

<b>Doe v Jewish Child Care Assoc. of N.Y., Inc.</b>
2014 NY Slip Op 32310(U)
September 2, 2014
Sup Ct, New York County
Docket Number: 107730/2011
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LUCY BILLINGS  
J.S.C.  
Justice

PART 46

John Doe

INDEX NO.

107730/11

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

Jewish Child Care Center

The following papers, numbered 1 to 3, were read on this motion to/for vacate the note of issue

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1

2-3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ :

*The court denies defendant's motion to vacate the note of issue and to enforce subpoenas pursuant to the accompanying decision. C.P.L.R. § 2308(b); 22 N.Y.C.R.R. § 202.21(e).*

**FILED**

SEP 02 2014

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/8/14

Lucy Billings

J.S.C.

LUCY BILLINGS

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

EA  
8/29/14  
13

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

JOHN DOE, an infant, by his mother  
and natural guardian, JANE DOE, and  
JANE DOE individually,

Index No. 107730/2011

Plaintiffs

- against -

DECISION AND ORDER

JEWISH CHILD CARE ASSOCIATION OF  
NEW YORK, INC.,

Defendant

**FILED**

-----x

SEP 02 2014

LUCY BILLINGS, J.S.C.:

**COUNTY CLERK'S OFFICE  
NEW YORK**

I. INTRODUCTION

Defendant moves to vacate the note of issue, claiming defendant has been prevented from completing disclosure from nonparties, and to enforce subpoenas duces tecum and ad testificandum served by defendant on nonparties in this action for injuries to the minor plaintiff at defendant's Pleasantville Diagnostic Center in Westchester County. C.P.L.R. § 2308(b); 22 N.Y.C.R.R. § 202.21(e). Plaintiffs filed their note of issue and served it by mail April 16, 2014, so that the motion to vacate it is timely. 22 N.Y.C.R.R. § 202.21(e). Defendant has not shown, however, what circumstances before April 16, 2014, prevented it from completing by then the disclosure it now seeks. Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d 481, 483 (1st Dep't 2010). Nor has defendant shown "unusual or unanticipated circumstances" that developed after the note of issue to warrant the depositions now sought or any other additional disclosure.

22 N.Y.C.R.R. § 202.21(d); Madison v. Sama, 92 A.D.3d 607 (1st Dep't 2012); Colon v. Yen Ru Jen, 45 A.D.3d 359, 360 (1st Dep't 2007); Pannone v. Silberstein, 40 A.D.3d 327, 328 (1st Dep't 2007); Schroeder v. IESI NY Corp., 24 A.D.3d 180, 181 (1st Dep't 2005). See Cuevas v. 1738 Assoc., L.L.C., 111 A.D.3d 416, 417 (1st Dep't 2013).

## II. DEFENDANT'S CLAIMED NEED FOR DISCLOSURE AT THIS STAGE

Defendant seeks to depose a Westchester County Department of Social Services (DSS) social worker, a Mount Pleasant Police Department detective, and four employees of Yonkers Public School (PS) 29 whom defendant describes as a department chair, a general education teacher, a special education teacher, and a classroom teacher. No party or nonparty thus far opposes defendant's subpoena for a deposition of Ana Gramlion, a Westchester Jewish Community Services (WJCS) case manager. As long as this deposition is to proceed, defendant does not seek to enforce its subpoena served on Elizabeth Bergman, a WJCS social worker.

