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

JOAN B. LOBIS

PART 60

Justice

Index Number : 108022/2009

FRANKLIN, BRENDA

vs.

BETH ISRAEL MEDICAL CENTER

SEQUENCE NUMBER : # 001

STRIKE

INDEX NO. 108022/09

MOTION DATE 10/16/09

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for strike

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-8
Answering Affidavits — Exhibits	9-14
Replying Affidavits	15

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER DECISION

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/22/09

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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BRENDA FRANKLIN,

Plaintiff,

Index No.: 108022/09

- against -

Decision and Order

BETH ISRAEL MEDICAL CENTER,

Defendant.

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JOAN B. LOBIS, J.S.C.:

Defendant Beth Israel Medical Center (the "Medical Center") moves for an order, pursuant to C.P.L.R. § 3123, striking plaintiff's request for admissions. Plaintiff asks the court to compel defendant to respond to plaintiff's request for admissions, but to the extent that plaintiff's papers seek relief, these requests are denied. Plaintiff's opposition papers improperly contain requests for relief without cross-moving for such relief.

In this medical malpractice and negligence action, plaintiff's complaint alleges that after she was admitted at the Medical Center for chronic neck pain, she was served noodles mixed with crab meat for lunch. She subsequently suffered from what she alleges was an allergic reaction and anaphylactic shock. Plaintiff asserts that she is allergic to shellfish and that the Medical Center was on notice of her allergy. She seeks damages for past and future pain and suffering as a result of the injuries she experienced at the Medical Center.

This case is in the very early stages of litigation. Plaintiff filed her summons and complaint on June 5, 2009. Defendants answered and served a demand for a verified bill of

particulars, together with other combined demands, on or about July 1, 2009. On or about August 13, 2009, plaintiff served what are titled "Requests for Admissions," which demanded that defendants admit the truth of thirteen (13) statements within twenty (20) days of receipt of the demand. The statements are set forth as follows:

1) . . . that number 300001894381 identifies Brenda Franklin's hospital records within Beth Israel Hospital.
2) . . . that Brenda Franklin was admitted to Beth Israel Medical Center on 27 September 2008.
3) . . . that on 27 September 2008, it was known that Brenda Franklin was allergic to iodine.
4) . . . that on 27 September 2008, it was known that Brenda Franklin was allergic to shellfish.
5) . . . that on 27 September 2008, Brenda Franklin was wearing a patient identification band.
6) . . . that on 27 September 2008, Brenda Franklin was wearing an allergy band.
7) . . . that Brenda Franklin's allergy band indicated that she is allergic to iodine.
8) . . . that Brenda Franklin's allergy band indicated that she is allergic to shellfish.
9) . . . that on 29 September 2008, Beth Israel Hospital employees served lunch to its hospital patients.
10) . . . that on 29 September 2008, Beth Israel Hospital served imitation crab meat for lunch.
11) . . . that on 29 September 2008, Beth Israel Hospital served imitation crab meat to Brenda Franklin.
12) . . . that Brenda Franklin had an anaphylactic reaction from the imitation crab meat.
13) . . . that Brenda Franklin was discharged from the hospital on 1 October 2008.

On August 25, 2009, defendant's counsel sent a letter objecting to the demands. On September 1, 2009, plaintiff's counsel responded by letter, maintaining that the notice to admit served on the Medical Center is "timely, permissible, [and] not in lieu of any other discovery devices." On or about September 9, 2009, plaintiff filed a notice to the court that the demands were

deemed admitted. Defendant's motion for a protective order followed, and was filed on or about September 25, 2009.

In general, motions related to disclosure must be accompanied by an affirmation of good faith, pursuant to 22 N.Y.C.R.R. § 202.7. Defendant's motion is not accompanied by a separate affirmation of good faith, but counsel does set forth that she sent a "good faith letter" to plaintiff in an effort "to resolve the issues amicably without the need for motion practice." The correspondence between the attorneys is annexed to defendant's motion. Because defendant complied with the spirit of 22 N.Y.C.R.R. § 202.7, the court will consider the motion on the merits.

