

**Nussbaum v St. John's Episcopal Hosp.**

2017 NY Slip Op 33257(U)

April 17, 2017

Supreme Court, Queens County

Docket Number: 700695/15

Judge: Peter J. O'Donoghue

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, PETER J. O'DONOGHUE IAS PART MD  
Justice

-----X PETER J. O'DONOGHUE  
Rita Nussbaum, as Administrator of the Estate  
of Morton Nussbaum,

Index No.:700695/15

Plaintiffs  
-against-

Motion Date: 2/22/17

St. John's Episcopal Hospital, et. al.

Motion Seq. No:00

Defendants  
-----X

**FILED**  
APR 24 2017  
COUNTY CLERK  
QUEENS COUNTY

The following papers numbered as set forth below read on this motion by plaintiff for an order directing defendant Woodmere Rehabilitation and Health Care Center, Inc. ("Woodmere") to: (a) provide plaintiff with a complete response to plaintiff's Combined Demands dated May 24, 2016; (b) produce the discovery required in the Order dated August 25, 2016; (c) conduct the Court Ordered depositions of the defendant; and awarding sanctions and costs.

PAPERS  
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	253-271
Answering Affidavits-Affidavits-Exhibits.....	272-281
Reply Affidavits.....	283

Upon the foregoing papers it is Ordered that the motion by plaintiff for an order directing defendant Woodmere to: (a) provide plaintiff with a complete response to plaintiff's Combined Demands dated May 24, 2016; (b) produce the discovery required in the Order dated August 25, 2016; (c) conduct the Court Ordered depositions of the defendant; and awarding sanctions and costs is decided as follows:

In the Amended Verified Complaint plaintiff alleges in the First Cause of Action that defendant Woodmere was negligent in that it "lacked sufficient staff to care for decedent" (See Exh G. Paragraph 45 annexed to motion). Additionally it is alleged that it was negligent in the care rendered by allowing decedent to develop decubitus ulcers (paragraph 47 a-r). In the Third Cause of Action, it is alleged that Woodmere violated Public Health Law

2801-d, 2803-c and other statutes. The Fourth Cause of Action alleges Wrongful Death.

Based upon plaintiffs' Reply papers, the only unresolved discovery issues with respect to item (a) above, the Combined Demands served May 24, 2016, pertain to items (a) through (d) listed in paragraph 25.

(A) negative outcome and incident reports involving conditions and occurrences like those alleged in the complaint...

The branch of the motion seeking an Order compelling defendant Woodmere to produce these documents is granted to the extent that copies of these documents shall be provided for a period of three years prior to the date of occurrence alleged herein as the information requested is material and necessary, not overly broad or burdensome and Woodmere is compelled by regulations to maintain and collect such information. (See Simmons v Northern Manhattan Nursing Home, Inc., 52 AD3d 351 [1<sup>st</sup> Dep't 2008]).

(B) Personnel files of personnel who treated the decedent and ( C) All documents and information relating to the demotion of any personnel who treated the decedent...

In plaintiff's Reply papers, plaintiff narrows these demands to apply to nurses who treated the decedent and were "arrested for falsifying medical records". Plaintiff's request for an Order compelling production of these documents is granted given the causes of action alleged in the Complaint against Woodmere (see Simmons, id.)

(D) all documentation of and from the quality assurance committee regarding or referencing the decedent...

This branch of the motion is granted to the following extent since defendant failed to meet its burden of demonstrating "all documents... relate to quality assurance" (see Simmons, id.). To ensure that protected information is not disclosed, the Court shall conduct an *in camera* inspection of these documents. Woodmere shall provide a copy of these documents to Chambers within 30 days of service of a copy of this order with Notice of Entry and shall serve all parties with copies of the cover letter indicating the forwarding of the documents (see Simmons, id.).

The branch of the motion for an order compelling Woodmere to

produce the discovery required in the Order dated August 25, 2016, namely a certified copy of the complete chart maintained by Woodmere with respect to plaintiff decedent's admissions to Woodmere was previously granted in Order dated August 25, 2016. The Court recognizes that defendant produced an Affidavit pursuant to the Court's August 25, 2016 Order from Brenda Lopez, records clerk for resident charts at Woodmere (annexed to moving papers as Exh 7), stating that certain portions of decedent's chart were destroyed by water damage. The portions of the chart destroyed include "Assignment Sheets and/or Flow Sheets for the time periods of June 27, 2012-July 2, 2012 and November 2, 2012-January 19, 2013." However, the Court previously ordered Woodmere to produce a certified copy of the complete chart or an Affidavit from the person who conducted a search setting forth the results of the search and copies of all documents located, even if incomplete. While the above affidavit was provided, it is unclear if these Assignment Sheets and Flow Sheets constitute the entire chart. Nor is it stated whether the search revealed any portions of the chart. Finally, the Court notes that Woodmere did provide certain pages of decedent's chart in discovery. Woodmere shall produce a Supplemental Affidavit from Brenda Lopez as set forth above detailing the copies of the chart previously provided during discovery, whether any additional records were located through her search, and if so providing copies, & whether the records previously located and described as water damaged constituted the entire chart within 30 days of service of a copy of the within Order with Notice of Entry.

The branch of the motion for an Order compelling a second deposition of witness Vanessa Robertson, Director of Nursing at Woodmere, is granted. Initially, the Court notes that the parties appeared before this Court on October 26, 2016 with respect to other motions. At that time defendant Woodmere was orally directed to go forward with its deposition scheduled for next day October 27, 2016. Despite this Order Woodmere's deposition did not go forward until November 11, 2016.

The witness produced, Vanessa Robertson, testified that she was employed by Woodmere as Director of Nursing and commenced her employment in May 2016 (See EBT transcript Exh J P.8, LL 13-14 and p. 40, L. 22). She testified as to her prior employment history which involved reviewing medical records of residents to make sure that the employees of the facility complied with state and federal law (see for example Exh J., p. 39, LL 17-18) as well as making sure that the standard of care was being provided (p 34, LL 21-28 and p. 35 L. 1-7).

In the case at bar, plaintiff's counsel attempted to

question the witness utilizing the available records in order to determine whether Woodmere treated and/or documented the condition of decedent's skin from his initial admission to Woodmere & throughout his admission(s) at this facility and whether the treatment and/or documentation complied with state and federal regulations. Defense Counsel objected and prevented the witness from answering arguing that plaintiff was attempting to use the witness as an expert witness. The Court disagrees. The witness is a fact witness whose duties include reviewing medical records to determine whether Woodmere policies & procedures are being complied with; whether state and federal law are being complied with; and whether standard of care is being satisfied and she should have been allowed to answer such questions. Witness Vanessa Robertson shall be produced within 30 days of service of a copy of the within order with Notice of Entry for the limited purpose of answering questions pertaining to her duties as set forth above.

The branches of plaintiffs motion for an award of sanctions is denied.

Dated: April 17, 2017

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 Hon. Peter J. O'Donoghue, J.S.C.

**FILED**  
 APR 24 2017  
 COUNTY CLERK  
 QUEENS COUNTY