

Hughes v DeWitt Rehabilitation & Nursing Ctr.
2016 NY Slip Op 32510(U)
December 19, 2016
Supreme Court, New York County
Docket Number: 805261/2014
Judge: Alice Schlesinger
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
DIANE HUGHES, as Administratrix of goods, chattels,
and credits which were of EMELDA HUGHES,

Index No. 805261/2014

Plaintiff,

-against-

DEWITT REHABILITATION & NURSING CENTER,
DANIEL P. KLEIN, M.D. and MARY MOLLOY, N.P.,

Defendants.

-----X
SCHLESINGER, J.

Before this Court is a motion by plaintiff asking the Court to strike the answer of defendant Dewitt Rehabilitation & Nursing Center ("DeWitt"), pursuant to CPLR §3126. Counsel is also requesting costs and sanctions. This motion was returnable before me on November 16, 2016. On the following day, I issued an interim order, expressing my dissatisfaction with defendant DeWitt's response.

Particularly what was in issue were two sets of Nursing Home records. The decedent here, Emelda Hughes was a resident of DeWitt during the years 2012-2014. The action was commenced in 2014. As referenced in my Interim Order of November 17, 2016, the two sets of records were "communication books" and "a series of binders." The communication books were kept daily by the nursing staff. At the end of each shift, the nurse leaving would leave behind notes, or "communication" for the nurse coming on. The notes would refer to issues involving the residents.

The binder books, with titles referring to matters such as Pressure Ulcers with dates coinciding with Ms. Hughes residence were actually observed though not given to counsel

to be read, at a July 28, 2015 deposition. Counsel photographed these books and their titles so that when she moved for their production on September 10, 2015, they could be easily identified. They have never been produced.

Rather, as noted by plaintiff's counsel, she was first told in a letter dated October 5, 2015 that the demand for these very specific binders was "overboard and burdensome." But in an November 4, 2015 Compliance Conference Order, DeWitt was directed to advise plaintiff as to the specificity of the binders. The defendant was also directed to provide any rules and regulations relevant to pressure ulcers and wound care "as per D&I dated September 10, 2015 within 30 days."

Again the binders were not produced.¹ This prompted a letter dated December 14, 2015 by Ms. Gold, plaintiff's counsel, addressing the directives in the November Order which had not yet been complied with although the 30 days had passed. On January 13, 2016, counsel for DeWitt finally responded by letter to counsel's December 14, 2015 letter. The excuse given there for non-compliance was the "change of administrators at our defendant's facility." Defense counsel asked for another 30 days "so that we may provide you with the requested discovery and responses."

The 30 days passed with no production of the demanded discovery. Ms. Gold reminded Ms. Valdez, opposing counsel, of this lapse in a letter dated March 2, 2016. This was followed with multiple reminder letters. New counsel for DeWitt took over the case

¹As noted above they never have been produced. But in the months after the demand, DeWitt acted in such a way as to suggest it was simply contesting whether the binders had to be turned over to counsel for plaintiff. This changed in May 2016.

and Ms. Gold, respecting this, resent her discovery demands "so that you have a clear understanding of what has been demanded and what is due and owing." This was on April 25, 2016. But on May 23, 2016, plaintiff's counsel was told the following regarding the binders:

Our client unfortunately is not able to locate the requested binders nor does our client believe those binders contain any information regarding Emelda Hughes.

One wonders what the clients' belief was based on since some of the binder titles, "Weekly Wound Report, 2013-2014," the "Wound Rounds Attendance 2013 October to 2015 April", "Wound Care Management," and "Nosocomial Pressure Ulcer 2013", together with the decedent's condition of having serious decubitus ulcers, would seem to make the content of these binders indeed relevant (see Exhibit I to Gold affirmation).