Defendant maintains that it needs these witnesses' testimony to establish the minor plaintiff's baseline personality and daily activities before he entered defendant's diagnostic center, as compared to his personality and activities after the sexual assault at defendant's facility for which plaintiffs claim damages in this action. Nevertheless, defendant has not shown how baseline personality is better determined from teachers' observations than from records of testing data, nor indicated that their testimony will provide any more data than are in the

testing records. Nor has defendant shown why it has not ascertained the child's daily activities from the depositions of plaintiffs and other witnesses already conducted. Thus it is questionable how useful the teachers' depositions would be toward these objectives. Reich v. Reich, 36 A.D.3d 506, 507 (1st Dep't 2007); Bustos v. Lenox Hill Hosp., 29 A.D.3d 424, 426 (1st Dep't 2006); Rosenberg v. Scaringi, 279 A.D.2d 389, 390 (1st Dep't 2001); Monica W. v. Milevoi, 252 A.D.2d 260, 263-64 (1st Dep't 1999). See Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d 593, 594-95 (3d Dep't 2001).

Defendant complains that when it sought records from Yonkers PS 29, it did not produce records from two other schools the minor plaintiff had attended. Defendant never explains, however, why it did not subpoena those other schools' records directly from those schools or, if it did subpoena the records from their source but was unsuccessful, why it did not seek to enforce those subpoenas. Ahroner v. Israel Discount Bank of N.Y., 79 A.D.3d at 483.

Defendant further maintains that, because it lacks those records, and because Yonkers PS 29's own records are scant, it needs to ascertain from the minor plaintiff's teachers their assessment of his school performance since being sexually assaulted, as a component of evaluating his damages. Again, defendant does not explain why it did not subpoena the teachers' depositions immediately upon receipt of the PS 29 records, since at that point it possessed all the information necessary to

decide whether to seek further disclosure from the school, such as the teachers' depositions. E.g., Rosenberg v. Scaringi, 279 A.D.2d at 390; Tirado v. Miller, 75 A.D.3d 153, 161-62 (2d Dep't 2010). See Martinez v. KSM Holding, 294 A.D.2d 111, 112 (1st Dep't 2002).

Similarly, defendant maintains that, because the WJCS records show termination of the minor plaintiff's therapy with WJCS within several months of his departure from defendant's facility, due to his improvement and lack of need for further services, defendant now needs a Westchester County DSS social worker's deposition to evaluate his psychological damages. In this instance defendant does not indicate whether it ever subpoenaed any DSS records; if it did, whether it was unsuccessful; if it did not, why not; if it was unsuccessful, why it did not seek to enforce the subpoena; and, if it was successful, why those records are insufficient to evaluate the minor plaintiff's need for therapy and his damages. Finally, whatever those circumstances, yet again defendant fails to explain why it did not subpoena the DSS social worker's deposition immediately upon receipt of the WJCS records or any DSS records defendant found insufficient for its purposes. Defendant's lack of diligence or strategic decision in not seeking further disclosure before the note of issue does not constitute "unusual or unanticipated circumstances." 22 N.Y.C.R.R. § 202.21(d); Madison v. Sama, 92 A.D.3d 607; Miller v. Metropolitan 810 7th Ave., 50 A.D.3d 474, 475 (1st Dep't 2008);

Colon v. Yen Ru Jen, 45 A.D.3d at 359-60; Schroeder v. IESI NY Corp., 24 A.D.3d at 181.

Finally, defendant has not shown why it did not seek the Mount Pleasant Police Department detective's deposition before April 16, 2014, or what circumstances have developed since then to warrant this additional disclosure. Regarding this witness, defendant does not even suggest what necessary facts are within the detective's personal knowledge and unavailable previously. Thus again, it is questionable how useful and toward what objective the detective's deposition would be. Phoenix Life Ins. Co. v. Irwin Levinson Ins. Trust II, 70 A.D.3d 476, 477 (1st Dep't 2010); Bustos v. Lenox Hill Hosp., 29 A.D.3d at 426; Monica W. v. Milevoi, 252 A.D.2d at 263-64; Ruthman, Mercadante & Hadjis v. Nardiello, 288 A.D.2d at 594.

