

**Vigilante v Levy**

2008 NY Slip Op 30385(U)

February 5, 2008

Supreme Court, New York County

Docket Number: 0100786/2006

Judge: Judith J. Gische

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

PRESENT Hon. Judith J. Sise JUSTICE PART 10

Index Number : 100786/2006

VIGILANTE, LOUISE

vs.

LEVY, MICHAEL M.D.

SEQUENCE NUMBER : 009

DISMISS ACTION

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

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.** 1 1 2008

**FILED**

NEW YORK COUNTY CLERK'S OFFICE

Dated: February 5, 2008

[Signature] J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

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

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

**Decision/Order**

Index No.: 100786/06

Seq. No. : 009

Plaintiffs,

-against-

Present:

Hon. Judith J. Gische

J.S.C.

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

Defendants.

-----X

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

<b>Papers</b>	<b>Numbered</b>
Defs' PR and DP n/m [compel/preclude] w/EFH affirm, exhs .....	1
Defs' ML and UBMS n/m [compel/preclude] w/MMK affirm, exhs .....	2
Pltf's opp (both motions) w/MLG affirm, exhs .....	3

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

This is an action by the estate representative and father of the deceased  
("plaintiffs") alleging that the defendants, all of whom are doctors or hospitals, committed  
malpractice. Before the court is a motion by Drs. Rangaswamy and Patel to compel  
discovery or impose discovery sanctions under CPLR §§ 3120, 3124, 3126. Dr. Levy and

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<sup>1</sup>Although plaintiffs have served an amended complaint, and the amendment was  
the subject of two prior decision/orders by the court, the caption has never been  
amended in this case. Plaintiffs may settle, on notice, an order directing the Clerk to  
amend the caption.

UBMS have cross moved for similar relief. Since this is the ninth (9<sup>th</sup>) motion in this case and discovery issues have been the subject of prior motions as well, the reader is presumed to have a general familiarity with this case. Further, since many of the arguments presented in each motion overlap, they addressed collectively below unless a separate discussion is required.

### **Arguments**

Drs. Rangaswamy, Patel, Levy and UBMS (collectively, hereinafter "the moving defendants") argue that have served plaintiffs with discovery demands that they have not responded to. The demands by Drs. Rangaswamy and Patel are dated August 17, 2007. Those by Dr. Levy and UBMS are dated July 26, 2006, November 28, 2006, and January 4, 2007. These demands were consolidated in the written stipulation among the parties so ordered by this court on April 19, 2007. Although Drs. Rangaswamy and Patel served yet another demand for discovery dated November 6, 2007, they brought this motion to compel/ preclude on the same day. Since the same issues would be raised in connection with those demands, and plaintiffs address the November 6<sup>th</sup> demands in opposition as well, this decision/order will, likewise, address that demand.

All of the discovery sought by the moving defendants relates to such treatment, medical procedures or medicine medical providers who reportedly treated the deceased who reportedly committed suicide at the age of 45 at defendants' hospital. As a result of plaintiffs providing HIPAA authorizations for their son's GHI and Oxford records, defendants identified several health care providers, etc., for whom they seek HIPAA authorizations. They also seek more information about plaintiffs' claims that the deceased received "dangerous and contraindicated medication."

The plaintiffs have already provided a number of authorizations. However, they contend that without more information about the other providers defendants have identified, they cannot provide properly completed HIPAA forms which is why they have not done so thus far. For example, in some cases defendants have demanded authorizations for a doctor only identified by his or her last name "Dr. Rao," "Dr. Awad," "Dr. LaForte". For some providers there is a complete name, but no address or hospital affiliation. For others, the hospital has multiple locations (i.e. Mercy Hospital reportedly has 10 different centers). In certain cases, the provider may have been misidentified by the defendants (i.e. "Houston Texas Hospital"). Plaintiffs' counsel contend she has undertaken internet research to see if she can obtain any more information. Plaintiffs contend that if the defendants can help in any way, they should since they may have greater resources available to them. Finally, plaintiffs contends that there is no reason to delay their EBTs and that they should proceed, even if the defendants are still waiting for responses to the already provided.

