

**Cumberbatch v Flushing Manor Nursing Home**

2012 NY Slip Op 30690(U)

March 2, 2012

Supreme Court, Queens County

Docket Number: 12772/07

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 6**

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KATHLEEN CUMBERBATCH, AS EXECUTRIX  
OF THE ESTATE OF LEILA BAILEY,  
Plaintiff,

Index No. 12772/07  
Motion  
Date January 17, 2012

-against-

FLUSHING MANOR NURSING HOME, HUNTER  
AMBULANCE and NEW YORK HOSPITAL OF  
QUEENS,  
Defendants.

Motion  
Cal. No. 10  
Motion  
Sequence No. 9

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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

1. Those branches of the motion by defendant, Flushing Manor Nursing Home, cross motion by defendant, New York Hospital Medical Center of Queens s/h/a New York Hospital of Queens, and cross motion by defendant Hunter Ambulance-Ambulette, Inc. for an order granting leave to reargue this Court's order dated April 29, 2011, which was clearly in error given the evidence submitted are hereby all denied as untimely, as all defendants failed to move to reargue within thirty (30) days from the date of the prior order with notice of entry (see, *Glicksman v. Board of Education/Central School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364 [2d Dept 2000]). Pursuant to CPLR 2221(d) (3) a motion for leave to reargue must be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. The record before me indicates

that defendants were served with a copy of the order dated April 25, 2011 and entered on April 29, 2011, with notice of entry on May 18, 2011. Accordingly, all defendants had thirty (30) days or up to on or about June 18, 2011 to make a motion to reargue. The affidavit of service of the instant motion by defendant, Flushing Manor Nursing Home indicates that it was not served until June 30, 2011 and the cross motions by the remaining two defendants were served thereafter. Therefore, those branches of all three defendants' motions/cross motions seeking leave to reargue this Court's order dated April 25, 2011 and entered on April 29, 2011 are hereby denied as untimely.

2. Those branches of the motion by defendant Flushing Manor Nursing Home and cross motions by defendants, New York Hospital Medical Center of Queens s/h/a New York Hospital of Queens and Hunter Ambulance-Ambulette, Inc. for an order granting a striking of the plaintiff's Complaint pursuant to the order of Judge Howard Lane dated January 31, 2011 are hereby denied as follows:

In a decision/order dated January 10, 2011 and entered January 31, 2011, this Court held that the complete requested relief by defendant, Flushing Manor Nursing Home and defendant, New York Hospital Medical Center of Queens s/h/a New York Hospital of Queens was granted. Said relief consisted solely of a request for the vacatur of plaintiff's Note of Issue as discovery was incomplete. As there was no other relief requested by either defendant, Flushing Manor Nursing Home or defendant New York Hospital Medical Center of Queens s/h/a New York Hospital of Queens, said defendants' instant request to have the plaintiff's Complaint stricken pursuant to this Court's order dated April 25, 2011 and entered on April 29, 2011 is denied.

In a decision/order dated January 10, 2011 and entered January 31, 2011, this Court held in relevant part, that:

Additionally, that branch of the cross motion by defendant, Hunter Ambulette-Ambulance, Inc. for an order to compel discovery in this matter is granted solely to the extent as follows:

On June 26, 2008, a Preliminary Conference Order was entered into between the parties, whereby the plaintiff was to provide discovery and appear for depositions and IME's. It is undisputed that plaintiff failed to comply with the terms of this order. Thereafter, on January 7, 2009, a Compliance Conference Order was entered into

between the parties, whereby the plaintiff was to again provide outstanding discovery and appear for depositions and IME's. It is undisputed that plaintiff has failed to comply with the terms of this order. As plaintiff has failed to comply with two court orders and has failed to provide an excuse for such non-compliance, plaintiff's Complaint shall be stricken without further order of the Court unless plaintiff provides all outstanding discovery within sixty (60) days after service of a copy of this order with notice of entry. Plaintiff is to appear for outstanding IME's and depositions on a date, time, and place mutually agreed upon by the parties, but no later than sixty (60) days from the date of service of a copy of this order with notice of entry.

Cross-moving defendant is directed to serve a copy of this order upon plaintiff.

It is undisputed that the order dated January 10, 2011 and entered January 31, 2011, was served with a Notice of Entry on plaintiff on February 28, 2011. As such, plaintiff had sixty (60) days from February 28, 2011 or until April 28, 2011 to provide all outstanding discovery or her Complaint would be stricken without further order of this Court. This Court finds that there was substantial compliance with the order dated January 10, 2011 in that it is undisputed that plaintiff appeared for her deposition prior to April 28, 2011 (see, *Zouev v. City of New York*, 32 AD3d 850 [2d Dept 2006]). Moreover, movant has demonstrated no prejudice.

In a decision/order dated April 25, 2011 and entered April 29, 2011, this Court held:

Plaintiff is ordered to comply with defendants' outstanding discovery demands within thirty (30) days after service of a copy of this order with notice of entry. Should plaintiff fail to comply with this order, defendants may move for sanctions pursuant to CPLR 3126.

Defendant, Hunter Ambulance is directed to serve a copy of this order upon plaintiff.

Accordingly, those branches of the motion by defendant Flushing Manor Nursing Home and cross motions by defendants, New

York Hospital Medical Center of Queens s/h/a New York Hospital of Queens and Hunter Ambulance-Ambulette, Inc. for an order granting a striking of the plaintiff's Complaint pursuant to the order of Judge Howard Lane dated January 31, 2011 are hereby denied.

