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| <b>Smith v Northern Manhattan Nursing Home, Inc.</b>                                                                                                                                                                                                             |
| 2016 NY Slip Op 30415(U)                                                                                                                                                                                                                                         |
| March 9, 2016                                                                                                                                                                                                                                                    |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 805104/14                                                                                                                                                                                                                                         |
| Judge: Alice Schlesinger                                                                                                                                                                                                                                         |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
FREDERICK SMITH, deceased, by and through, CAROLYN  
LUNDY-SMITH, as Administratrix of the Estate of  
FREDERICK SMITH,

Index No. 805104/14

Mot. Seq. 001

Plaintiff,

-against-

NORTHERN MANHATTAN NURSING HOME, INC.,

Defendant.

-----X  
SCHLESINGER, J:

Before the court is a discovery motion brought by plaintiff seeking a supplemental response to her Demand for Documents and Information dated July 1, 2014 (the “Demand”).<sup>1 2</sup>

Factual Background

This is a wrongful death action commenced by plaintiff Carolyn Lundy-Smith on behalf of her husband, Frederick Smith. In 2008, Frederick sustained a fractured hip in a fall. Following hip replacement surgery, Frederick was sent to defendant Northern Manhattan Nursing Home, Inc. for rehabilitation, where he remained for approximately three years until his death on April 15, 2012. Plaintiff alleges that Frederick’s medical condition worsened dramatically during his stay at the nursing home and died because of the defendant’s failure to properly diagnose or treat serious medical conditions including bed sores, hypoglycemic episodes, anoxic brain injury,

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<sup>1</sup> The motion sought other forms of discovery, but since the motion was filed, defendant produced the requested responses to plaintiff’s satisfaction. Thus, those portions of plaintiff’s motion are moot.

<sup>2</sup> The defendant also brought a cross-motion related to various discovery issues. However, the court need not discuss the cross-motion in this decision, as the court disposed of same in a telephonic conference held on February 19, 2016 in which the parties expressed willingness to carry out the court’s proposed disposition, albeit over objection.

and septic shock.

### Facts Relating to Plaintiff's Motion

Plaintiff commenced this action on March 24, 2014. On July 1, 2014, plaintiff served the Demand at issue. At a compliance conference held on January 12, 2015, this court directed defendant to respond to the Demand by February 11, 2015.

On March 13, 2015, defendant served a response to the Demand, in which defendant objected to essentially all the individual demands contained in the global Demand. As to its objections, in certain instances defendant cited privilege under the Public Health and Education Law (*i.e.*, the “quality assurance privilege”), and in others, claimed that the demands were irrelevant, vague, overly broad, unduly burdensome and/or not reasonably calculated to the discovery of relevant evidence.

Approximately two weeks later, plaintiff's counsel sent a letter to defense counsel, seeking details regarding the basis of each specific objection. Plaintiff also argued in the letter that defendant's claims of privilege were baseless, stating that the quality assurance privilege was inapplicable to nursing homes unless it could be proven that the documents sought were actually prepared for quality assurance functions. In other instances, such as where such documents were prepared and collected in the ordinary course of the nursing home's operation pursuant to the regulations governing same, plaintiff argued that such documents would be discoverable. Plaintiff further stated that in the event defendant could support its claims of privilege, to provide a privilege log so that plaintiff could request the court to conduct an *in camera* review to determine admissibility of the documents.

On May 27, 2015, at a further compliance conference, this court ordered defendant to

provide a supplemental response to the Demand within 30 days. Defendant did not provide a further response until after the instant motion was filed. In reply, plaintiff argues that this supplemental response is insufficient, as a large majority of the “supplemental” responses are restatements of the original objections without further details.

As discussed below, plaintiff seeks disclosure relating to defendant’s billing to Medicaid, Medicare and/or private insurance carriers. Plaintiff’s counsel claims that such demands are “tailored to the plaintiff’s allegation that the defendant derived substantial revenue from government programs and, further, that it actively sought patients with medical needs similar to the decedent’s in order to increase its rate of occupancy and overall revenue.” Counsel further argues that “if the plaintiff establishes that the decedent did not ‘receive adequate and appropriate medical care’ pursuant to Public Health Law § 2803-c, the jury could reasonably conclude that the nursing home collected substantial revenue while skimming on resident care.”

