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| <b>Lambert v Westhab, Inc.</b>                                                                                                                                                                                                 |
| 2019 NY Slip Op 34235(U)                                                                                                                                                                                                       |
| August 26, 2019                                                                                                                                                                                                                |
| Supreme Court, Westchester County                                                                                                                                                                                              |
| Docket Number: 56441/2017                                                                                                                                                                                                      |
| Judge: Joan B. Lefkowitz                                                                                                                                                                                                       |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

To commence the statutory time period 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 WESTCHESTER - COMPLIANCE PART**

-----X  
VIVIANNE LAMBERT as Parent and Natural  
Guardian of F.F., an Infant,

Plaintiff,

**DECISION & ORDER**

-against-

Index No.: 56441/2017  
Motion Date: August 26, 2019  
Motion Seq. No. 3

WESTHAB, INC., ANTHONY BOYD, and 40 EAST  
4<sup>TH</sup> STREET, LLC,

Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion by the moving defendant 40 East 4<sup>th</sup> Street, LLC ("moving defendant") for an order compelling the plaintiff Vivianne Lambert, as parent and natural guardian of the infant plaintiff F.F., to (i) provide medical authorizations and deposition testimony related to the infant plaintiff's younger sibling T.F., and (ii) submit to a further deposition related to any familial intervention by Child Protective Services ("CPS").

Order to Show Cause - Affirmation in Support - Anthony Boyd Affidavit- Exhibits A-G  
Affirmation in Opposition by Plaintiff- Exhibits 1-3  
NYSCEF File

Upon the foregoing papers and the proceedings held on August 26, 2019, this motion is decided as follows:

Plaintiff commenced this action on behalf of her infant son, F.F., by the filing of a summons and verified complaint on April 28, 2017. Plaintiff filed an amended complaint on December 21, 2018. It is alleged that there were various injuries sustained by the infant plaintiff F.F. as a result of F.F.'s ingestion of lead based paint at various residences<sup>1</sup> owned and operated by the defendants. According the pleadings, the premises were owned by the moving defendant, managed by Anthony Boyd, and repaired/maintained by Westhab, Inc.

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<sup>1</sup> According to the amended complaint, at all relevant times, the plaintiff's family relocated a total of three times, having resided in the following apartment buildings owned and operated by the moving defendant: (i) 20 East 4<sup>th</sup> Street, Mount Vernon, NY 10550 ("Premises #1"), (ii) 57 West 2<sup>nd</sup> Street, Mount Vernon, NY 10550 ("Premises #2"), (iii) 40 East 4<sup>th</sup> Street, Mount Vernon, NY 10550 ("Premises #3").

Issue was joined by the service of Westhab's answer dated July 17, 2017 as amended on January 7, 2019. Defendant Anthony Boyd, self represented, filed an answer on July 25, 2018 as amended on March 12, 2019. The moving defendant interposed an answer on February 5, 2019.

Plaintiff Vivianne Lambert was deposed in connection with this matter. At issue is plaintiff's counsel's directive at said deposition that Lambert refrain from answering any questions related to the infant plaintiff's younger sister T.F.'s medical history, autism diagnosis, blood testing of T.F. performed at or near the time that the plaintiff moved into the subject premises, as well as any prior intervention by CPS.

Counsel for the moving defendant filed the instant application for an order compelling the plaintiff to (i) provide authorizations and deposition testimony related to the infant plaintiff's younger sibling T.F.'s medical history and autism diagnosis, and (ii) submit to a further deposition related to any CPS intervention involving the plaintiff's family. Counsel contends that such information is relevant to this matter since both children "lived in the same home and had the same parents as well as the intervention of [CPS] in their home."<sup>2</sup> Counsel further contends that due to the plaintiff's deposition testimony that she initially contacted and retained counsel based on allegations resulting in autism (as opposed to lead poisoning), the moving defendant is entitled to the requested disclosure. Lastly, it is alleged that such information is not protected from disclosure under 22 NYCRR §221.2 as such information is not privileged, not subject to a court-ordered limitation of the scope of discovery, nor is such information plainly improper.

Plaintiff's counsel opposed the motion. First, counsel argues that the infant plaintiff's sibling T.F. is not a party to this action and has a right to privacy with respect to her medical records. Second, counsel notes that the moving defendant failed to proffer a supporting affidavit from a medical or genetic expert attesting that the medical history of a sibling (specifically, a diagnosis of autism) is directly correlated to the medical condition of the infant plaintiff. Third, counsel argues that information related to the infant plaintiff's sister T.F.'s medical history as well as any prior CPS intervention is confidential and privileged. Counsel highlights the fact that this court's decision dated January 28, 2019, in part, denied the co-defendant Westhab's request for disclosure of any family history of autism which the plaintiff herein claims was suffered by the infant plaintiff as a result of lead paint poisoning ingested by the infant at the premises owned and operated by the defendants.

