

Marx v Rosalind

2011 NY Slip Op 34098(U)

September 30, 2011

Supreme Court, Suffolk County

Docket Number: 00117/06

Judge: Joseph C. Pastoressa

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SUPREME COURT OF THE STATE OF NEW YORK
IAS/ TRIAL PART 34- SUFFOLK COUNTY

COPY

PRESENT:
HON. JOSEPH C. PASTORESSA

Mot Seq: #001-Mot-d
#002-Mot-d

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ARLENE MARX, AS ADMINISTRATRIX OF
THE ESTATE OF RUTH WIENER, DECEASED,

ATTY FOR PLAINTIFF(S):
PARKER, WAICHMAN & ALONSO, LLP
111 GREAT NECK RD.
GREAT NECK, NY 11021

Plaintiff(s),

-against-

ATTY FOR DEFENDANT(S):
WILSON, ELSER, MOSKOWITZ, EDELMAN &
DICKER, LLP
3 GANNETT DRIVE
WHITE PLAINS, NY 10604

THE ROSALIND AND JOSEPH GURWIN
JEWISH GERIATRIC CENTER OF LONG
ISLAND, INC., INDIVIDUALLY AND D/B/A
GURWIN JEWISH GERIATRIC CENTER AND
GURWIN JEWISH GERIATRIC CENTER,

Defendant(s),

_____ x

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Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations) Annexed 1, 2
Opposing Affidavits (Affirmations) _____
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Upon the foregoing papers, the plaintiff moves for an order pursuant to CPLR §3126 striking the defendants' answer, or in the alternative, a conditional order for the defendants' alleged failure to respond to plaintiff's discovery demands; and the defendants cross-move for a protective order, and a more particularized verified bill of particulars. It is

ORDERED, that the defendants are directed to provide a list of names and addresses of all eyewitnesses and notice witnesses whose identity it has learned in investigating this case other than those individuals whose names appear in the medical records relative to the deceased plaintiff Ms. Weiner within forty-five (45)days of service of copy of this order with notice of entry; and it is further

ORDERED, that the defendants are directed to provide personnel files of all CNAs, nurses and all Gurwin Jewish Geriatric Center employees that treated Plaintiff's decedent Ruth Wiener from February 18, 2004 through February 18, 2005 within forty-five (45)days of service of copy of this order with notice of entry; and it is further

ORDERED, that the defendants are directed to provide all documents and information

relating to any demotion of any personnel that treated plaintiff's decedent from February 18, 2004 through February 18, 2005 within forty-five (45) days of service of copy of this order with notice of entry; and it is further

ORDERED, that the plaintiff's demand for the defendants to provide all copies of all in service records for the nursing staff for the period of plaintiff's decedent's residency is denied; and it is further

ORDERED, that the defendants' cross-motion seeking a protective order from the plaintiff's demand for "all documents tracking pressure ulcers at the defendants facility for the period of decedent's residency, but not limited to copies of the "pressure ulcer reports" as testified to by the Director of Nursing" is granted; and it is further

ORDERED, that the defendants' cross-motion seeking a more particularized bill of particulars is denied.

This is a nursing home negligence lawsuit involving the care and treatment rendered to the plaintiff's decedent, Ruth Weiner, during her admission at Gurwin Jewish Geriatric Center of Long Island during the period of March 3, 2003 through February 18, 2005.

"Actions should be resolved on the merits wherever possible, and the nature and degree of the penalty to be imposed pursuant to CPLR §3126 is a matter of discretion with the court... The moving party must 'clearly demonstrate' that the failure to comply was willful and contumacious" (see, Pascarelli v. City of New York, 16 AD3d 472). In the case at bar, the plaintiff has failed to "clearly demonstrate" that the defendants' alleged failure to provide discovery was willful and/or contumacious conduct (see, Mangiapane v. Brookhaven Beach Health Related Facility, 305 AD2d 642; Patterson v. New York City Health & Hosps. Corp., 284 AD2d 516; Centerport Ins. Agency v. Atlantic Fabricators of Rhode Is., 277 AD2d 414). The court notes that the defendants in opposition demonstrated timely responses to plaintiff's demands.

