Marrero v Bestcare, Inc.
2020 NY Slip Op 31154(U)
March 16, 2020
Supreme Court, Bronx County
Docket Number: 27558/2018E
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK —BRONX COUNTY
PRESENT: GEORGE J. SILVER
Justice

NILDA MARRERO as Power of Attorney for DIEGO MARRERO, JR.,

Plaintiff,

- v -

BESTCARE, INC., MONTEFIORE HEALTH SYSTEM, INC., MONTEFIORE MEDICAL CENTER, and MONTEFIORE HMO, LLC d/b/a MONTEFIORE DIAMOND CARE,

Defendants.

Index No. 27558/2018E
Motion Seq. No. 002

DECISION & ORDER

Cross-Motion: ☐ **Yes** ■ **No**

Defendants MONTEFIORE HEALTH SYSTEM, INC. ("Montefiore Health System"), MONTEFIORE MEDICAL CENTER ("Montefiore Medical Center"), and MONTEFIORE HMO, LLC d/b/a MONTEFIORE DIAMOND CARE ("Montefiore HMO" collectively "defendants") move for an order, pursuant to CPLR §§ 3211 and 3212, dismissing the complaint against defendants Montefiore Health System and Montefiore HMO on the ground that "these non-treating entities owed no duty of care" to plaintiff. Defendants also seek an order dismissing plaintiff's claims of negligence against Montefiore Medical Center. Additionally, defendants seek an order, pursuant to CPLR § 3042, precluding plaintiff from offering evidence at trial as to the "particulars" that plaintiff failed to serve. Defendants further seek an order, pursuant to CPLR §§ 3124 and 3126, dismissing the complaint based on plaintiff's failure to comply with discovery demands. Lastly, defendants seek an order compelling co-defendant BESTCARE, INC. ("Bestcare") to provide defendants with copies of its medical records.

Plaintiff NILDA MARRERO ("Ms. Marrero"), as power of attorney for DIEGO MARRERO, JR. ("decedent" collectively "plaintiff"), opposes the motion. For the reasons discussed below, the court grants the motion in part.

BACKGROUND AND ARGUMENTS

This action was commenced with the filing of the summons and complaint on June 28, 2018. Plaintiff alleges that decedent sustained personal injuries due to defendants' failure to prevent the development and subsequent deterioration of decedent's pressure ulcers on or about January 1, 2014 through the present.

On September 17, 2018, prior to filing an answer, defendants served an affirmation of Tina Weinstein, Esq. ("Ms. Weinstein"), Vice President and Counsel of Risk and Loss Prevention at Montefiore Medicine Academic Health System, Inc., the corporate parent of Montefiore Health System. Defendants also served plaintiff with a stipulation of discontinuance as to Montefiore Health System and Montefiore HMO. In her affidavit, Ms. Weinstein states that Montefiore Health System is organized and operated as the parent corporation of the not-for-profit and for-profit subsidiaries within the Montefiore Health System. Ms. Weinstein also asserts that Montefiore Health System observes corporate formalities, and is a corporate entity separate and distinct from Montefiore Medical Center. Ms. Weinstein further notes that Montefiore Health System does not exercise dominion or control over Montefiore Medical Center, including the provision of health care services.

Similarly, Ms. Weinstein explains that Montefiore HMO is a health maintenance organization that is a limited liability company of Montefiore Health System, and that Montefiore Diamond Care is a managed long-term care plan offered through Montefiore HMO. Ms. Weinstein also states that Montefiore Health System and Montefiore HMO do not, and are not licensed to provide health care services to patients. Despite Ms. Weinstein's affirmation, plaintiff did not sign the stipulation of discontinuance as to Montefiore Health System and Montefiore HMO.

On October 10, 2018, defendants served an answer. Along with their answer, defendants served plaintiff with a demand for bills of particulars, combined demands, and demands for authorizations. Defendants served another demand on November 8, 2018 for authorizations for Senior Health Partner, Social Security, ESPEN, BestCare, and all hospitals and facilities at which decedent was hospitalized for alcohol and drug rehabilitation. On November 12, 2018, defendants served plaintiff with a notice to produce decedent's birth certificate and a copy of the power of attorney appointing Ms. Marrero as power of attorney for decedent.

On December 4, 2018, defendants served plaintiff with a formal letter demand for authorizations, including, *inter alia*, all nursing homes, rehabilitation facilities, Argus Community,

Jacobi Hospital, BestCare, and Medicaid. Defendants also served plaintiff with another demand for authorizations on January 3, 2019. By letter dated April 23, 2019, defendants demanded that plaintiff respond to all outstanding discovery and execute the stipulation of discontinuance as to Montefiore Health System and Montefiore HMO.

On May 9, 2019, plaintiff provided defendants with, *inter alia*, a response to defendants' demand for statements, information of witnesses, bills/collateral source information, photographs and videos, a copy of the power of attorney, medical records, and authorizations for Medicare, Medicaid, and social security. However, plaintiff objected to defendants' demand for an authorization for Espen since she was unable to find a provider by this name, but requested that defendants provide a complete name and address for this provider to take under advisement. Plaintiff also objected to defendants' demand for hospitals and facilities at which plaintiff was hospitalized for alcohol and drug rehabilitation as improper, overbroad, vague, and confidential.