Regarding all the depositions defendant now seeks, although they would memorialize witnesses' testimony for impeachment purposes and in the event the witnesses are unavailable for the trial, defendant has not claimed that interviews of the teachers, social worker, or detective, which it may conduct at any time, would be insufficient for its purposes. Defendant does not indicate, for example, that it has attempted, but been unable to gain access to these witnesses or that its access to these witnesses has been restricted in any way. Ramsey v. New York Univ. Hosp. Ctr., 14 A.D.3d 349, 350 (1st Dep't 2005); Martinez v. KSM Holding, 294 A.D.2d at 112; Rosenberg v. Scaringi, 279 A.D.2d at 390; Monica W. v. Milevoi, 252 A.D.2d at 263. See

Matter of New York City Asbestos Litig., 66 A.D.3d 600, 601 (1st Dep't 2009); Feldman v. New York State Bridge Auth., 40 A.D.3d 1303, 1304-1305 (3d Dep't 2007); Dixon v. City of Yonkers, 16 A.D.3d 542, 542 (2d Dep't 2005); Flex-O-Vit USA v. Niagara Mohawk Power Corp., 281 A.D.2d 980, 980 (4th Dep't 2001).

III. THE ABSENCE OF GROUNDS TO VACATE THE NOTE OF ISSUE OR ENFORCE THE SUBPOENAS

Yonkers PS 29's production of records and defendants' failures to subpoena records from other schools or DSS and, after receiving PS 29's and WJCS's records, to subpoena depositions of the school's teachers or of social workers gave plaintiffs no reason to consider any disclosure outstanding or anticipated when they filed a note of issue and certified that disclosure was complete. Pannone v. Silberstein, 40 A.D.3d at 328; Quintanna v. Rogers, 306 A.D.2d 167, 168 (1st Dep't 2003); Mateo v. City of New York, 282 A.D.2d 313, 314 (1st Dep't 2001); Mayo v. Lincoln Triangle Assocs., 248 A.D.2d 363, 363 (1st Dep't 1998). See 22 N.Y.C.R.R. § 201.21(e). Nor were plaintiffs expected to read defendant's mind and anticipate that, after comprehensive disclosure, defendant still contemplated conducting a particular detective's deposition.

Insofar as defendant served its subpoenas for the nonparties' depositions before plaintiffs filed the note of issue and before any other deadline for completing disclosure, the timing of defendant's subpoenas would not bar their enforcement. Yet defendant's failure to show when it ever served the subpoenas and, consequently, whether service complied with C.P.L.R. §§

2303(a) and 3106(b) is but another reason to deny the subpoenas' enforcement upon this motion. Defendant's further failure to show that, by designating New York County as the place of each deposition, defendant has designated the county where the witness resides or is regularly employed likewise impedes the subpoenas' enforcement. C.P.L.R. § 3110(2). See WILJEFF, LLC v. United Realty Mgt. Corp., 82 A.D.3d 1616, 1619 (4th Dep't 2011); Amherst Synagogue v. Schuele Paint Co, Inc., 30 A.D.3d 1055, 1056 (4th Dep't 2006).

In sum, defendant has failed to explain why, before the note of issue, defendant did not seek the depositions it now seeks, what circumstances since the note of issue have revealed a need for the depositions, and why documents and interviews obtained or obtainable were inadequate, 22 N.Y.C.R.R. § 202.21(d) and (e), or to demonstrate service of the subpoenas designating the place of the deposition as required. C.P.L.R. §§ 2303(a), 3106(b), 3110(2). Consequently, the court denies defendant's motion to vacate the note of issue and to enforce subpoenas served or sought to be served by defendant on special education teachers Cynthia Caprentieri, Sharon King, Shari Pearce, and Barbara Pearsall; social worker Veronica Rivera; and detective Lauren Valentino. C.P.L.R. § 2308(b); 22 N.Y.C.R.R. § 202.21(e). The parties shall appear for a pre-trial conference October 23, 2014, at 2:30 p.m. in Part 46. 22 N.Y.C.R.R. § 202.26.

DATED: August 8, 2014

**FILED**

SEP 02 2014

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

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