

<b>Abroon v Gurwin Home Care Agency, Inc.</b>
2012 NY Slip Op 31534(U)
May 30, 2012
Supreme Court, Nassau County
Docket Number: 22249/10
Judge: Roy S. Mahon
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SCW

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

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**PARVIN ABROON,**

**Plaintiff(s),**

**- against -**

**GURWIN HOME CARE AGENCY, INC.,**

**Defendant(s).**

**TRIAL/IAS PART 5**

**INDEX NO. 22249/10**

**MOTION SEQUENCE  
NO. 3**

**MOTION SUBMISSION  
DATE: May 24, 2012**

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**The following papers read on this motion:**

<b>Order to Show Cause</b>	<b>X</b>
<b>Reply Affidavit</b>	<b>X</b>

Upon the foregoing papers the motion by the Defendant, brought by Order to Show Cause, for an Order pursuant to CPLR §5015, vacating and or modifying, in the interests of fairness and equity that portion of this court's Sua Sponte Order of April 17, 2012, which directed Defendant to fund an escrow account to bear the cost of a limited appointment of a guardian ad litem and pursuant to CPLR §1204, ordering the cost of the limited appointment of a guardian ad litem will borne by any judgment or settlement that is eventually obtained by Plaintiff or from the Plaintiff's own assets, is determined as hereinafter provided.

In pertinent part the Court in its prior Order dated April 17, 2012 set forth:

"Upon the foregoing papers, the motion by the plaintiff for an Order striking the defendant Home Care Agency, Inc. Answer or compelling the defendant Gurwin Home Care Agency, Inc., to provide discovery in connection with plaintiffs' earlier demands of the production of the accident/incident report, including any statements by any of the plaintiff's children, or precluding the defendant from contesting issues of liability or proximate cause, and the preclusion of using any of the medical records or incident reports not disclosed to the plaintiff; compelling the production of the records from the date of the accident, or an affidavit which states a search was performed and no records exist, as ordered by this Court on November 17, 2011; or precluding the defendant's

contesting the issues of liability or proximate cause to the extent of precluding the defendant from using any medical records not disclosed to plaintiff; compelling the production of the personnel file of Ms. Natacha Joseph, the home health aide on the date of question; awarding plaintiff costs and sanctions and the motion by the defendant for an Order granting a protective order pursuant to 42 USC §1396r[b][1][B][ii]; §1395i-3[b][1][B][ii]; Public Health Law §2805-m; and Education Law §6527(3), protecting as privileged from disclosure incident, quality assurance reports and employee files; denying plaintiff's motion to strike defendant's answer and/or precluding the use at trial and prompting plaintiff to pursue guardianship proceedings pursuant to Article 81 of the MHL, are both determined as hereinafter provided:

This personal injury action arises out of an alleged failure of the defendant by its employee Natacha Joseph to properly transport the plaintiff on a Hoyer Lift at the plaintiff's home located at 9 Chelsea Place, Apt 1R, Great Neck, NY on September 6, 2010 allegedly causing the plaintiff to fall resulting in personal injuries.

The Court initially observes that the defendant seeks an Order prompting plaintiff to pursue guardianship proceedings pursuant to Article 81 of the MHL. Such relief pursuant to Article 81 of the Mental Hygiene Law may be commenced by a certain statutory defined set of individuals (*see Mental Hygiene Law §81.06*) by way of special proceeding (*see Mental Hygiene Law §81.08*). The Court does not herein specifically address the issue of whether the defendant is qualified pursuant to the provision of §81.06(6) of the Mental Hygiene Law to commence a proceeding pursuant to Article 81.

