Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

x	Index
JACKLYN DEANS, et al.,	Number 26844 2003
Plaintiffs,	Motion Date March 7, 2007
- against -	
JAMAICA HOSPITAL MEDICAL CENTER,	Motion Cal. Number 8
Defendant.	Motion Seq. No. 6
x	

The following papers numbered 1 to 15 read on this motion by plaintiffs for an order: (1) to restore this action to the trial calendar subject to additional discovery, or in the alternative, to permit plaintiffs to file a new note of issue; (2) pursuant to CPLR 3124 and CPLR 3126 to strike defendant's answer or preclude defendant from offering any evidence at trial; (3) to punish nonparties Jose Cervantes and Quechi V. Wong for their failure to comply with subpoenas; (4) pursuant to CPLR 3103 for a protective order suspending plaintiffs' obligation to respond to defendant's discovery demands; (5) pursuant to CPLR 3212 for partial summary judgment against defendant on the issue of liability; and (6) pursuant to 22 NYCRR 130.1-1 to impose sanctions, including attorneys fees, upon defendant and defendant's counsel; and on this cross motion by defendant: (1) pursuant to CPLR 3126, to dismiss the action based upon the wilful failure by nonparty witness Sharon Deans to appear for a deposition and produce documents pursuant to a subpoena duces tecum, to dismiss the claim for pecuniary injury based upon Sharon Deans' failure to appear and produce documents, or preclude the introduction of the testimony of Sharon Deans regarding decedent's mental or physical condition, and alleged damages, including pecuniary loss at the trial of this action; and (2) pursuant to CPLR 3212(e), for partial summary judgment with respect to the claim for pecuniary loss based upon alleged lost earnings of the decedent.

	Papers Numbered
Notice of Motion – Affidavits – Exhibits.....	1–4
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Sharon Deans, the decedent's wife, and Valeria A. Gray, in their capacities as co-administrators of the Estate of Livingston Mandel Deans, commenced this action, by filing a copy of a summons and complaint on November 14, 2003, for medical malpractice, negligence and wrongful death. Counsel thereafter moved to withdraw from representation of plaintiffs. During the period the motion was sub judice, Sharon Deans and Valeria A. Gray voluntarily resigned as the co-administrators of the Estate of Livingston Mandel Deans. By order dated January 7, 2005, the motion by plaintiffs' counsel to withdraw was granted. The Surrogate's Court, Queens County [Nahman, S.], subsequently appointed Jacklyn Deans, the decedent's daughter, and Felipe Orner, Esq., as successor co-administrators D.B.N. of the Estate of Livingston Mandel Deans and issued them letters of administration on February 4, 2005. Jacklyn Deans and Felipe Orner, as co-administrators of the Estate of Livingston Mandel Deans, were substituted as party plaintiffs herein and the caption was amended to reflect the substitution.

Plaintiff Felipe Orner appears in his capacity as co-administrator of the Estate of Livingston Mandel Deans and also as counsel for his co-plaintiff, Jacklyn Deans, as co-administrator of the Estate of Livingston Mandel Felipe. Defendant served an answer denying the material allegations of the complaint and asserting various affirmative defenses. Plaintiffs served a bill of particulars. Plaintiffs claim that their decedent had been admitted to defendant hospital, suffering from multiple myeloma, chronic renal failure, hypertension and other ailments. Plaintiffs claim that their decedent fell sometime during the night of November 13, 2001 or the early morning of November 14, 2001, and was found by hospital personnel on the floor next to his hospital bed, bleeding from his mouth. According to plaintiffs, their decedent's fall was the result of defendant's negligence, malpractice and wrongful conduct. Plaintiffs also claim that the fall caused their decedent to suffer a brain hemorrhage, and that defendant failed to properly evaluate and treat their decedent's

head injuries as a result of the fall, leading to his death on November 15, 2001.

Plaintiffs timely filed a note of issue on November 3, 2005 pursuant to the stipulation dated September 28, 2005. Under that so-ordered stipulation, the court, pursuant to 22 NYCRR 202.21(d), permitted discovery to continue while the case remained on the trial calendar, and directed any motion for penalties for failure to perform disclosure must be made returnable before the justice assigned to the trial assignment part.