#### *Analysis*

"CPLR 3101(a) is to be liberally construed 'to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity' (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). However, "unlimited disclosure is not required and supervision of disclosure is generally left to the trial court's broad discretion" (*Palermo Mason Constr. v Aark Holding Corp.* 300 AD2d 460, 461 [2d Dept 2002]) (internal citations omitted). The essential test is one based on "usefulness and reason" (*Andon v 302-304 Mott St. Assoc.*, 94 NY 2d 740, 746 [2000]) (internal citations omitted). In *Andon* the plaintiff mother sought damages resulting from

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<sup>2</sup> Doc. 72 ¶11.

alleged lead paint injuries to her infant son. The *Andon* court held that the plaintiff mother could not be compelled to submit to an IQ examination in order to determine whether the infant son's learning disabilities and developmental delays were genetic despite defendant's submission of a medical expert which opined that maternal IQ would be extremely relevant in assessing a child's potential cognitive development. In its determination, the *Andon* court emphasized that in these cases "discovery determinations are discretionary; each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (*Andon v 302-304 Mott St. Assoc.*, 94 NY 2d at 747).

In this case, co-defendant Westhab previously filed a motion (Motion Seq. 2) requesting the same relief as the moving defendant - namely, Westhab also sought disclosure of the infant-plaintiff's sibling T.F.'s medical records including any such records related to an autism diagnosis. This court, in applying the aforementioned disclosure principles, denied Westhab's motion.<sup>3</sup> In so holding, the court noted that the infant plaintiff's sibling T.F. is a non-party to this litigation and, as such, T.F. has not placed her medical condition in controversy and has not waived her privilege with respect to her medical history. Moreover, insofar as it is uncontroverted that the infant plaintiff F.F. has been diagnosed with autism, the movant failed to establish the relevancy of the hereditary nature of autism, nor has the movant established the relevancy, by affidavit of an expert or otherwise, concerning plaintiff's related medical history of learning disabilities, speech deficits, and/or psychiatric problems. The court's prior determination is the 'law of the case' and the doctrine of issue preclusion prevents the moving defendant from now re-litigating that issue at this juncture.

The moving defendant's motion for disclosure of any CPS intervention records involving the plaintiff's family is likewise denied. The moving defendant failed to establish the threshold evidentiary burden that such information related to any allegations of child neglect or abuse is in any way material or relevant to this litigation predicated on allegations of lead paint poisoning at their residence(s) owned and operated by the defendants. Instead, counsel merely states, in a conclusory fashion, that "the defendant should be permitted to question the plaintiff with regard to the intervention of Child Protective Services in the home as it is relevant to other environmental factors that may have impacted the infant plaintiff's behavior."<sup>4</sup>

Moreover, it is noted that Social Service Law §372 and §422 protect the confidentiality of CPS records related to reports of child abuse or neglect, which may include allegations ultimately deemed to be "unfounded". Social Services Law §422 limits the court's authority to direct the release of child protective services information to a number of specifically enumerated individuals, agencies, and other entities. Civil litigants are not on the enumerated list of individuals, agencies, or entities set forth in § 422 who are permitted to access the confidential records. Moreover, there is no statutory authority to expand the statutory list of those to whom access to the confidential records is authorized. Therefore, the moving defendant is not among the persons or entities specifically enumerated by Social Services § 422(4)(A) as

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<sup>3</sup> Decision and Order dated January 28, 2019 related to Motion Seq. No. 2 (Lefkowitz, J.) filed as Doc. 57.

<sup>4</sup> Doc. 72 ¶25.

being entitled to access the report(s) of infant plaintiff's purported abuse and the resulting investigation records.

Based on the foregoing, it is hereby

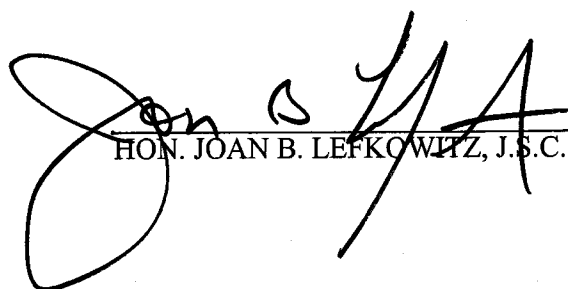
ORDERED that the moving defendant's motion is denied in its entirety; and it is further

ORDERED that counsel are directed to appear for the previously-scheduled conference in the Compliance Part, Courtroom 800, on August 28, 2019 at 9:30 A.M.; and it is further

ORDERED that plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon all parties within five days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
August 26, 2019



HON. JOAN B. LEFKOWITZ, J.S.C.

TO:

All counsel via NYSCEF

Anthony Boyd, self represented  
57 West 2<sup>nd</sup> Street, Apt. #1  
Mt. Vernon, NY 10550  
By First Class Mail

CC: Compliance Part Clerk