

Jenack v Goshen Operations LLC
2019 NY Slip Op 33772(U)
August 21, 2019
Supreme Court Orange County
Docket Number: EF008129-2018
Judge: Sandra B. Sciortino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
WILLIAM JENACK, as Attorney-in-Fact for MARY RICE and WILLIAM RAMLOW, as Administrator of the Estate of ADELINE RAMLOW, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

GOSHEN OPERATIONS LLC d/b/a SAPPHIRE NURSING AND REHAB AT GOSHEN, RICHARD PLATSCHEK, ESTHER FARKOVITS, MACHLA AMRAMCZYK and ROBERT SHUCK,

Defendants.

DECISION AND ORDER
INDEX NO.: EF008129-2018
Motion Date: 07/16/2019
Sequence No. 3

-----X
SCIORTINO, J.

The following papers numbered 1 to 14 were read on this motion by plaintiff for an order directing the entry of plaintiffs' Proposed ESI Discovery and Production Protocol (ESI protocol) and plaintiffs' Proposed Order for the Production and Exchange of Confidential and Protected Health Information (PHI order):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion / Affirmation of Good Faith (Frei-Pearson) / Affirmation in Support (Frei-Pearson) / Exhibits A - H / Memorandum of Law	1 - 12
Affirmation in Opposition (Albani)	13
reply Memorandum of Law	14

Upon the foregoing papers, the motion is granted.

Plaintiffs bring this putative class action alleging that defendants provided unsafe and

inadequate care in a nursing home facility in violation of Public Health Law § 2801-d.¹ By Decision and Order dated February 11, 2019, defendants' motions for an order dismissing the complaint (Seq. #1) and for an order striking the pleadings of class certification and severing the claims of the individual plaintiffs (Seq. #2) were denied.

By Notice of Motion filed on April 24, 2019, plaintiffs seek an order directing the entry of the ESI protocol and PHI order. Plaintiff counsel provided the ESI protocol and PHI order to defense counsel, requesting that defendants stipulate to their entry or provide plaintiff counsel with redlined copies. Defense counsel responded only to the proposed ESI protocol, taking the position that the same is not required in this action.

This matter was scheduled for conference on June 25, 2019 for the purpose of addressing the instant motion and certain other discovery issues. On that date, plaintiff counsel appeared, ready and willing to participate in discussions to resolve the issues which led to the filing of the motion. Defendants sent a per diem attorney without authority to negotiate any terms. The matter was adjourned to the following day, with defendants directed to send an attorney who is a member of the firm representing them.

On June 26, 2019, plaintiff counsel again appeared, ready and willing to negotiate. An attorney who is a member of the firm representing defendants appeared as directed. However, the attorney was unable to secure the permission of her managing partner to participate in any negotiations, necessitating a decision on the instant motion.

Plaintiffs submit to the Court that the proposed ESI protocol and PHI order will minimize future discovery disputes and facilitate the parties' efforts to exchange materials while protecting the

¹Plaintiffs' motion for class certification (Seq. #4) is currently pending.

confidentiality interests of the parties and the members of the putative class. Specifically, plaintiffs assert that defendants have refused to produce ESI and that such refusal will continue in the absence of an order directing production. Plaintiffs contend that defendants' refusal to provide ESI or to negotiate the terms of the proposed ESI protocol frustrates the Court's interest in effective, expedient discovery.

Plaintiffs submit that the proposed PHI order is HIPAA-qualified and is necessary to enable the parties to exchange PHI for the purposes of this matter without violating HIPAA. The PHI order limits discovery to information that is relevant to this litigation, protects all PHI from public disclosure, and provides for the return or destruction of all PHI at the conclusion of this matter.

In opposition, defendants assert that the PHI order is not required, and will add unreasonable and unnecessary burden to the disclosure process. Defendants contend that all disclosure of PHI can be accomplished via the use of HIPAA authorization forms. Further, defendants contend that the entry of an ESI protocol is required only in actions assigned to the Commercial Division. Defendants claim that they are prepared to disclose all relevant ESI and that the proposed protocol is neither required nor necessary.

In reply, plaintiffs point out that some of the PHI which may be exchanged in this matter cannot be produced in the absence of a HIPAA-compliant protective order. Defendants' suggestion that the exchange can be accomplished by the use of authorization forms is impractical in this putative class action. Defendants suggest no procedure for securing such forms from absent members of the class.

Plaintiffs contend that this matter meets all the requirements for assignment to a Commercial Division and has not been so assigned only because this County has no such division. In any event,

plaintiffs assert that the proposed ESI protocol will only make it easier for defendants to comply with their obligation to produce discovery.

The Court has fully considered the submissions of the parties.

PHI Order

The Court finds that the entry of a HIPAA-compliant protective order is necessary to ensure the confidentiality of information exchanged in this matter. Disclosure of PHI pursuant to such an order is expressly authorized by 45 CFR § 164.512(e)(1)(i). Such an order will enable the parties to exchange information relating to all members of the putative class, including those who are not active participants in this litigation. Defendants suggest no viable alternative to facilitate the exchange of PHI relating to absent members of the putative class, and suggest no alterations to the proposed PHI order which would make the order less burdensome or further the Court's interest in efficient discovery.

ESI Protocol

The Court finds that the entry of a protocol for the discovery and production of ESI will facilitate the efficient exchange of discovery in this matter. Defendants are correct in arguing that this matter is not governed by the Rules of the Commercial Division, and that such a protocol is not *required* in this matter. However, they advance no argument as to why such a protocol is not *useful* in this litigation. Defendants' assertion that they are prepared to produce all relevant ESI rings hollow in light of their refusal to participate in pre-motion negotiations or in the Court's attempt to resolve the issues presented on this motion, or to comply with the Court's April 29, 2019 deadline to provide responsive discovery.

Civil Practice Law and Rules section 3101(a)(1) requires full disclosure of all matter material

and necessary in the prosecution or defense of an action from a party. Section 3103(a) permits the Court at any time to make an order regulating the use of any disclosure device and requires such an order to “be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

There appears to be no dispute that a significant volume of the materials to be exchanged in this matter are stored electronically. The entry of a protocol for the production of such materials serves to minimize the opportunity for disputes and delays in discovery, and to promote the efficient resolution of this litigation.

Conclusion

In light of the above, it is hereby ORDERED that plaintiffs’ motion is in all respects granted. Plaintiffs have submitted copies of the Proposed ESI Discovery and Production Protocol and the Proposed Order for the Production and Exchange of Confidential and Protected Health Information. The Court finds the form and content of both to be appropriate.

The Proposed ESI Discovery and Production Protocol and the Proposed Order for the Production and Exchange of Confidential and Protected Health Information both are So Ordered this date.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 21, 2019
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: Counsel of Record
VIA NYSCEF