

**Vigilante v Levy**

2007 NY Slip Op 33361(U)

October 10, 2007

Supreme Court, New York County

Docket Number: 0100786/2006

Judge: Judith J. Gische

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.  
*Justice*

PART \_\_\_\_\_

Index Number : 100786/2006

VIGILANTE, LOUISE

vs

LEVY, MICHAEL M.D.

Sequence Number : 007

DEFAULT JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**

OCT 19 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/10/07

JUDITH J. GISCHE, J.S.C. *J.S.C.*

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York  
County of New York: Part 10

-----x

LOUSIE VIGILANTE, as Administratrix of the  
Estate of MICHAEL VIGILANTE, and Louise  
Vigilante, individually, and Michael Vigilante,  
Vigilante, Individually,

Plaintiffs,

-against-

MICHAEL LEVY, M.D., STATEN ISLAND  
UNIVERSITY HOSPITAL, SOUTH BEACH  
PSYCHIATRIC CENTER, JOHN DOES 1-10  
(these individuals being fictitious for unidentified  
doctors and/or nurses),

Defendants.

-----x

**Decision/Order**

Index No.: 100786/06  
Seq. No. : 007, 008

Present:  
Hon. Judith J. Gische  
J.S.C.

**FILED**  
OCT 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this  
(these) motion(s):

<b>Motion Sequence 007 - Papers</b>	<b>Numbered</b>
Plt's motion [DJ] w/MLG affirm, exhs .....	1
PR and DP opp w/EFH affirm, exhs .....	2
Plt's reply affirm in supp [MLG], exhs .....	3
PR and DP sur reply in opp [EFH], exhs .....	4

<b>Motion Sequence 008 - Papers</b>	<b>Numbered</b>
Def SIUH mot [reargue] w/GMM affirm, exhs .....	1
Plt's x mot [strike/sanc] w/MLG affirm, exhs .....	2
Def ML and BMS affirm in opp [MMK] .....	3
Def SIUH affirm in opp to Plt's x mot [GMM] .....	4

-----x

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action for medical malpractice. Plaintiffs now move (motion sequence  
007) for entry of a default judgment against Prabhakaran Rangaswamy, M.D. and

Dharmesh Patel, M.D. (the "new defendants"). Defendant Staten Island University Hospital ("SIUH") separately moves (motion sequence 008) to reargue the court's decision dated April 19, 2007 and plaintiffs cross move for an order striking SIUH's answer, imposing monetary sanctions on SIUH and declaring that defendants have waived their priority to depositions.

Motion Sequence Numbers 007 and 008 are hereby consolidated for consideration in a single decision and order.

This action arises from the suicide of Michael Vigilante ("Michael"), who was admitted to SIUH on May 7, 2005 "for his emotional and psychiatric condition[.]" and subsequently hung himself at SIUH on May 11, 2005. Pertinent to this motion, plaintiffs allege that upon admission to SIUH, Michael was placed on "continuous suicide watch[.]" but shortly thereafter, the new defendants "decreased [Michael's] supervision to intermittent suicide watch."

#### Motion Sequence 007

Plaintiffs commenced this action by filing a complaint on January 19, 2006. Plaintiffs thereafter moved to amend the complaint to add the new defendants. The court granted that motion by decision/order dated January 11, 2007, which provided that:

"[t]he amended complaint as set forth in the motion is deemed served on the existing defendants, who shall have 30 days to interpose answers. The [plaintiffs] shall have thirty days to serve the new defendants. This is w/o prejudice to seeking additional time if needed."

It is undisputed that plaintiffs served Rangaswamy and Patel on January 19 and 25, 2007, respectively, with the amended complaint and a version of the supplemental

summons which did not name the new defendants in the caption. Attorney for the new defendants contacted plaintiffs' attorney and notified her of this defect. Plaintiffs corrected the supplemental summons and re-served Rangaswamy and Patel on February 2 and 8, 2007, respectively.

However, plaintiffs did not file the supplemental summons and amended complaint with the County Clerk until June 7, 2007. The new defendants have not answered the complaint, and now, plaintiffs seek a default judgment against both Rangaswamy and Patel. The new defendants claim that plaintiffs' failure to file the correct supplemental summons and complaint with the County Clerk renders this action against the new defendants a nullity, therefore requiring dismissal of the case against them. Plaintiffs claim there is no jurisdictional defect requiring dismissal of this case because the action against the new defendants was commenced when this court granted plaintiffs' motion to amend the complaint on January 11, 2007. Plaintiffs further claim that if there is a jurisdictional defect, the court should disregard it in the interests of justice, because the new defendants have not been prejudiced as a result thereof.

The court finds that plaintiffs are not entitled to entry of a default judgment against the new defendants because they failed to complete service of the supplemental summons and amended complaint within thirty days of the court's January 11, 2007 order. CPLR § 304. However, the new defendants did receive a correct supplemental summons and amended complaint within thirty days of the court's prior order, and the court notes that plaintiffs' claims against the new defendants would not be barred by the statute of limitations, if they brought a plenary action at this time.