Defendant moved by order to show cause dated July 17, 2006, and made returnable on September 12, 2006, to mark the case off the trial calendar and vacate the note of issue on the basis that the case was not ready for trial due to outstanding discovery, including the failure of nonparty witness Sharon Deans to appear for a deposition. Plaintiffs opposed the motion.

Defendant separately served a notice of motion dated August 23, 2006, setting forth a return date of September 12, 2006, seeking, pursuant to CPLR 3126, to dismiss the action or preclude plaintiffs' introduction of evidence through the testimony of Sharon Deans, regarding the decedent's mental or physical condition, and damages, including claims based upon pecuniary loss, and pursuant to CPLR 3212, for partial summary judgment. Plaintiffs opposed the motion and cross-moved, pursuant to CPLR 3212, for partial summary judgment on the issue of liability, and pursuant to CPLR 3126, to strike defendant's answer and preclude defendant from offering evidence in defense of the action for alleged discovery defaults, and to impose sanctions. Defendant thereafter served plaintiffs with a separate amended notice of motion setting forth a new return date of September 19, 2006.

At the pretrial conference held on September 12, 2006, Justice Schulman issued an order granting the motion to vacate the note of issue. Defendant withdrew its motion (pursuant to CPLR 3126 and 3212), made returnable on September 19, 2006, and as a consequence, the cross motion by plaintiffs was not entertained by the court.

With respect to that branch of the motion by plaintiffs to restore this action to the trial calendar, the court notes that upon the vacatur of the note of issue, the case reverted to its status as a pre-note case and that CPLR 3404 is inapplicable (see Andre v Bonetto Realty Corp., 32 AD2d 973 [2006]). Thus, to the extent the note of issue has been vacated pursuant to 22 NYCRR 202.21(e), that branch of the motion seeking to restore the action to active status is granted (see Andre v Bonetto Realty Corp., 32 AD2d 973 [2006]; Badillo v Sheepshead Rest. Assoc.,

296 AD2d 514, 515 [2002]; Jile v New York City Tr. Auth., 290 AD2d 307 [2002]).

With respect to that branch of the cross motion by defendant seeking to dismiss the action or preclude any testimony by Sharon Dean at trial (see CPLR 3126), defendant issued a subpoena upon Sharon Deans directing her to submit to a deposition on June 2, 2006, and in addition, sent her a notice to take her deposition. The subpoena was not a subpoena duces tecum for it did not direct Sharon Deans to provide defendant's counsel with any documents. Moreover, Sharon Deans was free to ignore the subpoena because it was improperly served, and defendant has failed to offer proof any witness fee was tendered to Sharon Deans (see CPLR 303[a]; Jaggars v Scholeno, 6 AD3d 1130 [2004]; Bobrowsky v Bozzuti, 98 AD2d 700, 702 [1983]; see also Brown v Veterans Transp. Co., 170 AD2d 638, 639 [1991]). In addition, Sharon Deans is no longer a party to this action, and thus, service of the notice upon her was not proper (see 3106[b]). Thus, defendant has failed to demonstrate a basis for the imposition of the drastic sanction of dismissal or preclusion, pursuant to CPLR 3126, based upon Sharon Deans' failure to produce documents or submit to a deposition on June 2, 2006 in response to the subpoena or notice (see CPLR 3106[b]; Blaisdell v Huntington Hosp., 270 AD2d 376 [2000]).

To the extent Sharon Deans subsequently consented to submit to a deposition on August 8, 2006 at 10:00 A.M., her counsel appeared at such time, but she did not, apparently having been caught in traffic. Her counsel thereafter sent a letter dated October 30, 2006 to defendant's attorneys reminding them that his client was available for the purpose of conducting a deposition. Under such circumstances, the court declines to exercise its discretion to impose a CPLR 3126 penalty on plaintiffs based upon Sharon Deans' default in appearing for the deposition scheduled on August 8, 2006 (see Quintanilla v Harchack, 259 AD2d 681 [1999]). Defendant is free to reschedule the deposition of Sharon Deans in consultation with her attorney, or to utilize the proper procedures for conducting nonparty discovery as provided in the CPLR (see CPLR 3106[b]), including the procedure whereby leave of court can be sought in the event a witness is confined under legal process (CPLR 3106[c]). Those branches of the cross motion by defendant pursuant to CPLR 3126 to dismiss the action, or alternatively to dismiss that portion of the wrongful death claim based upon pecuniary injury due to loss of financial support, are denied.