Defendant argues that the notice to admit "goes beyond the permissible scope" of a notice to admit, and that the notice seeks "admissions of contested ultimate issues involved in this case, and is therefore improper." In response, plaintiff argues that the request for admission "merely calls for admissions as to matters of fact and not for ultimate or conclusory facts . . . ." Plaintiff also argues that defendant's motion for a protective order, made fourteen (14) days beyond the twenty (20) days provided for in C.P.L.R. § 3123, and the additional five (5) days provided for in C.P.L.R. Rule 2103(b)(2), is late, and therefore, the statements must be deemed admitted. In reply, defendant cites Handy v. Geften Realty, Inc., 129 A.D.2d 556, 557 (2d Dep't 1987), for the proposition that "a motion for a protective order against a notice to admit is not governed by the more rigid time limitations of CPLR 3122 or 3133 but rather by CPLR 3103."

"Generally the failure to make a timely motion for a protective order forecloses all inquiry into the propriety of the information to be discovered unless the notice to produce is palpably

improper." Klepner v. Codata Corp., 162 A.D.2d 116 (1st Dep't 1990) (citations omitted). "Where a notice to admit seeks admissions on matters which go to material or ultimate issues in the case," (Nat'l Union Fire Ins. Co. v. Allen, 232 A.D.2d 80, 85 [1st Dep't 1997] [citations omitted]), the notice is considered improper. Id. Although defendant's motion is technically untimely, the court will consider the propriety of plaintiff's notice to admit.

> C.P.L.R. § 3123(a) provides, in pertinent part, that
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> > a party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs . . . or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such party or can be ascertained by him upon reasonable inquiry.

"A notice to admit pursuant to CPLR 3123 (a) is to be used only for disposing of uncontroverted questions of fact or those that are easily provable, not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial." Meadowbrook-Richman Inc. v. Cicchiello, 273 A.D.2d 6 (1st Dep't 2000) (citation omitted). The First Department has "consistently held that the purpose of a notice to admit is 'to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices.'" Taylor v. Blair, 116 A.D.2d 204, 205-06 (1st Dep't 1986), citing Berg v. Flower Fifth Ave. Hosp., 102 A.D.2d 760 (1st Dep't 1984) (internal citations omitted). Additionally, while the First Department has ruled that it is "unnecessary for the court to prune the requests to construct for counsel and the parties a proper notice to admit" (Berg v. Flower Fifth Ave.

Hosp., supra, 102 A.D.2d at 761), where the notice is "not so lengthy or prolix" (Villa v. New York City Housing Auth., 107 A.D.2d 619, 621 [1st Dep't 1985]), it is appropriate for the court to strike certain improper requests for admissions in a notice to admit while not striking the notice to admit in its entirety. See Taylor v. Blair, supra, 116 A.D.2d at 208; cf., Villa v. New York City Housing Auth., supra, 107 A.D.2d at 621. Here, since there are only thirteen (13) brief statements in the notice to admit, it is appropriate to review each item, rather than to strike the notice in its entirety

Statements 1, 2, and 13 are within the knowledge of defendant Medical Center and can be easily determined upon a reasonable inquiry. See C.P.L.R. § 3123(a). These statements do not touch on fundamental or material issues of facts in dispute, and are easily provable. The request for a protective order is denied as to statements 1, 2, and 13.

In contrast, the issuance of a protective order as to statements 3 through 12 is warranted. Questions 3 through 11 raise issues of fact that are contested and are more appropriately addressed in a deposition. A notice to admit is not a substitute for other appropriate disclosure devices, such as a deposition. See Taylor v. Blair, supra, 116 A.D.2d at 205-06. Question 12 raises issues which would require expert medical opinion and is therefore beyond the scope of a notice to admit. See Berg v. Flower Fifth Ave. Hosp., supra, 102 A.D.2d at 760.

Accordingly, it is

ORDERED that defendant's motion for a protective order is granted only as to statements 3-12 from plaintiff's Request for Admissions, and said statements in the Request for

Admissions are stricken. Defendant is directed to respond to the remaining statements (statements 1,2, and 13) within twenty (20) days of the date of notice of entry of this decision and order.

The parties are to appear for a preliminary conference on November 17, 2009, at 9:30 a.m., in Part 6, Courtroom 345, at 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: October 22, 2009

JOAN B. LOBIS, J.S.C.

FILED
OCT 28 2009
COUNTY CLERK'S OFFICE
NEW YORK