

**Timko v Nassau Health Care Corp.**

2009 NY Slip Op 33138(U)

December 14, 2009

Supreme Court, Nassau County

Docket Number: 16962/08

Judge: Antonio I. Brandveen

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

ALYSSA TIMKO,  
  
Plaintiff,

TRIAL / IAS PART 31  
NASSAU COUNTY

Index No. 16962/08

- against -

Motion Sequence No. 003;004

NASSAU HEALTH CARE CORPORATION and  
NASSAU UNIVERSITY MEDICAL CENTER,  
  
Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The plaintiff moves for an order to compel the defendants to produce items requested in the plaintiff's notice of discovery and inspection dated July 17, 2009, and to compel the defendants to produce Stanislav Nosik, M.D. and Ryan Lakin, M.D. for depositions. The plaintiff's attorney states, in an affirmation dated August 13, 2009, nurse Inderjit Kaur testified on July 8, 2009, at a deposition, she provided nursing care to the plaintiff during a shift. The nurse testified she cleaned and changed the plaintiff for a bowel movement on March 12, 2009, at 1:40 p.m., and found the plaintiff on the floor next to her bed at 1:45 p.m. that same day. The plaintiff's attorney points out the nurse

participated in an investigation of the incident, as well as the preparation of an accident report. The plaintiff's attorney notes the nurse also testified she obtained and reviewed portions of the plaintiff's chart, as well as obtained and reviewed the written report from the prior shift's nurse, including information about the daily happening, diagnosis, injuries and other things. The plaintiff's attorney asserts the nurse was unable to locate the nurse's report in the plaintiff's chart, and identify many of the nurses of the surgical intensive care unit who cared for the plaintiff during the initial 12 days of the plaintiff's admission. The plaintiff's attorney avers the plaintiff seeks the depositions of Dr. Nosik, the first doctor allegedly to arrive at the accident scene, and participated in the incident investigation and accident report preparation, and Dr. Lakin, whom the plaintiff's attorney indicates prominently appeared throughout the plaintiff's medical chart, but the defense has not produced either doctor. The plaintiff's attorney points to a July 17, 2009 plaintiff notice for discovery and inspection upon defendant, and states it requests copies of all written reports by the outgoing and next shift nurses of the surgical intensive care unit pertaining to the plaintiff as testified to by nurse Inderjit Kaur, and the names and time sheets evidencing the shifts worked of all nurses assigned to care for the plaintiff during the plaintiff's admission to Nassau University Medical Center.

The defendants oppose the plaintiff's motion, and cross move pursuant to CPLR 3103 for a protective order in response to the plaintiff's overly broad and unduly burdensome demands for discovery and inspection. The defense attorney states, in an

affirmation dated September 2, 2009, the plaintiff's motion should be denied because Dr. Nosik, and Dr. Lakin are no longer employed by the defendants; the defendants have already provided the last known address for these individuals; and a portion of the documentation requested by the plaintiff is no longer maintained by the hospital, and some of the documentation demanded by the plaintiff is not maintained in the ordinary course of business presenting undue burden for the defense if forced to locate it. The defense attorney states, while the plaintiff demanded in a post deposition discovery the names and time sheets evidencing shifts work by all nurses assigned to care for the plaintiff during her admission to Nassau University Medical Center , the defense timely objected, and a subsequent investigation revealed that documentation is no longer maintained by the defendants as shown in an affidavit dated August 27, 2009, by Kathy Skarka, R.N., who is employed by the defendants now as senior vice president, and at the time of the alleged March 12, 2008 incident as the vice president of nursing. Skarka stated her duties included overseeing all nursing operations at the hospital. Skarka also stated it is the hospital's policy to keep nursing assignment sheets for three months, so the defendants have not maintained such documents since June 2008. The defense attorney asserts the defendants object to the plaintiff's demand for written reports by the outgoing surgical intensive care unit and the next shift incoming surgical intensive care unit pertaining to the plaintiff based upon a nurse's July 8, 2009 deposition. The defense attorney indicates such writings are informal documents, and not a medical record kept in

the ordinary course of the business of the hospital. The defense attorney asserts the plaintiff's demand is overly broad, unduly burdensome, irrelevant and unnecessary for all of the nursing shift tools for the entire surgical intensive care unit for the plaintiff's three week hospital admission. The defense attorney notes the nursing shift tools for the entire surgical intensive care unit, unlike the nursing assignment sheets, are not a medical record, so there is no obligation under the public health law to maintain the nursing shift tools for the entire surgical intensive care unit, and the nursing shift tools are used by the nursing staff for patient/nurse acuity, not for specific treatment of one particular patient. The defense attorney maintains the entries in the nursing shift tools for the entire surgical intensive care unit are neither signed nor identifiable by the name of the nurse who authored the entry, and contains the names of all of the patients in the surgical intensive care unit at one given time, and cannot be located by patient name.