That branch of the motion by plaintiffs to punish Jose Cervantes and Quechi V. Wong, alleged contemnors who are not parties to the action, for their failure to comply with a subpoena is denied. Plaintiffs have failed to offer proof of when, or

indeed whether, either of the purported witnesses were served with a copy of the motion (see Bigman v Dime Sav. Bank of New York, 138 AD2d 438 [1988]; Long Is. Trust Co. v Rosenberg, 82 AD2d 591 [1981]). In addition, it appears that Quechi V. Wong is not a New York resident, and any service of the subpoena upon her outside of New York would have had no effect (see White v Bronx Lebanon Hosp. Center, 240 AD2d 212 [1997]; see generally Coombs v Rowand, 39 AD2d 532 [1972], appeal dismissed 31 NY2d 853 [1972]).

With respect to that branch of the motion by plaintiffs, pursuant to CPLR 3124 and 3126, to strike defendant's answer or to preclude defendant from offering any evidence at trial, the penalty of striking an answer or to preclude evidence for failure to disclose is extreme and may be levied only where the failure has been willful, deliberate or contumacious (see Assael v Metropolitan Transit Authority, 4 AD3d 443 [2004]; Avenue C Const., Inc. v Gassner, 306 AD2d 506 [2003]; Martin v Hall, 283 AD2d 615 [2001]; Caruso v Malang, 234 AD2d 496 [1996]). Plaintiffs have failed to present sufficient evidence of willful, deliberate and contumacious conduct on the part of defendant, in failing to comply with the prior orders, to warrant dismissal of its answer or preclusion from offering evidence (see Mabey v Winthrop University Hosp., 302 AD2d 371 [2003]; Falco v Caterpillar, Inc., 248 AD2d 352 [1998]; Parish Constr. Corp. v Franlo Tile, 215 AD2d 545 [1995]; Vatel v City of New York, 208 AD2d 524 [1994]).

Pursuant to the March 1, 2006 so-ordered stipulation, defendant was directed to produce, at a deposition to be held on June 8, 2006, the physician in charge of the MICU on November 14, 2001, or if unavailable, the physician in charge of the MICU as of the date of the deposition. By letter dated June 2, 2006, defendant identified the physician in charge of the MCIU on November 14, 2001 as Dr. Mohammed Babary. Although defendant has failed to produce Dr. Babary for a deposition, Dr. Barbary is not an employee or otherwise under defendant's control, and is no longer affiliated with the hospital. Defendant nevertheless has provided plaintiffs with Dr. Babary's last known address.

Pursuant to the so-ordered stipulation dated September 28, 2005, defendant was directed to produce nurse Yvonne Williams for a deposition to be held on November 14, 2005. Defendant provided plaintiffs with Ms. Williams' last known address, but did not produce her for a deposition, stating that she is no longer in its employ. It is unclear from these submissions when Ms. Williams' employment ended. Krystyna Wilczewski, a nurse, when asked at her deposition held on May 15, 2006 whether she knew if Ms. Williams was still employed by the hospital, answered with a simple "Yes." It is unclear from such affirmative response whether Ms. Wilczewski

was indicating that she was aware of Ms. William' employment status, or whether Ms. Williams was, in fact, still employed by the hospital.

To the extent plaintiffs assert defendant has failed to provide the full names, including middle names and middle initials and last date of employment of those witnesses directed to be produced for depositions as "specifically identified in the court order of March 1, 2006," such so-ordered stipulation contains no direction requiring defendant to identify any particular person or witness, by use of a full name, or otherwise to identify any particular person's initials. In addition, it appears certain of the persons named in the order have been deposed, and other witnesses, i.e. Dr. Wong, Dr. Patel, Dr. Boykin and Dr. Barbary are not under the control of defendant, or in the case of Yvonne Williams, is no longer employed by it, and thus, cannot now be produced in compliance with the prior orders and stipulations in this action.