### Discussion

Defendant shall provide a complete response to Demand 1. Defendant’s objections to this demand are meritless.

The court need not address the substance of Demands 2-8, as defendant has either provided responses or has agreed to provide further responses under separate cover. Defendant shall provide such further responses within 45 days of this decision.

Defendant need not further respond to Demands 9 and 10 at this juncture, as there is no evidentiary foundation for this demand.

Demand 11 is broken down into subsections (a) through (t). Defendant shall produce substantive responses to subsections (b), (h) through (q), and (s). Defendant need not respond

further to the remaining subsections of this demand at this juncture, as there is no evidentiary foundation for these demands.

Defendant shall respond substantively to Demand 12, but only to the extent that the documentation pertains to supervision and care by defendant's staff relating to the claims alleged in the complaint and bill of particulars.

Defendant shall respond substantively and fully to Demand 13.

Defendant shall respond substantively to Demand 14 except for subsection (j). These demands go to the heart of plaintiff's claim that the decedent received improper care at the defendant's facility.

Defendant shall respond substantively to Demands 15 and 16 but only to the extent that such documentation pertains to plaintiff's visitors. This information will go to potential witnesses who could testify as to plaintiff's condition while at the defendant's facility.

Defendant shall respond substantively to Demands 17 and 18. Defendant's objections here are meritless and border on frivolity.

Defendant need not respond further to Demands 19 and 20 at this juncture, as there is no evidentiary foundation for these demands.

Defendant shall respond substantively to Demand 21.

Defendant shall respond substantively to Demand 22 and all subsections therein.

Defendant shall respond substantively to Demand 23.

Defendant need not further respond to Demands 24, 25, 26, and 27 at this juncture, as there is no evidentiary foundation for these demands.

Defendant need not further respond to Demands 28, 29, 30, and 31 at this juncture, as

there is no evidentiary foundation for these demands.

Defendant shall respond substantively to Demands 32, 33 and 34.

Defendant need not further respond to Demand 35 at this juncture, as this demand appears to be cumulative at this juncture.

Defendant shall respond substantively to Demands 36 and 37, but only to the extent of the timeframe when plaintiff was in fact treated at the defendant facility and not before.

Defendant need not further respond to Demand 38 at this juncture, as there is no evidentiary foundation for this demand.

Defendant need not further respond to Demand 39 at this juncture, as there is no evidentiary foundation for this demand.

Defendant need not further respond to Demands 40, 41, 42, 43, 44, 45, and 46, at this juncture, as there is no evidentiary foundation for these demands.

Defendant shall respond substantively to Demand 47.

Defendant need not further respond to Demands 48, 49, 50, at this juncture, as there is no evidentiary foundation for these demands.

Defendant shall respond substantively to Demand 51.

Defendant need not further respond to Demands 52, 53 and 54 at this juncture, as there is no evidentiary foundation for these demands.

### Conclusions

The court believes that several of the demands discussed above are premature given the early stage of this case, one in which the defendant has not yet been deposed. On this note, the court, which has not ruled on the defendant's objections relating to privilege, is open to

[\* 6]  
reexamining the above demands later in discovery should discovery provide an evidentiary foundation warranting further disclosure. Unless otherwise noted, defendant shall provide its responses to the above demands within 60 days of today. Finally, the court declines to award either party sanctions.

Accordingly, it is hereby

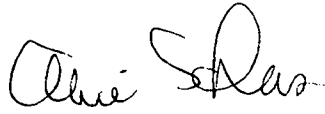
ORDERED that plaintiff's motion is granted to extent set forth in the memorandum decision. It is further

ORDERED that defendant's cross-motion is resolved in accordance with the telephonic conference held on February 19, 2016.

Counsel for plaintiff shall serve a copy of this decision and order with notice of entry within 20 days of entry.

Dated: March 9, 2016

**MAR 09 2016**

  
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J.S.C.  
**ALICE SCHLESINGER**