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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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JAMES FINNEGAN,

Plaintiff(s),

-against-

NASSAU UNIVERSITY MEDICAL CENTER and THE NASSAU HEALTH CARE CORPORATION,

Defendant(s).

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Index No. 8964/09

Motion Submitted: 2/22/12
Motion Sequence: 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants move this Court for an Order granting renewal and re-argument of their opposition to a prior determination of this court that directed defendants to provide certain items of discovery, which defendants contend is privileged (Motion Sequence 2). Plaintiff opposes defendants' motion, and moves by cross-motion to strike defendants' answer, or in the alternative, precluding defendants from testifying at trial (Motion Sequence 3). Plaintiff further cross-moves this Court for an Order compelling defendants to provide all outstanding discovery from the Court's July and September 2010 Orders, and from plaintiff's Notices for Discovery and Inspection dated September 3, 2010 and December 2, 2010. Defendants oppose plaintiff's cross-motion.

By Decision and Order dated July 21, 2010, the Court granted some of plaintiff's discovery requests, denied others, and also directed that defendants submit certain other items of discovery to the Court for an *in camera* inspection. Following the *in camera* inspection, by Decision and Order dated September 9, 2010, the Court directed that some of the submitted items be disclosed to plaintiff, either in their entirety, or in redacted form.

Since the Court rendered its September 9, 2010 Decision and Order, defendants have filed a Notice of Appeal;[1] yet, the parties have continued to engage in discovery and some settlement negotiations. In fact, the parties have reached a compromise on that portion of the Court's Order granting plaintiff's request for the names of all former patients who have made a claim against defendants for alleged misuse of insulin pens (July 21, 2010 Decision and Order). Defendants have agreed to provide a form of "de-identified" records to plaintiff.[2] Thus, by letter dated April 27, 2010, defendants withdraw subsection "A" of their instant motion to renew and reargue pertaining to that discovery issue.

The Court will now address the remainder of defendants' motion, which asserts that the Court "misapplied" the relevant Education and Public Health Law sections to the facts of this case.

Specifically with respect to the motion to renew, there are no new facts offered that would change this Court's prior determination. The Court does, however, wish to address itself to plaintiff's erroneous statement that, "[t]here is simply no document that records or even details a conversation between Mr. Gianelli and a nurse" (Affirmation in Support, paragraph 31).

As detailed in its September 9, 2010 Order, the Court determined:

> that the narrative e-mail of Arthur Gianelli's informal discussion with a particular NUMC nurse following a "town hall meeting" is not part of the hospital's insulin pen investigation conducted in accordance with the Public Health and Education Laws; moreover, such e-mail narrative contradicts an apparent statement made to plaintiff that defendants have no knowledge of any "direct" conversations between Mr. Gianelli and any member of the nursing staff.

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[1]The Court is not in possession of any information indicating that the appeal has been perfected, or that an appellate court decision is imminent.

[2]Defendants have not yet provided the "de-identified" records to plaintiff as of the date of this decision.

The plain reading of this particular e-mail reveals it to be Mr. Gianelli's recap of the nurse's "observations" regarding the insulin pen situation, as told to him by the nurse. It is beyond cavil that defendants once again asserted in their reply (paragraph 17)"[t]here was no such document."

The Court also notes defendants' misstatement of the Court's finding with regard to the aforementioned e-mail, claiming that, "the Court ordered the defendants to give over a particular email *that the Court indicated was otherwise privileged* because . . . it tended to reference a conversation between Mr. Gianelli and a nurse (emphasis added)." In its September 9, 2010 Order, this Court determined, as set forth above, that the email is not part of the hospital's insulin pen investigation, and is, therefore, not privileged.

In any event, the Court turns now to defendants' motion to reargue. It is settled that "[m]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (***Carrillo v. PM Realty Group***, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept., 2005); *see* ***CPLR § 2221[d][2]***; ***Barnett v. Smith***, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept., 2009); ***Frisenda v. X-Large Enterprises***, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept., 2001); ***William P. Pahl Corp. v. Kassis***, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dept., 1992); *see also* ***Foley v. Roche***, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1st Dept., 1979]).