The plaintiff opposes the defense cross motion. The plaintiff's attorney states, in an affirmation dated September 30, 2009, the sole issue is whether the defense should be compelled to produce the "nursing shift tools" pertaining to the plaintiff's March 1 to March 21, 2009 hospital admission. The plaintiff's attorney points out it is significant to highlight the plaintiff's contention, upon the March 1, 2008 hospital admission, the plaintiff's left upper extremity, particularly the fingers in her left hand were from any injury. The plaintiff's attorney also asserts every medical chart document, including the triage examination, indicates between March 1 to March 12, 2009, the plaintiff had not

sustained an injury to her left hand. The plaintiff's attorney indicates the nurse testified on July 8, 2009, at a deposition, she worked in the surgical intensive care unit, and participated in the plaintiff's care during the nurse's shift commencing March 11, 2008, at 7:00 p.m. That nurse also testified regarding a written report since identified by the defense as the "nursing shift tool." The plaintiff's attorney challenge the defense contention that written report is not a medical report, and it is not maintained by the hospital in the ordinary course of business. The plaintiff's attorney avers the defense position contradicts the nurse's testimony. The plaintiff's attorney argues that written report is material and necessary, and thus discoverable. The plaintiff's attorney contends the defense argument does not matter regarding "nursing shift tool" as unsigned.

The defense attorney states, in an affirmation dated October 14, 2009, in further support of the cross motion, and in further opposition of the plaintiff's motion, plaintiff's counsel conceded portions of the motion to compel are no longer at issue. The defense attorney maintains the only issue remaining is the production of the nursing shift tours pertaining to the plaintiff's entire hospital admission from March 1, 2008 to March 21, 2008. The defense attorney agrees with the plaintiff's counsel the main factual dispute is the issue of causation. The defense attorney points out, however, the plaintiff's contention is untrue that the documentation is material and necessary because every medical chart indicates no injury to the plaintiff's left hand prior to the alleged March 12, 2008 incident. The defense attorney maintains Dr. Nosik testified, at a deposition on

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October 1, 2009, about specific indications in the plaintiff's hospital chart which show an injury to the plaintiff's left hand prior to the alleged fall, and more specifically the March 11, 2008 chart notes exhibit pain and swelling in the left hand at 11:00 a.m., resulting in an x-ray of the left hand before. The defense attorney avers the "nursing shift tool." is not maintained in the ordinary course of business; it is not filed by patient rather contains multiple patient names; and would be difficult to find since it is not authored nor signed by a hospital staff member. The defense attorney contends the plaintiff's request is also an unreasonable annoyance, and an excessive burden as shown by the nurse's affidavit.

The plaintiff was brought to Nassau University Medical Center after a car accident where the plaintiff allegedly collided with a tree after falling asleep behind the wheel of the motor vehicle. The plaintiff presented to the hospital with multiple fractures to different areas of her body. The underlying personal injury action arises from an incident on March 12, 2008, at 1:40 a.m., when the plaintiff allegedly was caused, suffered, and permitted to fall from her hospital bed because the side rails were unsecured in the upright position. The plaintiff claims she sustained fractures to fingers of the left hand, and required surgical intervention. The defense disputes the plaintiff suffered those injuries from falling out of the bed, rather these were pre-existing injuries.

This Court has carefully reviewed and considered all of the parties' papers submitted with respect to the plaintiff's motion and the defense cross motion. This Court finds Dr. Nosik testified, at a deposition on October 1, 2009, so this aspect of the

plaintiff's motion is denied as moot. This Court determines Dr. Lakin is no longer employed by the defendants; the defendants provided the last known address for Dr. Lakin, so this aspect of the plaintiff's motion is also denied as moot. This Court holds the entries in the nursing shift tools for the entire surgical intensive care unit are neither signed nor identifiable by the name of the nurse who authored the entry, and contain the names of all of the patients in the surgical intensive care unit at one given time, and cannot be located by patient name, hence it is an overly broad and unduly burdensome demand by the plaintiff for discovery and inspection. The Court also holds the defendants have met their burden under CPLR 3103

Accordingly, the plaintiff's motion is denied, and the defense cross motion is granted.

So ordered.

Dated: December 14, 2009

**ENTERED**

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DEC 17 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX