Gottlieb v City of New York
2017 NY Slip Op 31158(U)
May 24, 2017
Supreme Court, New York County
Docket Number: 805129/2015
Judge: Joan B. Lobis

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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ADRIAN GOTTLIEB, as Executor of the Estate of MARTIN GOTTLIEB, Deceased and ADRIAN GOTTLIEB, Individually,

Plaintiffs,

Index No. 805129/2015

-against-

Decision and Order

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT (N.Y.P.D.)/911 EMERGENCY MEDICAL SERVICES a/k/a EMS/ NEW YORK CITY FIRE DEPARTMENT (N.Y.F.D.), SENIORCARE EMERGENCY MEDICAL SERVICES, INC., NEW YORK ROAD RUNNERS, INC., MOUNT SINAI HEALTH SYSTEM, INC., d/b/a MOUNT SINAI ST. LUKE'S d/b/a ST. LUKE'S HOSPITAL, and DIAMOND FOODS, INC., d/b/a EMERALD NUTS,

Defendants.

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In motion sequence number four, Diamond Foods, Inc., d/b/a Emerald Nuts (Diamond) moves for discovery sanctions up to and including dismissal against plaintiff Adrian Gottlieb. Defendants St. Luke's-Roosevelt Hospital Center s/h/a Mount Sinai Health System, Inc., d/b/a Mount Sinai St. Luke's d/b/a St. Luke's Hospital (Hospital defendants) make a cross-motion to compel outstanding discovery.[1] In motion sequence number five, The City of New York and New York City Police Department (NYPD)/911 Emergency Medical Services a/k/a EMS/New

[1] The Court notes that the Hospital defendants use the incorrect caption. Further, the amended caption above does not reflect the discontinuances against SeniorCare and New York Road Runners. At the end of this order, the Court will amend the caption accordingly.

York City Fire Department (NYFD) (the City) move for similar relief. The Court consolidates motion sequences number four and five for disposition and resolves them as follows:

This case alleges medical malpractice and negligence in the care defendants provided to plaintiff from December 31, 2013 to January 1, 2014. Martin Gottlieb, plaintiff-decedent, suffered a cardiac event during the annual Midnight Run. As the result of a 911 call, SeniorCare dispatched a paramedic unit which arrived along with members of the New York City Fire Department (NYFD). Plaintiff asserts that NYFD did not respond properly to the call and plaintiff received negligent treatment at St. Luke's. Allegedly, these problems proximately caused Mr. Gottlieb's death. Plaintiff's brother Adrian Gottlieb is the administrator of his estate. A preliminary conference took place in this matter on November 29, 2016, providing for an October 17, 2017 Note of Issue deadline and an April 11, 2017 compliance conference. The motions at issue were scheduled for argument on April 11 as well. The motion and conference were adjourned in order to give plaintiff a chance to oppose the motion. On the adjourn dates of May 2 and the subsequent conference date of May 23, the parties could not resolve the issues. Accordingly, the conference was adjourned and these motions were taken on submission.

Diamond states it served an omnibus demand on February 22, 2016, and served additional demands on June 21 and 29, 2016, relating to plaintiff's then-companion case relating to plaintiff-decedent's treatment at the Hospital defendants. Plaintiff provided responses on September 17 which Diamond deemed deficient. The November 29, 2016 preliminary conference order directed plaintiff to provide a supplemental bill of particulars and responses to other

discovery demands within thirty days.[2] Diamond served a demand for financial discovery on December 12, 2016. When plaintiff did not comply in full by the December 29 deadline, Diamond wrote to plaintiff asking for the discovery, while not specifying which items were outstanding from its various demands. It followed up with an email on January 19, and then made this motion. Diamond contends that plaintiff's conduct here is so outrageous that it warrants dismissal of the complaint – or, alternatively, an order of preclusion or an order to compel.

The Hospital defendants seek an order to compel outstanding discovery, indicating their desire for harsher sanctions if there is noncompliance. The Hospital defendants do not appear to have served formal discovery demands but seek compliance with the preliminary conference order. The sole attempt to obtain the discovery prior to motion practice was a letter dated March 7, 2017. The letter specifies that the following items were outstanding as of the date of their letter: HIPAA compliant medical authorizations, collateral source authorizations, a supplemental bill of particulars, a readable copy of plaintiff-decedent's will, copies of and authorizations for plaintiff-decedent's tax returns commencing in 2004 and until the closing of the estate, copies of and authorizations for plaintiff Adrian Gottleib's tax returns for the same period and continuing to the present, and copies of documentation demonstrating that plaintiff-decedent provided financial support to plaintiff. Apparently the Hospital defendants made no additional effort to obtain the discovery before resorting to motion practice.

[2] Diamond Foods' motion does not indicate whether these were new or previously existing demands, and does not set forth the particular discovery it sought.

The City demanded a bill of particulars (BP) and other discovery on August 5, 2016. Plaintiff responded with a BP on September 19, 2016. In its October 25, 2016 letter, however, the City advised plaintiff by letter that the BP was deficient as to items 16-17, 21-24, 28, and 30. The City sent a second letter on November 7, 2016. At the preliminary conference on November 29, 2016, plaintiff was directed to provide a further BP relating to special damages, pecuniary damages, funeral expenses and a supplemental BP correcting the alleged deficiencies of plaintiff's September 19, 2016 BP. The City also sought HIPAA-compliant authorizations, collateral source authorizations, copies of the decedent's death certificate and of plaintiff's letters of administration or letters testamentary, and an authorization for a copy of the autopsy report. The City sent another letter to plaintiff on January 18, 2017 due to plaintiff's alleged noncompliance with the preliminary conference order, and served an additional notice for discovery and inspection on January 20, 2017. After plaintiff did not respond to the City's February 28, 2017 letter, the City made this motion, seeking an order striking the complaint. Alternatively, the City seeks an order compelling plaintiff to comply with all outstanding discovery or face preclusion. The City underscores the alleged relevance and discoverability of records relating to plaintiff-decedent's prior treatment with a cardiologist.

Plaintiff opposes the motions and the cross-motion. He submits documentation which he alleges constitutes full compliance with the outstanding demands. He further notes that there has not yet been a compliance conference. Plaintiff contends he has operated in good faith and that sanctions of any kind are unwarranted.

In reply, Diamond points out that plaintiff's discovery response is deficient as it states that many of the items are to be provided. In particular, it notes that the will, the tax returns of plaintiff-decedent and plaintiff, and an authorization for plaintiff's tax returns are still outstanding. Diamond challenges plaintiff's assertion that he has acted in good faith and states that in fact his conduct has been wanton and contumacious, meriting the striking of the pleadings. The Hospital adopts Diamond's statements and again requests an order compelling full compliance and awarding sanctions if plaintiff fails to comply. The City's reply cites the outstanding discovery described by Diamond, and additionally notes that its requests for authorizations for records from plaintiff-decedent's primary care physician, cardiologist, hospitalizations, and prior cardiologists are outstanding. Although plaintiff did provide two medical authorizations, the City states, plaintiff does not explain who the doctors are or when and for what purpose they treated plaintiff-decedent. This so-called "gamesmanship," the City states, warrants dismissal of the action. All three moving parties declare that although plaintiff states they did not seek a court conference, they did try to contact the Court to discuss their disputes but despite their best efforts were unable to agree upon a day and time for the telephone call.

Under NYCRR 202.7(c), an affirmation of good faith must "indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held." Denial of the motion is also appropriate where the motion is insufficiently detailed, does not show that the movant tried to obtain previously ordered discovery prior to initiating the motion or is otherwise inadequate. See, e.g., Chervin v. Mercura, 28 A.D.3d 600, 602, 813 N.Y.S.2d 746, 748 (2nd Dept. 2006). In particular, the First Department has found noncompliance with Rule 202.7 when a party resorts to

motion practice directly after any alleged failure to comply with the preliminary conference order. Barber v. Ford Motor Co., 250 A.D. 552, 552-53, 673 N.Y.S.2d 642, 643 (1st Dept. 1998). Here, the Hospital's perfunctory letter of March 7, 2017 does not constitute good faith, the one-sided communications by letter of Diamond are of questionable value as they do not set forth the discovery that is outstanding.

In addition, contrary to defendants' adamant positions, although plaintiff has been delinquent this is not a situation in which sanctions are warranted. Plaintiff has complied with the discovery demands in part in response to this motion – and, as he points out, there has been no further conference setting forth new dates and clarifying precisely which discovery is outstanding. Though the Court accepts defendants' statements that they attempted to schedule a conference call to address these disputes, they did not resolve them when the parties actually appeared before the Court. Instead, they continued to argue for dismissal or lesser sanctions.

Despite the above, as the parties have been unable to resolve their disputes despite numerous court appearances, resolution of the motion is appropriate at this point in the interest of judicial economy. As defendants have demanded the outstanding authorizations, will, and financial documents that the Court describes above, and as plaintiff has not asserted any privilege or objection to the discovery, it is

ORDERED that the motions and cross-motion are granted to the limited extent of directing plaintiff to comply with the discovery demands described in the Hospital defendants'

March 7, 2017 letter and in the City's February 28, 2017 letter, to the extent not already provided; and it is further

ORDERED that, notwithstanding the state of discovery by the June 20 conference date, the parties shall proceed with the conference. These are precisely the types of disputes the parties should be able to resolve without resorting to motion practice.

Dated: May 24, 2017

ENTER:

JOAN B. LOBIS, J.S.C.