The plaintiff moves to compel the defendants to provide the following information pursuant to the preliminary conference order and/or the plaintiff's December 22, 2009 Notice for Discovery and Inspection:

1) "all parties to exchange names and addresses of all eyewitnesses and notice witnesses.....or if none, provide an affirmation to that affect."

2) "negative outcome and/or incident reports of all bedsores at Gurwin Jewish Geriatric Center that occurred from February 3, 2003 through February 18, 2005";

3) "personnel files of all CNAs, nurses and all Gurwin Jewish Geriatric Center employees that treated Plaintiff's decedent Ruth Wiener from February 4, 2003 through February 18, 2005";¹

4) "all documents and information relating to any demotion of any personnel that treated Plaintiff's decedent from February 18, 2004 through February 18, 2005";

5) "copies of all in service records for the nursing staff for the period of Plaintiff's decedent's residency."

The defendants on December 23, 2009 objected to the plaintiff's discovery demand on the grounds that the demands were irrelevant, palpably improper, and designed to harass. The defendants seek a protective order from the above referenced discovery demands and seek to compel the plaintiff to provide a more particularized verified bill of particulars.

"It is settled law that parties to an action are entitled to reasonable discovery of 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'. CPLR 3101 (a), which permits discovery of 'all evidence material and

¹ Plaintiff is willing to limit the demand for personnel files to the one 1 year period of February 18, 2004 through February 18, 2005.

necessary in the prosecution or defense of an action', has thus been liberally construed to include evidence required for preparation for trial, as well as 'testimony or documents which may lead to the disclosure of admissible proof'. The test is one of 'usefulness and reason', and CPLR 3101 (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'" (Southampton Taxpayers Against the Reassessment v Assessor of Southampton, 176 AD2d 795, 796).

The plaintiff's portion of the motion to compel the defendants to provide the name and addresses of all eyewitnesses and notice witnesses is granted to the extent that the defendants are directed to provide the names and addresses of all eyewitnesses and notice witnesses whose identity it has learned in investigating this case other than those individuals whose names appear in the medical records relative to the plaintiff Ms. Weiner. The preliminary conference order dated December 15, 2006 provides that the parties "shall exchange names and addresses of all eyewitnesses and notice witnesses, . . ." "Although the CPLR does not specifically mention the names and addresses of witnesses or create any disclosure device for obtaining such information, it is within a court's discretion to require a party to disclose the names and addresses of witnesses to transactions, occurrences, admissions and the like. However, nothing in CPLR Article 31 requires a party to generate a witness list per se. As with any other disclosure obligation, a party's compliance or noncompliance must be gauged with reference to the purposes of disclosure, which are to sharpen factual issues, advance the truth-finding process, accelerate the disposition of suits, and prevent gamesmanship and unfair surprise at trial" (Hunter v Tryzbinski, 278 AD2d 844, 845). The defendants' responded to the plaintiff's demand by providing that "with respect to defendant facility, this would include the individuals whose names and signatures appear in the medical records relative to Ms. Weiner". Under the circumstances of this case, however, the court finds that the defendants are also obligated to provide the names and addresses of additional witnesses that are not in the medical records whom may bear any facts on the controversy to the extent same is known to them.