Defendants contend that plaintiff's failure to provide these authorizations requires the wholesale dismissal of the complaint as a sanction. They also seek, in the alternative, to compel production of responses to their demands and to delay the EBTs until they have responses to discovery.

### **Discussion**

An Order pursuant to CPLR §3126 can provide for any one or more penalties as follows: (1) an order resolving for the purposes of the action, the claims in favor of the moving party, (2) prohibiting the disobedient party from supporting or opposing certain claims or defenses in the case, and (3) striking the disobedient party's pleadings

altogether, staying further proceedings, or rendering a judgment by default against that party. Striking the pleadings is the most extreme of these penalties. Corsini v. U-Haul Intern., Inc., 212 AD2d 288 *Lv App Dism in part Denied in part* Corsini v. U-Haul Intern., Inc., 87 NY2d 964 *Lv App Dism* Corsini v. U-Haul Intern., Inc., 87 NY2d 965 (1996). To warrant the dismissal of the complaint, the moving party has to establish that "the frustration of discovery was willful, contumacious, or due to bad faith . . ." Corsini v. U-Haul Intern., Inc., 212 A.D.2d 288 at 291 (1<sup>st</sup> Dept 1995) (internal citations omitted). The moving defendants have not met this very heavy burden in connection with their respective motion and cross motion. Plaintiffs have, in opposition, shown that they have complied with defendants' demands by providing HIPAA compliant authorizations when possible, but cannot comply if certain basic information is (thus far) unavailable to them.

Although the names of certain doctors and care providers that treated the deceased were among the documents defendants obtained from the deceased's health insurance providers, GHI and Oxford, there is nothing in this record to suggest that the plaintiffs have withheld, or are withholding, authorizations for any further health records. To the contrary, even defendants are at a loss as to who some of these doctors are. While plaintiffs acknowledge that it is their responsibility to provide HIPAA compliant authorizations, they have established that despite their good faith efforts to get the information with which to complete these forms, they are still missing basic information that is necessary. Plaintiffs have established that they have already provided defendants with a number of authorizations, and they further represent that they will continue to make efforts to get more information. It is undisputed that an incomplete HIPAA form would be of any use to the defendants. Thus, for example, they are willing to sign a form for "Dr.

Rao," but it is meaningless without the other required information. The court finds the plaintiffs legal position on these issues to be reasonable.

If plaintiffs try to introduce any documents, records, etc. which defendants have demanded authorizations for, but plaintiffs have not provided, then it will be up to the trial judge to decide whether that evidence is admissible. There is no reason, however, to strike the pleadings, or issue an order of preclusion against plaintiffs at this time.

The court also sees no reason to delay the EBTs of the plaintiffs. Though both have some familiarity with their son's treatments, neither professes to know all of the medication he was prescribed, or procedures he may have undergone, given that he was 45 years old at the time of his death. Therefore, the defendants shall proceed with the plaintiffs' EBTs within Twenty (20) Days hereof, with the understanding that either or both plaintiffs may be re-deposed if ,after the defendants have reviewed documents responsive to the HIPAA authorizations it becomes necessary.

**FILED**

FEB 11 2008

**Conclusion**


NEW YORK  
COUNTY CLERKS OFFICE

In accordance with the foregoing, the motion and cross motion to dismiss the complaint/preclude is denied. The motions, however, to compel discovery are granted only to the extent that defendants shall proceed with the plaintiffs' depositions on a date to be mutually agreed, but no later than twenty (20) days hereof.

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

This shall constitute the decision and order of the court.

Dated: New York, New York  
February 5, 2008

So Ordered:   
\_\_\_\_\_  
Hon. Judith J. Gische, JSC