

Siegel v New York Hosp. at Med. Ctr. of Queens

2008 NY Slip Op 31146(U)

April 14, 2008

Supreme Court, Nassau County

Docket Number: 0329-06/

Judge: Thomas A. Adams

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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Acting Supreme Court Justice

TRIAL/IAS, PART 37
NASSAU COUNTY

AUDREY SIEGEL, as Co-Administratrix of the
Estate of LOUIS PLISKY,

Plaintiff(s),

MOTION DATE: 3/07/08

INDEX NO.: 10329/06

-against-

SEQ. NOS. 3, 4 & 6

NEW YORK HOSPITAL AT MEDICAL CENTER OF
QUEENS and GRACE PLAZA NURSING AND
REHABILITATION CENTER and PINE GROVE MANOR
II, LLC,

Defendant(s).

The plaintiff and defendants Grace Plaza Nursing and Rehabilitation Center and Pine Grove Manor II, LLC (hereinafter Grace Plaza's) respective motions are determined as hereinafter provided.

The plaintiff filed this medical malpractice, wrongful death and nursing home negligence action against the defendants on October 12, 2005 (see plaintiff's Exhibit A). Four separate causes of action (Public Health Law §2801-d, negligence, gross negligence and wrongful death) are pleaded as against Grace Plaza with respect to the decedent's September 22, 2004 - October 20, 2004 post-surgery rehabilitation residency at that facility. In sum, the plaintiff alleges, inter alia, that those defendants negligently monitored the decedent causing him to fall on October 9, 2004 and October 12, 2004. He subsequently died, following a second hip surgery, approximately six months later. Issue was joined by Grace Plaza on or about November 1, 2005 (see Grace Plaza's Exhibit A). Upon the completion of discovery (apart from any additional disclosure emanating from these applications), the case was certified on March 7, 2008.

Pursuant to a so-ordered stipulation, the sole remaining discovery issue is Grace Plaza's motion for a protective order as to the plaintiff's November 2, 2007 notice for discovery and inspection demanding "any incident reports pertaining to any falls for the 3 years prior to the decedent, Louis Pitsky's residency" (emphasis added) (see Pine Grove's Exhibit L). This non-party information is

purportedly material and relevant to the issues of notice and punitive damages (see 12/27/07 affirmation of Jonathan Ginsberg, Esq., para. 28).

More specifically, the December 27, 2007 affidavit of Bonnie Brady, R.N., avers, inter alia, that a review of these records is necessary to determine whether or not a "trend" of patient neglect existed "with more frequent accidents/incidents taking place after ... cuts in [Grace Plaza's] staff" (see plaintiff's Exhibit U, para. j).

10 NYCRR §415.30(f) mandates that nursing homes maintain "an accident and incident record which shall include a clear description of every accident and any other incident involving behavior of a resident or other staff member that poses a threat to a resident or other staff member ...". Since these records are compelled by regulatory mandate and are "not expressly related to quality assurance" (Mtr. of Subpoena Duces Tecum, 99 NY2d 434, 440), they are not statutorily privileged (see e.g., Education Law §6527[3]; cf. Marte v Brooklyn Hospital Center, 90 AD3d 41). The incident reports prepared in connection with the plaintiff's accidents are therefore discoverable (see Spakoski v Amsterdam Memorial Hospital Skilled Nursing Facility, 6 Misc.3d 757, 759) and Pine Grove has produced them (see Pine Grove's Exhibit M).

"Records of prior similar accidents are admissible and discoverable in a negligence action since they are relevant in establishing that a particular condition was dangerous and that the defendant had notice of that condition" (Lancaster v St. Like's Hospital, 295 AD2d 321 quoting Coan v Long Island R.R., 246 AD2d 599). However, the plaintiff is required to demonstrate that the conditions in each case were substantially similar (see Fischer v Westchester County, 24 AD3d 498, 499; Kane v Triborough Bridge & Tunnel Auth., 8 AD3d 239, 241; Martin, Capra and Rossi; New York Evidence Handbook §4.5.3 [2nd Ed.]).

"A general rule of evidence, applicable in both civil and criminal cases, is that it is improper to prove that a person did an act on a particular occasion by showing that he did a similar act on a different, unrelated occasion" (Matter of Brandon, 55 NY2d 206, 211). Here, the plaintiff's overly broad and unduly burdensome demand seeks an unspecified number of reports (estimated by Ms. Brady

to be "far less than 75" [see plaintiff's Exhibit U, para. O) involving non-parties extending back over the three year (i.e., 2001-2004) period before his September 22, 2004 - October 20, 2004 residency (see Rabinowitz v St. John's Episcopal Hosp., 24 AD3d 530, 531). Moreover, there is no indication that the condition in those cases were substantially similar to the plaintiff's claim. Contrary to her contention, even if an increase in incidents occurred following Grace Plaza's reduction in staff, it is mere speculation to attribute that change (as well as each accident) to inadequate personnel as opposed to individual acts of negligence or some other cause. Otherwise stated, there is no automatic correlation between a reduction in staff and an increase in incidents. Accordingly, Grace Plaza's motion, pursuant to CPLR §3103(a), for a protective order as to the plaintiff's November 2, 2007 notice of discovery and inspection is granted and the plaintiff's cross motion, pursuant to CPLR §3126(3), to strike grace Plaza's answer is denied.

Dated: 4-14-08



 A.J.S.C.

ENTERED

APR 16 2008

**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**