Moreover, the new defendants have not moved to dismiss this action against

them. Nor have they demonstrated any prejudice to them as a result of such defect, having had actual notice of the action by being served with the amended complaint twice, a correct version of the supplemental summons and opposing the instant motion. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95 (2001).

Accordingly, in the interest of justice and judicial economy, plaintiffs are hereby given leave to re-serve the a supplemental summons and amended complaint on Rangaswamy and Patel within 30 days from the date of this decision.

#### Motion Sequence 008

SIUH seeks to reargue that portion of the court's decision, dated April 19, 2007, which granted plaintiffs' motion to compel SIUH to produce incident reports prepared in connection with Michael's death as well as all "reports or statements or summaries that had anything whatsoever to do with the death of Michael" (transcript from April 19, 2007, p. 4). In the underlying motion, counsel for SIUH did not oppose that motion, but stated:

"[t]o the extent we have not provided what [plaintiffs] claims we were required to provide, we seek that [from our client] as well. We were no trying to hold anything back. I told him that in my opposition, that if we have it we will provide it.

I have sent some stuff back in the opposition papers that address some of the things we are seeking, and if there is anything they would like, I would contact my client and advise them to provide.

...

I know what [plaintiffs] needs. It's easy. Just time to provide it."

In open court and on the record, the court directed SIUH to:

“produce any reports regarding the death of plaintiff Vigilante; and by reports I mean reports, statements and summaries, whether those are reports that are required by law or not required by law, whatever you have.

Those materials should be provided within 45 days.”

SIUH now claims that the court’s decision dated April 19, 2007 is ambiguous as to whether said decision compels SIUH to produce reports, statements and summaries prepared in connection with Michael’s death that are otherwise privileged and protected from disclosure pursuant to Education Law § 6527(3) and Mental Hygiene Law § 29.29. SIUH now claims that “[t]here is no incident report that is outside the provision of Education Law § 6527(3). If any incident reports [were] prepared by the Risk Management staff under their quality assurance function it will fall under said section and exempt from disclosure. Any report prepared by hospital personnel as part of an internal investigation [is] clearly exempt from disclosure under Education Law § 6527(3).”

Plaintiffs cross move for an order: [1] striking SIUH’s answer, pursuant to CPLR § 3126; [2] setting this matter down for a trial on the issue of plaintiffs’ damages; and [3] imposing sanctions for SIUH’s failure to comply with the court’s prior orders. Plaintiffs claim that the court should impose such sanctions for SIUH’s “repeated and willful disobedience” of the court’s orders dated November 9, 2006 and April 19, 2007, which, in part, directed SIUH to turn over of SIUH’s Procedure Manual and the aforementioned incident reports.

Plaintiffs also claim that defendants have waived their priority to take plaintiffs’

depositions by delaying and failing to schedule such deposition dates.

SIUH opposes plaintiffs' cross motion. It claims that it has produced numerous documents, and has withheld only those portions of the Procedural Manual that are "not useful or necessary."

Defendants Michael Levy, M.D. ("Levy") and University Behavioral Medicine Services, P.C. ("UBMS") oppose plaintiffs' cross motion to the extent that plaintiffs argue they (Levy and UBMS) have waived their priority to take plaintiffs' depositions. Levy and UBMS claim the cross motion against them is improper since the respective notice of cross motion identifies relief sought solely against SIUH and plaintiffs have failed to comply with CPLR § 2214(b) or CPLR §2103(b)(2) in that Levy and UBMS are non-moving parties.

A motion to reargue is addressed to the discretion of the court and is intended to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any principle of law. CPLR § 2221 [d] [2]. An unsuccessful party may not use a motion to reargue in order to assume a different position inconsistent with that taken on the original motion. Foley v. Roche, *supra*. Further, an unsuccessful party may not move to reargue the very same questions previously decided against him or her. Pro Brokerage, Inc. v. Home Ins. Co., 99 A.D.2d 971 (1<sup>st</sup> Dept. 1984).

Although SIUH claims this is a motion to reargue, it has raised additional facts and related arguments that were not before the court on the original motion, which existed at that time. See Foley v. Roche, *supra* (1<sup>st</sup> dept. 1979); James v. Nester, 120 A.D.2d 442 (1<sup>st</sup> Dept. 1986). Therefore, this motion is properly considered a motion to

renew. While these "new" facts could have been put before the court on the original motion, the court will still grant renewal in light of the strong public policy implications of nondisclosure of certain hospital reports

Education Law § 6527(3), provides in pertinent part that:

"[n]either the proceedings nor the records relating to performance of a medical or a quality assurance review function ... nor any report required by the department of health pursuant to section twenty-eight hundred five- 1 of the public health law described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law."

Public Health Law § 2805-1 requires hospitals to report a patient's death to the Department of Health of the State of New York.

Mental Hygiene Law § 29.29 provides that: "[i]ncident reports shall ... mean reports of accidents and injuries affecting patient health and welfare at facilities [of the Offices of Mental Health and Mental Retardation and Developmental Disabilities]."

Mental Hygiene Law § 29.29 also specifically requires such facilities to prepare an incident report in the case of patient suicide.

