

Ratigan v Sunshine Care Corp.
2017 NY Slip Op 32808(U)
June 26, 2017
Supreme Court, Nassau County
Docket Number: 600958/14
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

KATHLEEN RATIGAN, as Administratrix of the
Estate of PHYLLIS RATIGAN, Deceased,

TRIAL / IAS PART 31
NASSAU COUNTY

Plaintiffs,

Index No. 600958/14

- against -

Motion Sequence No. 001

SUNSHINE CARE CORP. d/b/a HEMPSTEAD
PARK NURSING HOME, SUNSHINE CARE
CORP. and HEMPSTEAD PARK NURSING
HOME,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

This is a nursing home negligence action alleging gross negligence and statutory violations. Issue was joined on April 18, 2014, and the plaintiff served a verified bill of particulars on May 20, 2014.

The plaintiff administratrix now moves (Sequence 001) pursuant to CPLR 3126 to strike the answer of the defendants, nursing care facilities. The plaintiff asserts the defendants' conduct consisted of deliberate and long-term failure to comply with the

directives contained in the preliminary conference order dated June 19, 2014, and court orders as charged during compliance conferences which directed the defendants to appear for depositions and to provide discovery.

The plaintiff alternatively moves pursuant to CPLR 3124 to compel the defendants to produce the designated witnesses for depositions and to provide the outstanding discovery documents, or in the alternative for such other and further relief as the Court deems just and proper.

The defendants oppose the motion. The defense asserts the defendants fully complied with the plaintiff's demands and the preliminary conference order. The defense avers the defendants provided more than 100 pages of adequate responses on August 10, 2016, to the plaintiff's notice for discovery and inspection, including but not limited to daily assignment sheets, CNA assignment sheets, visual check sheets, staffing levels and 24 hour reports. The defense maintains those things comprise items 1-5 of the plaintiff's demands. The defense notes the defendants appropriately objected to the plaintiff's demands numbered 6-9, 11 and 15 (case mix index, radiology books, consult books, MD communication notebooks and accucheck books), as irrelevant, vague, overly broad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence. The defense indicates the medical chart requested was already provided to the plaintiff. The defense asserts the reiteration of Nurse Fabian and Nurse Morgan's depositions are essentially the same as the February and August notices for discovery and inspection which were responded to on August 10, 2016.

The defense points out the defendants objected to the plaintiff's requests for negative outcome/incident reports as previously provided despite the overly broad demand seeking privileged materials under the Public Health and Education Law and HIPAA laws. The defense contends those documents concern other residents, and would include other residents' private healthcare information which is not relevant to this action. The defense notes the defendants appropriately objected to the plaintiff's demands for all personnel files, documents relating to demotion or personnel, written contracts, last known addresses of all formally employed nurses and any CNA, who may have treated the decedent during the period of the decedent's admission. The defense contended that documentary evidence request by the plaintiff was irrelevant, vague, overly broad, unduly burdensome and not reasonably calculated to the discovery of admissible evidence, since those files contain employee medical information, social security numbers and other private material that are privileged under the Public Health and Education Law and HIPAA laws.

The defense avers the defendants provided more than 100 pages of adequate responses, including documents comprising previously requested policies and procedures covering a variety of topics on November 14, 2016, to the plaintiff's notice for discovery and inspection dated August 9, 2016. The defense contends the plaintiff's letter dated August 8, 2016, is not the equivalent of a compliance order or a court order, nevertheless the defendants responded to the letter two days later. The defense points out no court order was violated by the defendants, and the plaintiff failed to attach an exhibit, any court order other than the preliminary conference order dated June 19, 2014.

The defense asserts the defendants produced three witnesses on behalf of the insured for deposition, including RN Ingrid Luyun on July 6, 2015, employed Licensed Practical Nurse Jacqueline Morgan, who testified on November 23, 2015, and the former Director of Nursing Eva Marie Fabian. The defense maintains the defendants continuously agreed to produce CNA Angela Bailey for deposition, but the plaintiff failed to contact the defense attorney to schedule that deposition. The defense asserts the last known address of former employee Mary Robinson and the former Assistant Director of Nursing Jodannah Venzon was provided to the plaintiff, but the plaintiff had not contacted the defense attorney regarding Ms. Bailey and the other witnesses, as former employees, not under the direction or control of the defendants.

In reply, the plaintiff contends the defense objections are late. The plaintiff asserts the defense opposition lacks a showing that the plaintiff's demands are palpably improper or that the documents sought are not discoverable so as to deny the plaintiff's discovery demands. The plaintiff maintains that the plaintiff has not received certain demanded discovery.

The Court determines the plaintiff does not satisfy either the CPLR 3126 or the CPLR 3124 burdens to show the defendants' conduct was willful and contumacious in failing to comply with court-ordered discovery (*see Morgenstern v Jeffsam Corp.*, 78 A.D.3d 913 [2d Dept. 2010]). The plaintiff fails to show that the nature of the defendants' conduct can be inferred from the defendants' repetition of failing to comply with discovery demands or court orders without a reasonable excuse or explanation (*Horne v*

Swimquip, Inc., 36 AD3d 859 [2d Dept. 2007]).

In opposition, the defendants make a satisfactory showing of discovery compliance. The defense provides exhibits detailing the lack of any willful or contumacious conduct by the defendants. Nevertheless, the Court directs defendants to provide the plaintiff with the items detailed in the plaintiff's reply papers, and produce for examinations before trial individuals named in the plaintiff's reply papers.

ORDERED that the motion is DENIED in all respects, and it is also,

ORDERED that the defendants are directed to provide the plaintiff with the items detailed in the plaintiff's reply papers, and produce for examinations before trial individuals named in the plaintiff's reply papers within 40 days after service of a copy of this order with notice of entry.

This decision will constitute the order and judgment of the Court.

So ordered.

Dated: **June 26, 2017**

ENTERED
JUN 29 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:



J. S. C.

NON FINAL DISPOSITION