Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

MADELEINE FENSTER, individually and as Executrix of the Estate of MARION FENSTER, deceased and SAMUEL FENSTER, Plaintiffs,	Index No. 29008/10
-against-	Motion Date September 6, 2011
SENIORBRIDGE FAMILY COMPANIES, INC., SENIORBRIDGE FAMILY COMPANIES (NY), INC. and SENIORBRIDGE CARE MANAGEMENT, INC., Defendants.	Motion Cal. No. 11 Motion Sequence No. 1

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	1-4
Cross Motion.....	5-8
Reply and Opposition to Cross Motion...	9-11

Upon the foregoing papers it is ordered that defendants' motion for an order compelling the plaintiffs to comply with Defendants' Demand for Inspection of Premises dated June 21, 2011 pursuant to CPLR 3120(a)(1)(ii) and that branch of plaintiffs' cross motion for an order compelling the defendants to appear for a deposition are hereby decided as follows:

This is a wrongful death action in which plaintiffs seek damages as the result of an accident that allegedly occurred on June 18, 2010. Pursuant to the Verified Complaint, Marion Fenster, fell while she walking in her home and sustained injuries while receiving care from defendants' home health aide, which injuries resulted in her death. Plaintiffs allege that the injuries were due to the negligence of defendants in, inter alia, causing, permitting and/or allowing the decedent, Marion Fenster, to fall. Plaintiff, Samuel Fenster, sues derivatively for loss of services from his wife. Defendants maintain that a carpet caused Marion Fenster's fall.

It is well-established law that under CPLR 3101(a), the parties may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (*see, Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial" (*Anonymous v. High School for Environmental Studies et. al.*, 820 NYS2d 573, 578 [1st Dept 2006] [citations omitted]). The Court is given broad discretion to supervise discovery (*Lewis v. Jones et. al.*, 182 AD2d 904 [3d Dept 1992]). "The test is one of usefulness and reason. CPLR 3101(subd[a]) should be construed . . .to permit discovery of testimony 'which is sufficiently related to the issues in litigation to make the effort to obtain it in preparation for trial reasonable' (Weinstein-Korn-Miller, NY Civ Prac ¶ 3101.07, at 31-13)" (*Allen, supra*). The information sought need not qualify as evidence admissible at the trial of an action, but only lead to such evidence.

Pursuant to CPLR 3120(a):

> "After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum . . . to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon."

Pursuant to CPLR 3106(a):

> (a) Normal priority. After an action is commenced, any party may take the testimony of any person by deposition upon oral or written questions. Leave of the court, granted on motion, shall be obtained if notice of the taking of the deposition of a party is served by the plaintiff before that party's time for serving a responsive pleading has expired.

"In providing that leave of the court is required before a plaintiff may, within 20 days after service of the complaint, serve a notice of the taking of a deposition, CPLR 3106 (subd[a])

impliedly mandates that the party who first notices the deposition obtains priority. The reason for the priority is fairly obvious. '[The] defendant is blameless until the plaintiff proves him otherwise; therefore, in the absence of special circumstances, he should be given the chance to examine first in order to find out what the case is about'" (*Rapillo v. Saint Barnabas Hospital*, 93 AD2d 760 [1st Dept 1983])([internal citations omitted]). "Under CPLR 3106(a), '[a]s a general rule, in the absence of special circumstances, priority of [deposition] examination belongs to the defendant if a notice is served within the time to answer; otherwise priority belongs to the party who first serves a notice of examination'" (*Serio v. Rhulen*, 29 AD3d 1195 [3d Dept 2006][internal citations omitted]). The Court has the discretion to determine priorities (*Goldman v. White Plains Center Nursing Care LLC*, 2006 NY Misc LEXIS 2617 [Sup Ct, NY County 2006]) and the Court retains broad discretion to issue protective orders governing disclosure (*Serio, supra*). The Court may by means of a protective order regulate the priority of examinations if special circumstances exist (*Preferred Electric & Wire Corp. v. Price*, 326 NYS2d 614 [Sup Ct, Kings County 1971]). The order of priority may be reversed if plaintiff demonstrates the existence of special circumstances, such as where the facts sought to be elicited are solely within the knowledge of the defendant (*Serio, supra*).

Pursuant to the Preliminary Conference Order dated May 4, 2011, the defendant was to appear for a deposition on July 8, 2011. It is undisputed that plaintiffs' counsel requested an adjournment of that deposition, and defendants' deposition has not yet taken place. Defendants maintain that the home health aide cannot be properly prepared for her deposition without the on-site inspection having occurred first. Plaintiffs contend that there is a danger of altered testimony because "[i]f the defendant's on-site inspection expert visits the plaintiff's living room and pulls up all the carpets until he finds one which is loose, it is possible that this information might color the memory and testimony of the home aide regarding the place and manner of the fall".

Following the rationale that "'[the] defendant is blameless until the plaintiff proves him otherwise; therefore, in the absence of special circumstances, he should be given the chance to examine first in order to find out what the case is about'" (*Rapillo v. Saint Barnabas Hospital*, *supra*), the Court finds that the defendants shall proceed with the Inspection of the Premises prior to submitting to a deposition, as the Court finds special circumstances do not exist in the instant case.

Accordingly, it is ORDERED that plaintiffs are compelled to comply with Defendants' Demand for Inspection of Premises dated June 21, 2011 on or before October 19, 2011.

It is further ORDERED that defendants are to appear for an examination before trial at a date, time, and place mutually agreed upon by the parties, but no earlier than at a date thirty (30) days after the Inspection of the Premises has taken place.

That branch of plaintiffs' cross motion for an order compelling the defendants to disclose certain other documents pursuant to CPLR 2215 and 3124 is hereby decided as follows:

It is undisputed that plaintiffs requested certain discovery via letter dated June 15, 2011 in which they requested, inter alia: the home health aide's last known address (#5), the home health aide's contract of employment, if any (#6), and the home health aide's personnel file (#7). It is undisputed that defendants provided a Response to the Combined Discovery Demands dated August 15, 2011, in which they objected to demands #5 and #6 as improper and objected to #7 as improper, but asserted that they would produce the requested documents, *in camera*, for a judicial review and rulings as to their discoverability.

Item #5-The home health aide's last known address

Pursuant to Paragraph 6(a) of the Preliminary Conference Order, within thirty days of the order of May 4, 2011, all parties were required to exchange the names and addresses of all witnesses. Furthermore, under CPLR 3101(a), such discovery is "material and necessary" for the preparation of trial (*see, Allen v. Crowell-Collier Publ. Co., supra*). Accordingly, defendants shall provide the home health aide's last known address within thirty (30) days from the date of service of a copy of this order with notice of entry.

Item #6- The home health aide's contract of employment, if any

As defendants established that the home health aide's employment contract is completely irrelevant to the claims asserted by the plaintiffs, the Court finds that defendants need not produce such an employment contract.

Item #7- The home health aide's personnel file

As defendants established that the home health aide's personnel file is not discoverable because it is not disputed that she was an employee on the date in question, and an employee's personnel records are not discoverable where there is no action to recover damages for negligent hiring, (*see, Neiger v. City of New York*, 72 AD3d 663 [2d Dept 2010], and in the instant case, there is no action for negligent hiring, the Court finds that defendants need not produce such a personnel file.

It is ORDERED that any failure to comply strictly with the terms of this order shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: September 26, 2011

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Howard G. Lane, J.S.C.