The defendant premises the defendant's requested relief upon the plaintiff's October 14, 2011 deposition transcript (*see Defendant's Exhibit G*). While the plaintiff maintains through counsel that the plaintiff at times unresponsiveness in part was due to a language barrier, the Court notes that the transcript indicates that a Farsi interpreter was present for the deposition. While the plaintiff additionally sets forth that a guardian is not required, the text of the deposition raises significant issues of the plaintiff's competency and ability to represent her interests in this litigation. In this regard, the Court in **Barone v Cox**, 51 AD2d 115 (Fourth Dept., 1976) set forth:

"Incompetent persons become the wards of the court, upon which a duty devolves of protection both as to their persons and property. This duty is not limited to cases only in which a committee has been appointed, but it extends to all cases where the fact of incompetency exists" (*Wurster v Armfield*, 175 NY 256, 262; *Prude v County of Erie*, 47 AD2d 111, 113) (*Sengstack v Sengstack*, 4 NY2d 502, 509; and *see Matter of Lugo*, 8 AD2d 877, *affd* 7 NY2d 939; *Prude v County of Erie*, *supra*)." **Barone v Cox, supra at pg 118**

In this regard upon review of all of the foregoing, the Court, sua sponte, appoints Thomas J. Foley, Esq., 666 Old Country Road, Garden City, NY 11530 (516) 741-1110 as guardian ad litem for the plaintiff pursuant to the provisions of CPLR §1202. The guardian ad litem's appointment is for the limited purpose of interviewing the plaintiff and determining whether further guardianship proceedings are required and reporting to the Court his recommendations. The payment of the fees to the guardian ad litem pursuant to the provisions of CPLR §1204 shall be made by the defendant to the guardian ad litem

at an hourly rate not to exceed \$250.00 per hour plus disbursements with the defendant providing a lump sum payment of \$5000.00 prior to the rendering of services by Mr. Foley to be held in escrow by the guardian ad litem.

Based upon the foregoing, this action is **stayed** pending the report of the guardian ad litem and further order of the Court.”

The Court observes that the Defendant in substance contends that the Plaintiff rather than the Defendant should bear the cost associated with the guardian ad litem due to the “improper act” of the Plaintiff’s counsel in not having a guardian appointed (see affirmation of Kirandeep Madra at paragraphs 19 and 20) citing the *Board of Educ. of Northport-East Northport Union Free School Dist. v. Ambach*, 90 AD2d 227, 458 NYS2d 680 affirmed 60 NY2d 758, 469 NYS2d 669, 457 NE2d 775 certiorari denied 104 S.Ct. 1598, 465 US 1101, 80 L.Ed.2d 129 due to the Defendant’s contention as to the Plaintiff’s mental capacity.

Initially the Court observes that in the absence a “reversal, modification or vacatur of a prior judgment or order upon which [the Court’s April 17, 2012] order is based”, the Defendant’s reference to CPLR §5015(a)(5) is misplaced (see Madra affirmation at paragraph 11). As such that branch of the Defendant’s application which seeks an Order pursuant to CPLR §5015(a)(5), vacating and or modifying, in the interests of fairness and equity that portion of this Court’s Sua Sponte Order of April 17, 2012, which directed Defendant to fund an escrow account to bear the cost of a limited appointment of a guardian ad litem is denied.

In relation to the issue of the Plaintiff’s competency, this Court is charged with a duty to protect those individuals who are incapable of protecting themselves (see *Barone v. Cox, supra*). While the Court acknowledges that the Plaintiff’s deposition transcript raises concerns as to the Plaintiff’s competency (*supra*), the parties offer divergent and competing positions relative to the deposition with the Plaintiff maintaining that there were language issues but the Defendant maintaining that the Plaintiff lacked competence and that an Article 81 proceeding should be directed. It was against this background that the Court directed the appointment of the guardian ad litem with the attendant payment to be borne by the Defendant.

In examining this issue Justice Spatt in *The Matter of Lydia E. Hall Hospital*, 117 Misc.2d 1024, 459 NYS2d 682 set forth:

“By order to show cause signed October 15, 1982, petitioner Lydia E. Hall Hospital (herein referred to as the “hospital”) sought an order of this court authorizing the hospital to continue hemodialysis treatment of their patient Peter Cinque. This proceeding involved a determination by the Court as to whether Peter Cinque, while mentally competent, evidenced an intent to discontinue dialysis treatment.