3. That branch of the motion by defendant, Flushing Manor Nursing Home for an pursuant to CPLR 3126 for sanctions as against the plaintiff is hereby granted solely to the following extent:

On June 24, 2008, a Preliminary Conference Order was entered into between the parties, whereby the plaintiff was to provide discovery including: all authorizations, including but not limited to authorizations to obtain medical records from the decedent's physician(s) and/or hospital(s) and employment records. On January 7, 2009, a Compliance Conference was held, wherein the plaintiff was again ordered to provide all outstanding authorizations, including collateral sources. On or about November 15, 2010, moving defendant served a Notice to Produce upon plaintiff, asking for duly executed IRS Form 4506 authorizations for copies of all Federal and State Income Tax Returns of the plaintiff for the years 2000-present. On or about November 15, 2010, defendant served a Demand for Authorizations asking for authorizations to release any medical records in possession for Leila Bailey by Ms. Bailey's primary care physician, Dr. Reddy as well as for Script Pharmacy, where the plaintiff filed Ms. Bailey's prescriptions. It is undisputed that on or about February 11, 2011, the defendant received Plaintiff's Response to Defendant Flushing Manor's Notice to Produce dated November 15, 2010. In the Response to defendant's request for duly executed IRS Form 4506 authorizations for copies of all Federal and State Income Tax Returns of the plaintiff for the years 2000-present plaintiff stated: "OBJECTION. Plaintiff objects to this demand on the grounds that it is material [sic] and unnecessary to the prosecution of this case. Furthermore, this demand is not reasonably calculated to produce any admissible evidence to the matter at hand".

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 [1<sup>st</sup> 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, N.Y. Civ. Prac., par. 3101.07, p. 31-13)." (*Allen, supra*). It is immaterial that the material sought may not be admissible at trial as "pretrial discovery extends not only to proof that is admissible but also to matters that may lead to disclosure of admissible proof" (*Twenty Four Hour Fuel Oil Corp v. Hunter Ambulance Inc.*, 226 AD2d 175 [1<sup>st</sup> Dept 1996]; *Polygram Holding, Inc. v. Cafaro*, 42 AD3d 339 [1<sup>st</sup> Dept 2007] ["disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof, including materials which may be used in cross-examination"]). The CPLR directs full disclosure of all relevant material. The test is one of usefulness and reason (CPLR 3101[a]; *Allen, supra*; *Andon v. 302-304 Mott Street Assocs.*, 94 NY2d 740 [2000]; *Hoenig v. Westphal*, 52 NY2d 605 [1981] [pre-trial discovery is to be encouraged, limited only by the test of *materiality of "usefulness and reason"*]; *Spectrum Sys. Int'l. Corp. v. Chemical Bank*, 78 NY2d 371, 376 [1991]). With respect to discovery, in order to withstand a challenge to the disclosure request, the party seeking disclosure must satisfy the threshold requirement that the disclosure sought is "material and necessary" (*Kooper v. Kooper*, 74 AD3d 6 [2d Dept 2010]). Moreover the adequacy and circumstances and reasons for the disclosure will ultimately be determined by the trial court, and the "determination of whether a particular discovery demand is appropriate, are all matters within the sound discretion of the trial court, which must balance competing interests" (*Id.*; *Santariga v. McCann*, 161 AD2d 320 [1<sup>st</sup> Dept 1990] [the scope and supervision of disclosure is a matter within the sound discretion of the court in which the action is pending]).

The Court finds that defendant, Flushing Manor Nursing Home has failed to satisfy the threshold requirement that the IRS records sought are "material and necessary" (*Kooper v. Kooper*, 74 AD3d 6 [2d Dept 2010]). The Court finds defendant Flushing Manor Nursing Home's contention that plaintiff testified that she was to inherit everything from the decedent, and as such, moving defendant needs plaintiff's tax records, is unpersuasive.

The Court additionally finds that plaintiff is directed to provide defendant, Flushing Manor Nursing Home with all outstanding HIPAA compliant medical authorizations for the period of five (5) years from the plaintiff-decedent's accident within thirty (30) days from the date of service of a copy of this order with notice of entry.

4. That branch of the cross motion by defendant, Hunter

Ambulance-Ambulette Inc. seeking sanctions against the plaintiff pursuant to CPLR 3126 is hereby granted solely to the following extent:

To the extent that this defendant seeks to obtain IRS records, the Court finds that defendant, Hunter Ambulance-Ambulette Inc. has failed to satisfy the threshold requirement that the IRS records sought are "material and necessary" (*Kooper v. Kooper*, 74 AD3d 6 [2d Dept 2010]).

The Court additionally finds that plaintiff is directed to provide defendant, Hunter Ambulance-Ambulette, Inc. with all outstanding HIPAA compliant medical authorizations for the period of five (5) years from the plaintiff-decedent's accident within thirty (30) days from the date of service of a copy of this order with notice of entry.

5. That branch of the cross motion by defendant, New York Hospital Medical Center of Queens s/h/a New York Hospital of Queens seeking sanctions against the plaintiff pursuant to CPLR 3126 is hereby granted solely to the following extent:

To the extent that this defendant seeks to obtain IRS records, the Court finds that defendant, New York Hospital Medical Center of Queens s/h/a New York Hospital of Queens has failed to satisfy the threshold requirement that the IRS records sought are "material and necessary" (*Kooper v. Kooper*, 74 AD3d 6 [2d Dept 2010]).

The Court additionally finds that plaintiff is directed to provide defendant, New York Hospital Medical Center of Queens s/h/a New York Hospital of Queens with all outstanding HIPAA compliant medical authorizations for the period of five (5) years from the plaintiff-decedent's accident within thirty (30) days from the date of service of a copy of this order with notice of entry.

This constitutes the decision and order of the Court.

Dated: March 2, 2012

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**Howard G. Lane, J.S.C.**