The statutes evidence strong public policy of keeping certain information privileged. It is still the burden of the party seeking to invoke privilege under Education Law § 6527(3) to establish that documents sought were prepared in accordance with the relevant statutes. Kivlehan v. Waltner, 36 A.D.3d 597 (2d Dept. 2007). The policy underlying Education Law § 6527(3) is to encourage hospitals to evaluate the quality of medical care without fear of legal reprisal. Brathwaite v. State, 208 A.D.2d 231 (1<sup>st</sup>

Dept. 1995); see also Katherine F. v. State of New York, 257 A.D.2d 539 (1<sup>st</sup> Dept. 1999), Shapiro v. Central General Hosp., Inc., 171 A.D.2d 786 (2d Dept. 1991);

Although SIUH broadly claims that the documents sought are privileged, it has not provided information about the particular documents it seeks to withhold[*cf.* Zion v. New York Hosp., 183 A.D.2d 386, 590 N.Y.S.2d 188 (1<sup>st</sup> Dept. 1992)]. SIUH is therefore directed to turn over to plaintiffs all reports, statements and summaries prepared in connection with Michael's death, except for those documents for which it asserts a claim of privilege. As to such withheld documents, SIUH will prepare a privilege log in compliance with CPLR 3122(b). The documents and/or the privilege log will be provided within 30 days of the date of this decision. The privilege log will identify each document by date and title (if applicable) and will identify the individuals who were parties to the communications, and such other detail as is necessary to determine whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between the individuals listed in the log and the litigating parties, the maintenance of confidentiality and the reasons for any disclosures of the document to individuals not normally within the privileged relationship, should be supplied by affidavit or deposition testimony.

If any other party still seeks the withheld documents identified in the privilege log, then they may make an application to have the documents reviewed *in camera* by the court.

Plaintiffs cross move for certain relief in connection with SIUH's failure to comply with the court's prior orders dated November 9, 2006 and April 19, 2007. In part, plaintiffs claim that SIUH has failed to disclose numerous sections of the Procedural

Manual. SIUH claims that these portions are "not necessary or useful," however it did not raise these arguments on the original motion. Further, defendants have not shown any undue burden in producing the Procedural Manual. Defendants cannot self-select what portions they believe are relevant and truncate a document that this court has already ordered them to produce. Accordingly, the court hereby directs SIUH to turn over the entire Procedure Manual within thirty days of this decision.

Plaintiffs further move for an order striking SIUH's answer, awarding monetary sanctions and declaring that defendants' priority for plaintiffs' depositions has been forfeited. Although actions should be resolved on the merits wherever possible, a court may strike the defendant's answer as a sanction if the defendant "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." CPLR § 3126. Striking an answer is not warranted absent a clear showing that the failure to comply with discovery demands [was] willful, contumacious or in bad faith. Gillen v. Utica First Ins. Co., 41 A.D.3d 647 (2d Dept. 2007). Here, plaintiffs have not made a showing that SIUH's failure to comply with the prior court orders was in bad faith, and accordingly declines to grant the relief requested in this portion of plaintiffs' motion.

The parties should, however, set a mutually agreeable deposition schedule. All depositions are to be completed on or before December 31, 2007.

Further, plaintiffs have improperly "cross moved" against UBMS, a non-moving party, and therefore that portion of plaintiffs' requested relief must be denied.

The court also rejects plaintiffs' argument that SIUH has waived its priority to take plaintiffs' depositions by not proceeding. Plaintiffs have sought to add two new

defendants to this action. Depositions should, therefore, take place after issue has been joined as to the new defendants.

**Conclusion**

In accordance herewith, it is hereby:

**ORDERED** that plaintiffs' motion for entry of a default judgment against Prabhakaran Rangaswamy, M.D. and Dharmesh Patel, M.D. is hereby denied; and it is further

**ORDERED** that plaintiffs are directed to re-serve the corrected supplemental summons and amended complaint on defendants Prabhakaran Rangaswamy, M.D. and Dharmesh Patel, M.D. within 30 days of the date of this decision; and it is further

**ORDERED** that the motion by defendant Staten Island University Hospital to renew its opposition to plaintiff's motion to compel decided by the court's decision dated April 19, 2007 is hereby granted; and it is further

**ORDERED** that upon renewal, SIUH is hereby directed to turn over to plaintiff all reports, statements and summaries prepared in connection with Michael's and/or provide a privilege log in compliance with CPLR 3122(b) within 30 days of the date of this decision. The privilege log will identify each document in accordance with this decision and any party still seeking such documents identified on the log may apply to the court for an *in camera* examination; and it is further

**ORDERED** that plaintiffs' cross motion is hereby granted only to the extent that SIUH is hereby directed to provide a full copy of the Procedure Manual within thirty days of the date of this order; and it is further

**ORDERED** that the parties shall enter into a mutually agreeable deposition schedule pursuant to which all depositions shall be completed on or before December 31, 2007.

**ORDERED** that plaintiffs' cross motion is otherwise denied.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York  
October 10, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
OCT 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE