

Florian v Board of Mgrs. of Hillside Vil. Condominiums
2013 NY Slip Op 33743(U)
December 9, 2013
Sup Ct, Westchester County
Docket Number: 50430/2012
Judge: Joan B. Lefkowitz
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NYSCEF DOC. NO. 220

INDEX NO. 50430/2012

RECEIVED NYSCEF: 12/10/2013

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
DENNISE FLORIAN and JOEL FLORIAN,

Plaintiffs,

-against-

DECISION & ORDER

Index No. 50430/2012
Motion Date: Dec. 9, 2013

Seq. No. 3

BOARD OF MANAGERS OF HILLSIDE VILLAGE
CONDOMINIUMS, HILLSIDE VILLAGE CONDOS,
INC., HUDSON NORTH MANAGEMENT, LLC,
DAVID BENCIVENGA, WHITE PLAINS HOSPITAL
MEDICAL CENTER, CHARLES MULLIN, PA.,
LANY LORIEGA, RT, SHARI CAMPODONICO RN,
MELISSA BRENNAN NURSING TECHNICIAN, LORNA
MCFARLANE, RN, BRUNI AND CAMPISI PLUMBING AND
HEATING, INC., and WEIL-MCLAIN COMPANY, INC.,

Defendants.
-----X

LEFKOWITZ, J.

The following papers numbered 1 to 32 were read on this motion by plaintiffs for an order pursuant to CPLR 3126 compelling the medical defendants to respond to certain demands and produce phlebotomy/laboratory policies and procedures, prior written complaints, and personnel records.

Order to Show Cause - Affirmation in Support - Exhibits	1-30
Affirmation in Opposition - Exhibit	31-32

Upon the foregoing papers and the proceedings held on December 9, 2013, this motion is determined as follows:

Plaintiffs allege they were condominium owners in a building with a defective boiler, which caused a fire at the premises and caused smoke to fill plaintiffs' condominium unit. Plaintiffs allegedly suffered smoke inhalation and sought treatment at White Plains Hospital on October 21, 2011. It is alleged that during the collection of arterial blood samples, a nerve was damaged in plaintiff's right arm and she sustained a total loss of use and movement of the right arm (Plaintiffs' Exhibit A-1, Third Amended Summons and Complaint).

Plaintiffs served a June 19, 2013 demand for the table of contents for the policy and procedure manual in effect for the Hospital's emergency department and phlebotomy department on the date of the accident (Plaintiffs' Exhibit M, Supplemental Specific Demands Related to Policies and Procedures). Defendants served a July 5, 2013 response objecting to the demands for the policy and procedure manual for the emergency and phlebotomy departments on the grounds that they are not relevant (Plaintiffs' Exhibit N, Response to Specific Demands Related to Policies and Procedures). The Court issued an August 14, 2013 order directing defendant Hospital to provide a copy of the table of contents for the policies and procedures regarding emergency room treatment and phlebotomy on or before August 23, 2013 (Plaintiffs' Exhibit O). Defendants served an August 23, 2013 response providing the table of contents for the policies and procedures manual pertaining to the Emergency Department and the Laboratory Department (Plaintiffs' Exhibit P, Response to Specific Demands Related to Policies and Procedures). Defendants also provided a three page policy from the respiratory therapy arterial blood gas procedure manual pertaining to arterial blood gas puncture and analysis (Exhibit Q). In a letter dated September 5, 2013, plaintiffs demanded twenty-three sections of the laboratory department policies and procedures and fifteen sections of the emergency department policies and procedures (Plaintiffs' Exhibit R). Plaintiffs argue the laboratory department policies regarding arterial blood draws are relevant and have not been provided.

Plaintiffs argue defendants failed to provide written complaints concerning defective or improper blood collection procedures and written complaints concerning nerve injuries caused by defective or improper blood collection procedures at the Hospital for four years prior to and including the date of the incident at issue. Plaintiffs contend that prior similar complaints are discoverable because they may reveal information the Hospital possessed about the efficacy of its lab staff and their phlebotomy procedures (Plaintiffs' Attorney Affirmation, p. 10-11). Plaintiffs request that the Court conduct an *in camera* review of such prior written complaints to determine whether they are privileged under Education Law 6527(3). Plaintiffs also seek the personnel file for Usha Unnithan, the respiratory technician who allegedly damaged plaintiff's median nerve. Plaintiffs allege the Hospital was negligent in the hiring, retention, and supervision of Unnithan.

In opposition, defendants White Plains Hospital, Charles Mullin PA, Lany Loriga, RT, Shari Campodonico, RN, Melissa Brennan, and Lorna McFarlane argue plaintiffs fail to establish the laboratory department policies and procedures are discoverable. Defendants argue they provided the policy in their possession regarding the performance of an arterial blood draw. Defendants provided multiple responses stating they are not in possession of additional policies and procedures relevant to this case (Defendants' Exhibits F, J, L). Defendants argue White Plains Hospital does not have a phlebotomy department. Defendants provided the table of contents for the policies and procedures of the Emergency Department and the Laboratory Department in an effort to comply with plaintiffs' discovery demands (Plaintiffs' Exhibit P). Defendants argue the thirty-eight policies and procedures from the Emergency and Laboratory Departments that plaintiffs demanded do not contain any information regarding the proper procedure for performing of an arterial blood draw. Defendants agreed to provide the demanded policies and procedures from the Emergency Department, as plaintiff was treated in the Emergency Department. Defendants object to plaintiffs' demand for twenty-three policies and

procedures from the Laboratory Department as overbroad and not relevant, as the arterial blood draw at issue was performed by an individual in the Respiratory Therapy Department.

CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” The phrase “material and necessary” is “to be interpreted liberally to require disclosure, upon request, of any facts bearing 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 Publishing Co.*, 21 NY2d 403 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). Although the discovery provisions of the CPLR are to be liberally construed, “a party does not have the right to uncontrolled and unfettered disclosure” (*Merkos L'Inyonei Chinuch, Inc. v Sharf*, 59 AD3d 408 [2d Dept 2009]; *Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2d Dept 2007]). “It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims” (*Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The trial court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Auerbach v Klein*, 30 AD3d 451 [2d Dept 2006]; *Feeley v Midas Properties, Inc.*, 168 AD2d 416 [2d Dept 1990]).

Plaintiffs fail to demonstrate the twenty three policies demanded from the Laboratory Department are relevant to claims in this matter. It is unclear on this motion how the laboratory policies sought are relevant to the performance of an arterial blood draw. Plaintiffs argue they are entitled to explore whether laboratory department policies and procedures were not followed. The broad demand for policies for this purpose appears to be nothing more than a fishing expedition.

With respect to the branches of the motion seeking to compel the Hospital to provide prior written complaints regarding blood collection procedures and the personnel file for Usha Unnithan, defendants argue the Court should not consider those branches of plaintiffs' motion which seek discovery outside the bounds of the briefing schedule. The Court issued a September 12, 2013 briefing schedule for plaintiffs to move to compel production of laboratory department policies and procedures. The Court notes defendants have a pending motion to dismiss, which may impact whether plaintiffs are entitled to the discovery at issue. The Westchester Supreme Court Differentiated Case Management Protocol states that nothing stated therein prevents or limits counsel from making any motion deemed appropriate to best represent a party's interest. However, to foster the just, expeditious and inexpensive resolution of discovery disputes, pre-motion conferences are held to permit the Court an opportunity to resolve issues before motion practice ensues. When motion practice is deemed necessary, a briefing schedule is established by the court-attorney referee. The Court notes that the issues raised by plaintiffs, regarding prior written complaints and the personnel file, were not included in the briefing schedule issued. While plaintiffs may raise these discovery issues at a future conference and reserve their right to make a motion seeking further relief related to this discovery, the Court declines to consider these branches of the motion at this time.

In view of the foregoing, it is

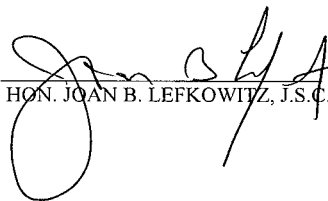
ORDERED that the branch of plaintiffs' motion for an order compelling defendants to produce certain Hospital policies and procedures is denied; and it is further

ORDERED that the branches of the motion seeking an order compelling defendants to provide certain prior written complaints and personnel records were not considered on this motion; and it is further

ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on January 8, 2014 at 10:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 9, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

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