

Bradshaw v Lenox Hill Hosp.

2011 NY Slip Op 32942(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 114078/05

Judge: Joan B. Lobis

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SCANNED ON 11/7/2011
* 1
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

BRADSHAW, BARBARA

INDEX NO. 114078/05

MOTION DATE 8/23/11

LENOX HILL HOSPITAL,
REAL.

MOTION SEQ. NO. 09

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for strike answer

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-23

x ref. 24-43

44-48, 49-51

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION & ORDER

FILED

NOV 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/3/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

FILED

NOV 04 2011

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

NEW YORK
COUNTY CLERK'S OFFICE

-----X
BARBARA BRADSHAW,

Plaintiff,

Index No. 114078/05¹

-against-

Decision and Order

**LENOX HILL HOSPITAL, JEFFREY MOSES, M.D., and
VERONICA DAANTJE, RCVT.,**

Defendants.

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

In Motion Sequence Number 009, plaintiff Barbara Bradshaw moves, by order to show cause, for an order, pursuant to C.P.L.R. § 3126, striking defendant Lenox Hill Hospital's (the "Hospital" or "Lenox Hill") answer due to its failure to adequately respond to plaintiff's notice of discovery and inspection dated January 18, 2011 (the "D&I"). Alternatively, plaintiff seeks an order, pursuant to C.P.L.R. Rule 3124, compelling the Hospital to respond to the D&I; precluding the Hospital from offering the April 11, 2003 computed tomography ("CT") scan at trial; and extending her time to file the note of issue. Defendant Hospital and co-defendants Jeffrey Moses, M.D. and Veronica Daantje, RCVT, oppose plaintiff's application and cross-move for an order compelling plaintiff to respond to defendants' demands for authorizations.²

¹ For discovery purposes only, this action is consolidated with Barbara Bradshaw v. Gershowitz Libo & Korek, P.C., Index Number 116719/08.

² Although the cross motion purportedly seeks to compel plaintiff to provide documentary proof of plaintiff's claims for lost earnings, the body of the attorney's affirmation in support of the cross motion only addresses outstanding demands for authorizations.

This is a medical malpractice action arising out of a cardiac catheterization that Ms. Bradshaw underwent at Lenox Hill under the care of Dr. Moses on April 7, 2003. Following this procedure, Ms. Bradshaw was hospitalized at Lenox Hill for sixteen (16) days, during which time she underwent a blood transfusion for a hemorrhage and an implantation of an inferior vena cava filter. Plaintiff alleges that Lenox Hill's conduct during and after the catheterization "caused her to become totally disabled and be subjected to continuous intractable pain."

A number of discovery disputes have arisen in connection to plaintiff's efforts to establish that the Hospital is vicariously liable for the acts of independent contractors who were working in the Hospital and providing care to plaintiff while she was hospitalized. For example, by stipulation so-ordered by the Hon. Joan B. Carey (to whom this case was originally assigned prior to her retirement) on November 20, 2009, defendants agreed to identify certain signatures in plaintiff's hospital chart after a number of non-party depositions were held. Those particular depositions ended in March 2010, and defendants did not identify the signatures. Approximately ten (10) months after those depositions ended, plaintiff served the D&I in or about January 2011, further specifying the ten (10) signatures that she wanted Lenox Hill to identify from the chart. At a court conference on February 8, 2011, the parties entered into a so-ordered stipulation (the "February 2011 Order"), by which Lenox Hill agreed to respond to the D&I on or before March 10, 2011. The response provided by Lenox Hill dated March 10, 2011 (the "Response to D&I"), identifies four of the ten signatures and states that Lenox Hill is unable to identify the other signatures.

By her D&I, plaintiff also sought the bylaws and the rules and regulations for medical staff at Lenox Hill in effect while she was hospitalized. In the Response to D&I, Lenox Hill objected to the demand as vague, overbroad, and unduly burdensome. Plaintiff also sought copies of the contracts in effect at the time of plaintiff's hospitalization between Lenox Hill and a number of physicians and medical entities that provided treatment to plaintiff while she was hospitalized—Dr. Bruce Charash; Center for Hypertension and Cardiovascular Medicine (“CHCM”); Lenox Hill Interventional Cardiology, P.C. (“LHIC”); Dr. Jeffrey Stein; Dr. Donna R. Kesselman; Dr. Gerald J. Smallberg; and Lynne Glasser. Further, she asked Lenox Hill to provide identification badges or name tags worn at the time of plaintiff's hospitalization by a number of physicians who provided treatment to plaintiff during her hospitalization. In the Resopnse to D&I, Lenox Hill objected to these demands as irrelevant and immaterial.

The court notes that Lenox Hill provided a number of the disputed items of discovery after the motion was filed. Currently, the outstanding items of disputed discovery from the D&I are the bylaws, rules, and regulations for staff; the contracts between Lenox Hill and Dr. Bruce Charash, CHCM, Dr. Jeffrey Stein, Donna R. Kesselman, Dr. Gerald J. Smallberg, and Lynne Glasser; the identification badges; and the identification of four signatures from progress notes in plaintiff's chart.

Plaintiff argues that the outstanding discovery is material and relevant to the issue of Lenox Hill's control over the acts of the physicians who treated plaintiff. She supports her motion with an affidavit from Dr. Samuel H. Steinberg, who attests that he is an expert in hospital accreditation standards. Dr. Steinberg states that any accredited hospital must keep permanent records that identify all treating physicians. He sets forth that every physician would have had to

sign an application, an acceptance of the medical staff bylaws and rules and regulations, an identification card, and a statement attesting to his or her health. He further states that finding out who signed a chart should be readily available and discernable within a matter of hours.