This then prompted the current motion alleging spoliation of evidence deserving of serious sanctions and it prompted my interim order wherein I noted Scott Mair's response was not satisfactory and made no sense. A minor point here, though worthy of mention, is the conflicting information I received as to when Mr. Mair began his association with DeWitt. In the defendant's opposition, the Court was told Mr. Mair did not arrive at DeWitt until late 2014. This comported with its January 13, 2016 letter asking for more time as there had been a recent change of administrators at the facility. When I referred to this in my interim order, Mr. Mair responded that in fact he had been at DeWitt since 2010. Frankly, this scenario is one that smacks of smoke and mirrors.

I gave a further opportunity to defendant to provide details of the search, to make sense of their conclusions that the records were not relevant and to explain how these binders managed to be lost well after litigation had commenced and well after counsel had

made an explicit request for them. I said sanctions would be imposed if the "compliance continues to be unsatisfactory."

In fact, it has been. This time, I have received two affidavits: one from Scott Mair, the other from nurse Marie Lamour. Since Mr. Mair now tells me he has been at the facility since 2010, he says he has "firsthand knowledge of the record maintained by the facility during the years of 2012-2014 when Emelda Hughes was a resident at the facility."

In his paragraph "9", he discusses the binders. First he says the ones depicted in the May 2015 photos are no longer available. In fact the photos were taken in July 2015, but that is a truly minor point. He then provides the reason: "Due to a renovation of the facility AT THE END OF 2015, these binders were unfortunately lost" (emphasis added). The binders existed and were on display in July. They were explicitly requested on September 10, 2015. Neither of those dates fall at the end of 2015. No reasons are provided by Mair or DeWitt's counsel for why these records were allowed to be lost after being requested. Particularly egregious here is that counsel, in response as to the binders, misleadingly told Ms. Gold for months, until the end of May 2016, defendant was not turning over the subject discovery was that plaintiff was not entitled to the material, rather than acknowledging that the material was lost.

Frankly, I do not understand the entire scenario. If DeWitt's original position was that the documents were not discoverable, was that not a decision made by counsel and if it was, did she after September 10, 2015 have them in her possession to be able to come to such a conclusion.

It is kind of the reverse of Mair's conclusion that the binders contained no material of relevance despite having supposedly never explored their content. He attests to this in

his affidavit:

I have determined that these binders do not contain any information regarding the plaintiff, Emelda Hughes that is not already contained in the decedent's chart

(Mair affidavit, ¶ 10).

Mair also says "it has been determined," without saying by whom or on what basis, "that the binders have nothing to do with Ms. Hughes or her pressure ulcers or anyone else's in fact." Further, paragraph 11 tells me, in the same vague, passive constructed way, that it "has also been determined [that the binders] merely contain copies of wound care provided and/or accident reports maintained." Apparently, he has learned this from conversations with unnamed nurses during the years 2012 through 2014. But he insists they did not include any relevant material to the decedent.

Mair concedes that the protocols on wound care were in the lost binders, but insists those protocols were the same as the ones already provided. Lastly, in paragraph 14, Mair states they would include copies of previous Quality Assurance reports. But presumably, though not stated, these are not discoverable. My query, even for an in camera review?

Mair of course obtained his information from other employees. One assumes one such employee is Marie Lamour. Ms. Lamour states she has an independent recollection of these binders as she has seen their contents at various times during her employment at DeWitt. She then repeats the same facts as to their content as was recited by Mair. She also gives the same account of the unavailability of the binders due to a renovation of the facility. Finally, she describes how communication books were discarded after six months of use.

I draw the following conclusions from these self-serving, non-helpful statements.

One, that proper care was not taken to protect and preserve these binders. Two, that Ms. Lamour's recent recollections, at this stage of discovery are both too little and too late. Three, that sanctions therefore are in order.

While I understand Ms. Gold's frustration and desire for the ultimate sanction, striking the answer, I believe that would be too harsh. Rather, what I think is more appropriate and balanced is a direction by the trial judge to give a missing document charge to the jury as to the binders. I am also directing that sanctions of \$1000.00 be paid to Ms. Gold by the defense within 30 days of this decision, that is for the time and effort expended by her in her attempt to obtain these documents even after defense counsel knew or should have known they no longer existed.

Dated: December 19, 2016



Alice Schlesinger J.S.C.
ALICE SCHLESINGER