

Tarkoff v Winthrop Univ. Hosp.
2018 NY Slip Op 33820(U)
August 15, 2018
Supreme Court, Nassau County
Docket Number: 601410-17
Judge: Jerome C. Murphy
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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

**SHERYL TARKOFF, as Executrix of the Estate of
BEATRICE PUCHALSKY, deceased,**

Plaintiff,

- against -

**WINTHROP UNIVERSITY HOSPITAL, BENJAMIN
A. HAGENDORF, M.D., WINTHROP SURGICAL
ASSOCIATES, P.C., ROCKVILLE OPERATING,
L.L.C. d/b/a THE GRAND PAVILION FOR REHAB
& NURSING AT ROCKVILLE CENTRE, JOHN A.
OSTUNI, M.D., SOUTH NASSAU INTERNAL
MEDICINE ASSOC., STEVEN I. FRIEDMAN, M.D.,
STEVEN I. FRIEDMAN, M.D., P.C., SOUTH NASSAU
COMMUNITIES HOSPITAL d/b/a SOUTH NASSAU
WOUND CARE CENTER, SOUTH NASSAU
COMMUNITIES HOSPITAL d/b/a SOUTH NASSAU
COMMUNITIES HOSPITAL HOME CARE, and
SOUTH NASSAU COMMUNITIES HOSPITAL,**

Defendants.

TRIAL/IAS PART 14

Index No.: 601410-17

Motion Date: 6/6/18

Sequence No.: 001

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DECISION AND ORDER

The following papers were read on this motion:

Notice of Motion, Affirmation, Affirmation in Good Faith and Exhibits.....1
Affirmation in Opposition and Exhibits (2 Parts).....2
Affirmation in Opposition of Winthrop University Hospital and Exhibit.....3
Reply Affirmations (2) and Exhibits.....4

PRELIMINARY STATEMENT

Plaintiff brings this application for an Order, pursuant to CPLR § 3126 striking defendants,

Winthrop University Hospital, Rockville Operating, L.L.C. d/b/a The Grand Pavilion for Rehab & Nursing at Rockville Centre, John A. Ostumi, M.D., South Nassau Communities Hospital d/b/a South Nassau Wound Care Center, South Nassau Communities Hospital d/b/a South Nassau Communities Hospital Home Care and South Nassau Communities Hospital's answers for failure to comply with court-ordered discovery, or in the alternative; pursuant to CPLR § 3124 compelling the defendants to comply with discovery by a date certain, as previously ordered by this Court; and for such other and further relief as this Court deems just and proper. Opposition has been submitted to this application.

BACKGROUND

Beatrice Pulchasky was a patient at Winthrop University Hospital from October 23 through November 4, 2014, a resident at Grand Pavilion for Rehabilitation and Nursing from November 4, 2014 through December 18, 2014, and at South Nassau Communities Hospital, d/b/a South Nassau Wound Care from December 19 through January 13, 2015. She died on February 19, 2015. The nature of the claims in this action are set forth in the Bill of Particulars are as follows:

- Buttock Skin tear, Excoriated Necrotic Coccyx;
- Malnutrition;
- Right Buttock Skin Care;
- On Bilateral Buttocks with Partial Thickness Skin Loss;
- Right Buttock 4 x 3 cm;
- Left Buttock 7 x 4 cm.;
- Coccyx Ulcer, which became Stage IV;
- Sacrum Unstageable Ulcer, which became Stage IV;
- Surgical Debridement of Necrotic Tissue Sacrum;
- Left Heel Pressure Ulcer;
- Infected Sacral Ulcer;
- Sepsis;
- Death.

On June 29, 2017, plaintiff served extensive Notices to Produce upon defendants (Exh. "E" to Motion). Of 39 requested documents in the Notice for Discovery and Inspection and Production

of Hospital Record, South Nassau has provided 1, the Hospital Record, contingent upon payment of the cost for reproduction of the hospital record. Six are responded to as “not applicable”, 23 are responded to as “Objection”, 1 is objected to as privileged, 4 are rejected as overly broad, and the remainder are responded to as “Request taken under advisement”. As an example, Demand 3 requests a copy of the hospital protocol and/or policy and procedure relative to skin screens/assessments, the use of Braden Scales/Scores, Nutrition/Hydration Screens and Nutritional Consultations, in effect during plaintiff’s admission. It would be hard to imagine a more applicable item for discovery given the nature of the claimed injuries. Request 4 seeks a copy of the initial nutritional assessment of plaintiff, nutritional referrals for consultation, and nutritional reports. South Nassau objects on the ground of “privilege”.

Plaintiff has demanded copies of policy manuals regarding pressure ulcers, the measurement of ulcers, avoidance of ulcers, pressure ulcer flow sheets, documentation of pressure ulcers, pressure ulcer tracking forms, protocol and/or policy regarding debridement, protocol and/or policy relative to nutrition and hydration. These are all specific and not objectionable. The Court notes that South Nassau has produced the Policy Manual entitled Prevention and Management of Pressure Ulcers.