Defendants argue that the majority of the requested discovery has no relationship to the defendants named in this lawsuit. They contend that Lenox Hill is merely the place where plaintiff's procedures took place and that none of the physicians who treated plaintiff during her hospitalization were employees of Lenox Hill. Defendants maintain that because Lenox Hill is not liable for the acts of the independent contractors who treated plaintiff, the complaint against it will eventually be dismissed so it should not have to produce what it refers to as "irrelevant and unrelated materials." Defendants further maintain that they have responded to plaintiff's discovery demands and that they have never willfully nor contumaciously failed to comply with an order of the court. As to the specifically demanded discovery, defendants argue that the demands for the bylaws and rules and regulations for medical staff at Lenox Hill are too broad; that the demands for the contracts between Lenox Hill and certain physicians and medical entities are improper because plaintiff never established through deposition testimony that such contracts exist; that the identification badges are irrelevant, will yield no useful information, and are only used for security purposes; and that they have tried diligently to identify the four remaining signatures (which they maintain belong to only two different people) to no avail. They submit an affidavit from Ken Solosky, director of security at Lenox Hill, who states that identification badges are provided to all individuals who need to enter the hospital for a business or professional purpose; that the purpose of the badges is for security clearance to certain areas of the Hospital; that identification badges are not conditioned on an employment relationship with the Hospital; and that once an individual ends their relationship with

the Hospital, the identification badge is deactivated along with access provided through use of the badge. They further submit an affidavit from Monica Losquadro, director of "PA" services in the Department of Interventional Cardiology at Lenox Hill, who sets forth that a search has been conducted to identify the signatures; that there are only two people whose signatures have not been identified; and that she had made every effort to obtain the identification of the two people, but as of June 2011, is still unable to identify those signatures.

Pursuant to C.P.L.R. § 3101(a), "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof[.]" What is considered "material and necessary" is left to the discretion of the court. Andon v. 302-304 Mott St. Assocs., 94 N.Y.2d 740, 746 (2000). The phrase "material and necessary" means "any facts [that] bear[] on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." Allen v. Crowell-Collier Publ'g Co., 21 N.Y.2d 403, 406 (1968).

Plaintiff has sufficiently demonstrated that the materials sought are relevant to the issue of the Hospital's control over the acts of independent contractors who were working in the Hospital and providing care to plaintiff while she was hospitalized, which bears on the controversy of whether the Hospital is vicariously liable for the acts of those independent contractors. Since plaintiff has asserted theories under which the Hospital may be liable for the acts of these independent contractors, and since this is not a motion for summary judgment, the requested discovery shall be exchanged to the extent set forth below.

As to the medical staff bylaws and rules and regulations, they should be exchanged to the extent that they bear on the controversy and are not privileged. However, the demand as stated is overly broad. Accordingly, Lenox Hill shall provide plaintiff with a copy of the tables of contents for the medical staff bylaws and rules and regulations in effect at the time of plaintiff's hospitalization within fourteen (14) days of service of this decision and order with notice of entry. Within seven (7) days thereafter, plaintiff shall notify Lenox Hill of which specific bylaws and rules and regulations it seeks copies. Lenox Hill is to provide same within seven (7) days of plaintiff's notification.

As to the employment contracts and the identification badges, to the extent they exist, Lenox Hill shall exchange copies of the requested materials within thirty (30) days of service of this decision and order with notice of entry. The court is not persuaded by defendants' position, unsupported by any case law, that it should not be compelled to turnover the contracts because plaintiff did not establish through deposition testimony that such contracts exist. While a party cannot be compelled to turnover discovery that does not exist, defendants have never argued such, and no cogent reason has been advanced that would shift the burden of demonstrating that the contracts exist in the first place to the party seeking their production.

As to the remaining signatures to be identified on plaintiff's hospital chart, the affidavit that Lenox Hill produced is inadequate to demonstrate that a good faith investigation was undertaken to identify those four signatures. Lenox Hill is hereby directed to undertake a good faith investigation to identify the person or persons of the signatures at issue and inform plaintiff of the identity of such within thirty (30) days of service of this decision and order with notice of entry.

Should the Hospital be unable to identify the signatures, it must provide plaintiff with an affidavit from an employee with actual knowledge of the search describing the employee's familiarity with the records, the nature of the search conducted, and the results of the search. If required, this affidavit shall be provided within forty-five (45) days of service of this decision and order with notice of entry.

Given the complexity of the issues at controversy here, the court does not find Lenox Hill's delay in producing discovery to be willful or contumacious as to warrant the drastic remedy of striking its answer. Therefore, that branch of plaintiff's motion seeking an order striking Lenox Hill's answer is denied. Furthermore, defendants' cross motion seeking to compel plaintiffs to respond to their demand for certain authorizations is denied as moot, as it appears from plaintiff's reply papers that those authorizations have since been produced.

The parties shall appear for a status conference on December 13, 2011, at 9:30 a.m.
The deadline to file note of issue is extended to December 30, 2011.

This constitutes the decision and order of the court.

Dated: November 3, 2011

FILED

NOV 04 2011

NEW YORK
COUNTY CLERK'S OFFICE



JOAN B. LOBIS, J.S.C.