Kelner and Gail S. Kelner, New York Law Journal, Sept. 19, 2006). While the answer to these questions may prove to be irrelevant to this litigation, such a determination cannot be made until the questions are posed and answered (*see*, Lipp v. Zigman, 14 Misc3d 1217(A) [Sup. Ct. Nassau County 2007]). All issues regarding admissibility in evidence of questions asked and answered at a deposition, except those relating to form, are reserved for the trial court (*see*, Shapiro v. Levine, 104 AD2d 800 [2d Dept. 1984]).

Thus, the depositions of Cancellieri and Glover should be re-opened and the defendants allowed to inquire regarding the 2005 Settlement Agreement. To prevent a further delay in the completion of discovery, the continued depositions shall be supervised by a Court Attorney Referee (*see*, CPLR 3126; O'Neill v. Ho, 28 AD3d 626 [2d Dept. 2006]).

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SIUH has not opposed that portion of the motion requesting the production of documents demanded by the defendants in a letter dated October 5, 2006. Thus, SIUH is directed to produce those documents within 30 days.

Finally, the defendants' request for legal fees, costs and disbursements is denied.

Accordingly, it is

ORDERED that the defendants' motion pursuant to CPLR 3124 is granted, and SIUH is directed to produce Alfred Cancellieri and Alfred Glover for continued depositions on or before April 30, 2007; and it is further

ORDERED that SIUH is directed to produce documents as demanded by defendants in a letter dated October 5, 2006; and it is further

ORDERED that the parties are directed to appear for a compliance conference on March 21, 2007, at 9:30 a.m.

E N T E R,

Dated: March 9, 2007

J.S.C.