That branch of the motion by plaintiffs to strike defendant's answer or to preclude defendant from offering any evidence at trial, is granted only to the extent of directing defendant, within 30 days of service of a copy of this order with notice of entry, to produce the physician presently in charge of the MCIU for the purpose of plaintiffs' conducting a deposition at a place mutually agreeable to the parties, and provide plaintiffs with an affidavit, by someone possessing personal knowledge of the facts, as to the last date of employment of Yvonne Williams and her full name, including middle name, if known.

With respect to that branch of the motion by plaintiff, pursuant to CPLR 3101, for a protective order, plaintiffs assert that defendant did not obtain leave of court for service of its demands of additional discovery, which were served at a time when the note of issue was on file. Nevertheless, there was outstanding discovery when plaintiffs filed the note of issue. In addition, plaintiffs delayed in producing various items of discovery, so that defendant cannot be said to have waived its right to demand additional discovery following its receipt of such items.

That branch of the motion by plaintiff, pursuant to CPLR 3101, for a protective order is granted, except insofar as plaintiffs shall provide defendants, within 30 days of service of a copy of this order with notice of entry, with an authorization for the release of records maintained by Louis Muelhgay, concerning the decedent's income, authorizations compliant with the Health Insurance Portability and Accountability Act (HIPAA) for the release of the records of LI Radiology Associates, Empire Imaging,

Dr. Ahuja Surinder, Health Now NY, Inc., Dr. Eric Hedrick, Dr. L. Palomba, Dr. Cervantes and Dr. Boykin, concerning the care and treatment of the decedent, copies of income tax returns, 1065 forms and K-1 forms for Deans Shipping for tax years 1996-2001 which are in plaintiffs' possession, and a copy of income tax returns, including W-2 forms, for Sharon Deans for tax years 1996, 1997, and 1998 which are in their possession.

With respect to the branch of plaintiffs' motion for partial summary judgment in their favor on the issue of liability, and that branch of defendant's motion for partial summary judgment dismissing so much of the wrongful death cause of action as it relates to plaintiffs' claim of pecuniary injury based upon loss of financial support, the preliminary conference order provided that all motions for summary judgment were to be made no later than 120 days after the filing of the note of issue. By so-ordered stipulation dated September 28, 2005, the court directed that all motions for summary judgment be made returnable no later than March 28, 2006. By so-ordered stipulation dated March 1, 2006, the court extended the time for the parties to file motions for summary judgment until September 5, 2006 to accommodate the parties' conducting of additional discovery.

Plaintiffs' instant motion for partial summary judgment was served on December 27, 2006, beyond the deadline set forth in the March 1, 2006 so-ordered stipulation. Plaintiffs argue that their motion nevertheless should be considered timely because they previously served a cross motion for the same relief. Such earlier cross motion, however, was untimely made, having been served after September 5, 2006 (cf. Rivera v Glen Oaks Village Owners, Inc., 29 AD3d 560 [2006]). Nor can such earlier cross motion be considered to have "piggybacked" upon the prior motion for partial summary judgment by defendant. There has been no showing that such prior motion of defendant (albeit ultimately withdrawn) had been timely made and that the cross motion had been on "nearly identical" grounds as defendant's motion (cf. Grande v Peteroy, 39 AD3d 590 [2007]; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496, 497 [2005]; Boehme v A.P.P.L.E., 298 AD2d 540 [2002]; Miranda v Devlin, 260 AD2d 451 [1999]).

In addition, that branch of defendant's motion which seeks partial summary judgment is also untimely, having been served on February 7, 2007. Again, to the extent defendant asserts that it previously moved for such relief, such motion was withdrawn by it. Defendant too has failed to demonstrate such prior motion was timely served.

An untimely motion for summary judgment may not be entertained in the absence of a showing of good cause for the delay (CPLR 3212[a]; see Brill v City of New York, 2 NY3d 648 [2004]; Fuller v Westchester County Health Care Corp., 32 AD3d 896 [2006]; Gaines v Shell-Mar Foods, Inc., 21 AD3d 986 [2005]). The parties have failed to offer an explanation for their failure to move for summary judgment in accordance with the deadline set in the March 1, 2006 so-ordered stipulation.