It is clear that many of plaintiff’s items for Discovery and Inspection of June 29, 2017 are objectionable. Most of the documents demanded are almost certainly contained in the Hospital Record. To the extent that photographs of decedent’s skin condition are available, they are to be produced. South Nassau has responded that the only photograph they had was marked for identification at a deposition.

Videotapes of the floor unit and the identity of all residents on the unit would be violative of other patients’ privacy, and need not be produced. Also inappropriate are copies of log-in sheets for visitors, identity, and last known address of former employees if no longer employed, of Administrators, Medical Director, Director of Nursing, and Assistant Director of Nursing. The Court cannot be expected to analyze each and every demand and response thereto. The starting point for this action is an 85 page Complaint. This matter was scheduled for the fourth time for a Certification Conference on August 15, 2018, and discovery is barely started. Counsel are to again appear for the conference on October 16, 2018. By September 27, 2018, counsel are to confer to go over appropriate and outstanding discovery demands, and to respond to those which are material and

necessary; which has long been interpreted as “useful”. They are to advise the Court as to what discovery remains open on October 16, 2018.

The scope of disclosure under Civil Practice Law and Rules § 3101 has been interpreted to be generous, broad and is to be interpreted liberally (*Allen v. Crowell-Collier Publ. Co.*), 21 N.Y.2d 403, 406 (1968). The statute was amended in 1993 to broaden the reach of disclosure devices. The general view is that the amendment did no more than codify what Courts had been doing in practice, effectively making the disclosure standards comparable to the standards of discovery contained in Rule 26(b) of Federal Rules of Civil Procedure. Rule 25(b)(1) is a general statement of the scope of discovery.

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

The limitations of Rule 26(b)(2)(i), (ii), and (iii) involve determinations by the Court that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

The scope of disclosure in Civil Practice Law and Rules § 3101(a) is more abbreviated, but

is generally regarded as having the same import as Rule 26. It provides as follows:

(a) Generally. There shall be full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action of defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

While it is difficult to ascertain to which defendant various demands were submitted, and what remains outstanding, the Reply Affirmations help to narrow the issues. In ¶ 3, plaintiff acknowledges that the hospital advised that it was not in possession of any other photographs of surveillance of plaintiff other than what has already been exchanged within the medical records maintained by defendant. Plaintiff states, however, that no medical records have been exchanged by South Nassau. The resolution of this is plaintiff's assertion that they forwarded a check for reproduction, which was never been processed. If plaintiff has submitted a replacement check, South Nassau is directed to provide a copy of the record to plaintiff by August 28, 2018.

With respect to the use of beds by plaintiff during her admission, South Nassau has previously indicated that it would inquire as to the type of beds used in their Supplementary Response on April 12, 2018, but have not provided the requested information (¶ 8).

¶ 9 requests Transfer Forms received from the facility from which decedent came, and sent to the facility to which she was transferred. It appears that South Nassau has provided the hospital

protocol for wound care. In ¶ 10, plaintiff reiterates her demand for documents indicating the daily cost of patient's care pursuant to Public Health Law § 2801-d, Nurse and Certified Nursing Assistant training documents relating to patient skin care and pressure ulcer care, and copy of the Pressure Ulcer Tracking Form. To the extent that there are documents other than what has already been provided with respect to the management and care of ulcers, plaintiff is entitled to them.

In Reply to Rockville Operating, LLC., d/b/a Grand Pavilion for Rehabilitation and Nursing, plaintiff points to 18 protocols, which may or may not exist, all relating to skin assessments and treatment of pressure ulcers. To the extent that Rockville Operating has such printed policies or protocols, they are directed to provide them to plaintiff. In ¶ 4, plaintiff refers to a response to a search for protocols for Minimum Data Sets and Resident Assessment, Admission Assessment Form, Pressure Ulcer Protocol, Nutrition Risk Protocol, Policies and Procedures concerning assessments, charting, pressure ulcers, and falls, as well as fall prevention.

To the extent that Rockville Operating has such written protocols, they are directed to supply copies to plaintiff.

Plaintiff has not provided a Reply addressing specific items with respect to other defendants. The Affirmation in Opposition on behalf of Winthrop University Hospital indicates that they are in full compliance with the plaintiff's demands.

It is noted that by Stipulation dated May 17, 2018, the affirmative defense of culpable conduct on the part of plaintiff, as alleged in the Answers of John A. Ostuni, M.D., South Nassau Internal Medicine Assoc., Steven I. Friedman, M.D., and Steven I. Friedman, M.D., P.C. are withdrawn.

To the extent that requested relief has not been granted, it is specifically denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
August 15, 2018

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

AUG 17 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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