Notably, the remedy "is not designed to provide an unsuccessful party with successive opportunities" to make repetitious applications, "rehash questions already decided" or "present arguments different from those originally presented" (***V. Veeraswamy Realty v. Yenom Corp.***, 71 A.D.3d 874, 895 N.Y.S.2d 860 (2d Dept., 2010); ***William P. Pahl Equipment Corp. v. Kassis, supra***; *see* ***Gellert & Rodner v. Gem Community Mgt.***, 20 A.D.3d 388, 797 N.Y.S.2d 316 (2d Dept., 2005); ***Pryor v. Commonwealth Land Title Ins. Co.***, 17 A.D.3d 434, 436, 793 N.Y.S.2d 452 (2d Dept., 2005); ***Amato v. Lord & Taylor, Inc.***, 10 A.D.3d 374, 375, 781 N.Y.S.2d 125 [2d Dept., 2004]).

The Court finds that in its motion for leave to reargue, defendant has failed to demonstrate that this Court overlooked or misapprehended any matters of law or fact applicable to this action in determining the original motions. (***CPLR § 2221(d)(2)***; ***McGill v. Goldman***, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept., 1999); ***Amato v. Lord & Taylor***, 10 A.D.3d 374, 781 N.Y.S.2d 125 [2d Dept., 2004]).

Accordingly, the court adheres to its original determinations and decisions dated July 21 and September 9, 2010, and the defendants' motion is denied in its entirety.

There being no stay of the proceedings in effect, this Court directs defendants to provide the disclosure previously directed to be provided to plaintiff, in accordance with the Court's July 21 and September 9, 2010 Orders.

As to plaintiff's cross-motion, the Court declines to strike defendants' answer, or to preclude defendants from testifying at trial. The Court does not find that defendants' failure to comply with discovery demands is willful, contumacious, or in bad faith; rather, defendants' counsel is vigorously defending its clients within the bounds of the applicable Education and Public Health Law provisions.

Plaintiff seeks to compel defendants' compliance with item #3 of his September 3, 2010 demand, which requests the individual schedules for each nurse/medical staff member on plaintiff's floor when he received insulin pen injections. Defendant objected on the grounds that the demand is irrelevant, overbroad, unduly burdensome and palpably improper. Defendants have provided the name of the one nurse they claim administered an injection to plaintiff, but plaintiff has not yet deposed her.

Plaintiff contends that the schedules are necessary because his deposition testimony indicates that two separate nurses administered injections to him. Although plaintiff has not included relevant portions of his testimony with the instant motion, plaintiff previously submitted to the Court, by letter, certain pages of plaintiff's testimony. In that testimony, plaintiff stated that an Asian nurse in the emergency room administered an insulin pen injection to him, and that later, a blonde nurse on an upper floor administered a second injection to him once he was admitted to the hospital. Accordingly, it appears that plaintiff's demand, as drafted, is overbroad, and is therefore denied.

With respect to plaintiff's December 2, 2010 demand for discovery, the Court directs defendants to comply therewith as outlined below. In view of the fact that defendants have advised plaintiff that they no longer possess his blood samples, which were tested in regard to this action, plaintiff's request for defendants' rules and regulations regarding the storage and disposition of same is both reasonable and relevant. The Court notes that, although defendants objected to this demand, they also stated that they are currently searching for any rules and/or regulations relative to this particular demand.

The Court agrees with defendants that plaintiff's request for defendants' Table of Contents for all of the hospital's rules and regulations is overbroad, likely to be irrelevant, and potentially unduly burdensome. Insofar as the rules and/or regulations pertaining to the storage and disposal of blood samples make reference to additional rules and regulations, defendants shall provide those additional rules and/or regulations.

All discovery directed to be disclosed by defendants to plaintiff shall be accomplished on or before May 31, 2011. Failure to provide the discovery will result in appropriate sanctions being imposed pursuant to CPLR § 3126.

The foregoing constitutes the Order of this Court.

Dated: April 28, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.