Unfortunately, shortly after the signing of the order to show cause initiating this proceeding and prior to the first hearing, Peter Cinque lapsed into a coma. This required two hearings at the hospital and also necessitated the appointment of Thomas W. Stanisci as guardian ad litem for Peter Cinque.

In response to this motion, the hospital indicated that it had no objection to the fixing of the fee of the guardian ad litem “on condition that the order directs the petitioner and the additional respondents to share the sum equally.”

The additional respondents are the mother, sister and a brother of decedent Peter Cinque. The additional respondents oppose this application insofar as it requests payment of a fee by them. The additional respondents' counsel states that \$125.00 per hour rather than the \$150.00 per hour requested by the guardian would be appropriate. The main thrust of the opposition by the additional respondents is their contention that the sole responsibility for the payment of the guardian's fee is by the petitioner-hospital.

This application for compensation is governed by CPLR 1204 which reads, in part, as follows:

"A court may allow a guardian ad litem a reasonable compensation for his services to be paid in whole or part *by any other party* or from any recovery had on behalf of the person whom such guardian represents or from such person's other property." (Emphasis supplied)

[1][2] A guardian whose services were beneficial and necessary to adverse parties is entitled to compensation. *Livingston v. Ward*, 248 N.Y. 193, 161 N.E. 468 (1928). The duly appointed guardian ad litem is entitled to fair and reasonable compensation for his services. *Matter of O'Malley's Trust*, 286 App. Div. 869, 142 N.Y.S.2d 21 (2d Dept. 1955). Further, the compensation for the services of a guardian ad litem must be fixed with due regard to the responsibility, time and attention required in the performance of their duties . . ." *Matter of Becan*, 26 A.D.2d 44, 270 N.Y.S.2d 923 (1<sup>st</sup> Dept. 1966).

[3] In this case, the sole issue presented to the Court, in addition to determining the amount of compensation, is who should pay the guardian's fee. In this regard, this Court views as persuasive the argument of respondents' counsel that this proceeding "was brought by the petitioner in order to protect itself and if the proceeding was what the petitioner felt was necessary then the petitioner should bear the cost of the guardian."

Not only did the petitioner initiate this proceeding, but such action was contrary to the wishes of the respondents. The appointment of the guardian ad litem became necessary because of petitioner's attempt to obtain Court sanction of the request made by the decedent to terminate dialysis treatment.

There is authority for the payment of the guardian's compensation by the party who instituted the proceeding which required such appointment. See *Hines v. Hines*, 8 A.D.2d 804, 187 N.Y.S.2d 614 (1<sup>st</sup> Dept. 1959); *Seidel v. Werner*, 81 Misc.2d 1064, 367 N.Y.S.2d 694 (Sup.Ct.N.Y.Co. 1975), *aff'd* 50 A.D.2d 743, 376 N.Y.S.2d 139 (1<sup>st</sup> Dept. 1975).

[4] Accordingly, the court determines that fair and reasonable compensation for the guardian ad litem under the particular circumstances of this proceeding is the sum of \$1500.00, which sum is directed to be paid solely by the petitioner Lydia E. Hall Hospital within twenty (20) days after service of a copy of this order on the attorney for the petitioner. *The Matter of Lydia E. Hall Hospital supra* at 1024-1025."

**Matter of Lydia E. Hall Hospital supra at 1024-1025**

The Court finds the rationale of Justice Spatt to be compelling in relation to the instant case

based upon the Defendant's prior application herein to direct the Plaintiff to commence an Article 81 proceeding.

Based upon the foregoing that portion of the Defendant's motion which seeks an order pursuant to CPLR §1204, ordering the cost of the limited appointment of a guardian ad litem will borne by any judgment or settlement that is eventually obtained by Plaintiff or from the Plaintiff's own assets, is denied.

The Court observes that to the extent that the guardian ad litem determines that an Article 81 Proceeding should be commenced, the cost for said Proceedings shall be determined upon motion.

SO ORDERED.

DATED:

*5/30/2012*

*Roy S. Malton*  
.....  
J.S.C.

**ENTERED**

JUN 05 2012

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**