Insofar as the plaintiff contends that defendants failed to comply with discovery demands by providing "negative outcome and/or incident reports of all bedsores at Gurwin Jewish Geriatric Center that occurred from February 3, 2003 through February 18, 2005"; "[a party] may not be compelled to produce information that does not exist or which he [or she] does not possess" (Corriel v Volkswagen of Am., 127 AD2d 729, 731; see, Lauro v Top of the Class Caterers, 169 AD2d 708; Rosado v Mercedes-Benz of North Amer., 103 AD2d 395, 398; Romeo v City of New York 261 AD2d 379). The defendants in opposition submitted the affidavit of Florence Oldacre, Director of Nursing for the defendant Gurwin Jewish Geriatric Center of Long Island, attesting that "between 2003 and 2005, Gurwin did not generate or maintain negative outcome and/or incident reports for pressure ulcers". As to personnel files of all CNAs, nurses and all Gurwin Jewish Geriatric Center employees that treated plaintiff's decedent Ruth Wiener from February 18, 2004 through February 18, 2005; and all documents and information relating to any demotion of any personnel that treated plaintiff's decedent from February 18, 2004 through February 18, 2005"; said demands are material and necessary and are not overly broad or unduly burdensome and, accordingly the court is ordering their production (see, Clement v Kateri Residence, 60 AD3d 527; Simmons v Northern Manhattan Nursing Home, Inc., 52 AD3d 351; Grant v PALJR, LLC, 64 AD3d 750; Sanchez v Kateri Residence, 79 AD3d 492). In addition, the court finds that the plaintiff's demand for copies of "all in service records for the nursing staff for the period of Plaintiff's decedent's residency" is overreaching and broad. Moreover, the plaintiff failed to show that it was material and necessary to obtain the in service records of all of the nursing staff. Accordingly, the plaintiff's portion of the motion to compel is denied and the defendants' request for a protective order regarding this demand is granted.

The defendants' portion of its cross-motion seeking a protective order from the plaintiff's demand for "all documents tracking pressure ulcers at the defendant-facility for the period of decedent's residency, but not limited to copies of the 'pressure Ulcer Reports' as testified to by the Director of Nursing" is granted on the basis that the documents are privileged documents of the quality assurance committee (see, Matter of Subpoena Duces Tecum to Jane Doe, Esq., 9 NY2d 434). Ms. Kineiko, Director of Quality Assurance, and Ms. Oldacre, Director of Nursing, both members of the quality assurance committee at the defendant facility, aver that data and statistics regarding pressure ulcers are gathered and generated at the behest of the quality assurance committee for quality assurance purposes and are reviewed by the quality management committee to devise a plan for corrective measure if required. Ms. Kineiko and Ms. Oldacre further aver that the quality management committee reviews the plans for effectiveness and for improvement purposes to improve the quality of care of the residents at the facility. Moreover, the plaintiff does not claim that any specific statute or regulation requires the defendant to maintain these particular reports and/or data independent of quality assurance assessment. In addition, contrary to the plaintiff's averments, the defendants demonstrated a specific "review procedure" regarding the data compiled through the aforementioned affidavits and deposition testimony. Accordingly, the plaintiff's discovery demand for "all documents tracking pressure ulcers at the defendant-facility for the period of decedent's residency, but not limited to copies of the 'pressure Ulcer Reports' as testified to by the Director of Nursing" is stricken.

The defendants' demand for a more particularized verified bill of particulars is denied. Contrary to the defendants' averments seeking to "crystallize the claims being asserted", the plaintiff's bill of particulars was sufficient to "amplify the pleadings, limit proof and prevent surprise at trial" and for the defendants to conduct depositions and prepare a defense regarding the plaintiff's allegations contained in the complaint (see, Napolitano v Polichetti, 23 AD3d 534; Graves v County of Albany, 278 AD2d 578; cf. Lorenzo v Ellison, 114 AD2d 926). Moreover, contrary to the defendants' averments that the plaintiff's bill of particulars is designed to "obfuscate" the issues in this lawsuit, the plaintiff's bill of particulars in paragraph 8 contains clear and concise statements of the acts and/or omissions constituting the negligence claimed listed under: pressure ulcers-left heel; sacrum; and death.

This shall constitute the decision and order of the court.

DATED: September 30, 2011



HON. JOSEPH C. PASTORESSA

FINAL DISPOSITION ___ NON-FINAL DISPOSITION