Furthermore, even assuming the court's sanction of the continuation of discovery, in the March 1, 2006 order, suffices to constitute good cause, the parties have failed to establish their respective entitlement to summary judgment (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v City of New York, 49 NY2d 557 [1980]). Questions of fact exist as to whether the decedent fell from the hospital bed, or fell after already having been out of the bed (cf. Alaggia v North Shore University Hosp., 92 AD2d 532 [1983]). Insofar as plaintiffs assert that regardless of the manner in which their decedent fell, he should not have been permitted to leave the hospital bed, they have failed to establish that the hospital chart of the decedent contains any doctor's medical orders, during the relevant period before the accident, to keep decedent in restraints or to erect all four bed rails (cf. Haber v Cross County Hospital, 37 NY2d 888 [1975]; see also Kadyszewki v Ellis Hospital Assoc., 192 AD2d 765 [1993]; Pedraza v Wyckoff Heights Medical Center, 191 Misc 2d 659 [2002]). Plaintiffs also have failed to establish the existence of a hospital rule that bed rails should have been set up in all cases for the particular class of patients of which the decedent was a member (see Haber v Cross County Hospital, 37 NY2d 888 [1975]; see also Kadyszewki v Ellis Hospital Assoc., 192 AD2d 765 [1993]; Pedraza v Wyckoff Heights Medical Center, 191 Misc 2d 659 [2002]). Plaintiffs also have failed to show that the nurses were authorized to exercise their own independent judgment concerning the use of siderails in the absence of a physician's order (cf. Alaggia v North Shore University Hosp., 92 AD2d 532 [1983]).

Plaintiffs, furthermore, have failed to submit an affidavit of a medical doctor qualified to render a medical opinion as to the relevant standard of care, and whether defendant deviated from it by failing to use restraints or erect all four bed rails, or failed to properly evaluate and treat decedent's injuries following his fall (see Mills v Moriarty, 302 AD2d 436 [2003]; LaMarque v North Shore Univ. Hosp., 227 AD2d 594 [1996]; Douglass v Gibson, 218 AD2d 856, 857 [1995]). Nor can the transcripts alone of the nurses' deposition testimony submitted by plaintiffs establish that defendant departed from the requisite standard of care (see Elliot

v Long Island Home, Ltd., 12 AD3d 481 [2004]; see also Collymore v Montefiore Medical Center, 39 AD3d 237 [2007]).

Defendant also has failed to establish that the decedent's distributees have sustained no loss of financial support as a consequence of the decedent's wrongful death. A wrongful death action is based on the right of a decedent's distributees to seek redress for alleged pecuniary injuries directly resulting from the death of the decedent (see EPTL 5-4.3). "These compensable damages include the loss of support, services, voluntary assistance, the prospect of inheritance, and the medical and funeral expenses (see EPTL 5-4.3; Parilis v Feinstein, 49 NY2d 984, 985 [1980]; Regan v Long Is. R.R., 128 AD2d 511, 513 [1987]; Odom v Byrne, 104 AD2d 863, 864 [1984])," (DeLuca v Gallo, 287 AD2d 222, 223 [2001]). Although defendant argues that the federal income tax returns for the years 1999, 2000 and 2001 filed jointly by the decedent and his wife showed no earned income by the decedent, plaintiffs have raised a triable issue of fact through admissible evidence as to whether the decedent provided financial support to his distributees, including through unreported income (see CPLR 3116; see also Pellegrino v State, 128 Misc 2d 757 [1985], affd 121 AD2d 612 [1986]).

That branch of the motion by plaintiffs for partial summary judgment is denied. That branch of the cross motion by defendant for partial summary judgment with respect to so much of plaintiffs' wrongful death claim as is based upon alleged pecuniary injury due to loss of financial support is denied.

To the extent plaintiffs seek an order directing defendant to provide additional discovery, they have failed to move for such relief by a proper notice of motion. Finally, that branch of the motion by plaintiffs seeking leave to reinstate the note of issue previously vacated is denied at this juncture. In view of the outstanding discovery sought by both parties, plaintiffs have failed to establish the case is presently ready for trial (see 22 NYCRR 202.21[f]). That branch of the motion by plaintiffs seeking to impose sanctions is denied.

Dated: July 9, 2007

J.S.C.