Plaintiff also served defendants with verified bills of particulars on May 9, 2019. However, defendants assert that plaintiff's bills of particulars contained boilerplate allegations, and were identical as to Montefiore Medical Center, Montefiore Health System, and Montefiore HMO. By letter dated May 30, 2019, defendants advised plaintiff that they had not received properly executed authorizations for Medicare, Medicaid, and social security, and demanded copies of photographs of plaintiff's sacrum or videotapes taken at Montefiore Medical Center. Defendants also demanded the name of decedent's sister who resided with him.

On July 10, 2019, plaintiff responded to defendants' notice to produce dated November 12, 2018 and December 4, 2018. Plaintiff contends that she appropriately objected to defendants' demand for a copy of plaintiff's birth certificate as improper and irrelevant. Plaintiff also submits that she properly objected to defendants' demand for authorizations for the nursing homes at which decedent resided in August of 2010, and between 2008 to the present, since such demand is vague, overbroad, and unduly burdensome. Plaintiff further asserts that she does not recall the name(s) of the facilities responsive to this demand, and requests that defendants provide the names and addresses of the providers to take under advisement.

Defendants argue that the court should dismiss the complaint as to Montefiore Health System and Montefiore HMO because neither entity provided any medical care, treatment, or health services to decedent. According to defendants, no physician-patient relationship existed between decedent and these non-treating entities such as to give rise to a duty of care. Defendants

elaborate that in the absence of any duty owed to decedent, plaintiff cannot maintain any claims of negligence or malpractice against these defendants. Defendants highlight that plaintiff's bills of particulars and notice of medical malpractice specifically allege malpractice as to Montefiore Medical Center in its care and treatment of decedent between December 28, 2015 through January 5, 2016, and that plaintiff does not allege any claims separate and apart from those pertaining to decedent's care during this admission. Defendants also note that Montefiore HMO and Montefiore Health System are separate and distinct entities from Montefiore Medical Center, and did not provide any medical care to decedent. Defendants further point out that neither Montefiore HMO nor Montefiore Health System exercised dominion or control over the operations, including the provision of health care services at Montefiore Medical Center, and that neither entity is a hospital, or held itself out to be a medical facility.

In addition, defendants argue that all cause of actions alleging negligence against Montefiore Medical Center must be dismissed with prejudice. Defendants contend that plaintiff's complaint, bills particulars, and notice of medical malpractice allege medical malpractice with respect to decedent's treatment at Montefiore Medical Center in December of 2015, and that there are no claims of negligence apart from the causes of action sounding in medical malpractice.

Defendants also argue that plaintiff should be precluded "as to which particulars have been demanded but not served." According to defendants, plaintiff's claims are broad, vague, and non-specific as to the individual defendants. Defendant further advises that while plaintiff has served nine authorizations, three authorizations were not in proper form, and that plaintiff failed to serve authorizations for the facilities at which decedent was hospitalized for drug and alcohol rehabilitation as well as for the nursing homes at which plaintiff resided. Defendants also note that plaintiff has failed to identify the dates and locations of the photographs.

In opposition, plaintiff argues that contrary to defendants' assertion, Montefiore HMO provided medical care, treatment, and/or health care services to decedent through its credentialed medical providers. In support of her argument, plaintiff annexes an affirmation of a physician, Dr. Weinstein,[1] who explains that an HMO is a health maintenance organization that provides health services to its subscribers through its network of providers. Dr. Weinstein asserts that as an HMO, Montefiore HMO had a duty to ensure that plaintiff received appropriate medical services from its

[1] Plaintiff redacts the name of her expert physician, and only references "Weinstein Aff." in her opposition papers.

providers, and that through its providers, Montefiore HMO made direct treatment-related decisions as to decedent's care by approving and/or denying various treatment and services related to decedent's medical condition. Notably, Dr. Weinstein notes that Montefiore HMO's duty to assess decedent's condition and make specific determinations, arrangements, and supervisions through its credentialed providers related to decedent's care and treatment, and that Montefiore HMO's failure to provide plaintiff with appropriate care and treatment caused decedent's alleged injuries. Specifically, Dr. Weinstein observes that the Home Health Certification/Plan of Care from August 3, 2016 to February 3, 2017 stated "or as directed by Montefiore" in the provider section, and that letters sent to Best Care Home Health, Inc. dated August 28, 2017 and August 29, 2017 were written on "Montefiore" stationary, were signed by Giovanna Imburgia of the Montefiore HMO Care Management Team, and stated that defendants made decisions related to the approval or denial of patient care assistant services for decedent.

Plaintiff also annexes the affidavit of Ms. Marrero who states that contrary to defendants' contention, Montefiore Health System, Montefiore HMO, and Montefiore Medical Center each provided direct care, treatment, and health care services to decedent, her son. According to Ms. Marrero, defendants made treatment, coordination, and supervisory decisions about decedent's treatment based on their medical/nursing assessment of decedent's condition. Ms. Marrero also notes that she was the contact person for each defendant for all decisions related to her son's care, and that she would contact defendants to discuss the same. Specifically, Ms. Marrero asserts that she often complained to Montefiore HMO that it was not providing proper care and treatment to her son, and that following these conversations, Montefiore HMO sent nurses and other medical providers to assess and provide direct care and treatment to her son.

In addition, plaintiff argues that defendants' motion should be denied since there is extensive discovery outstanding in this matter, including defendants' complete charts and records and the depositions of all parties.[2] In that regard, plaintiff submits that because there are references to care provided by "Montefiore" and "Monte" in the records without any specification as to which entity such language refers to, further discovery is necessary to provide plaintiff with information material to the prosecution of this matter.

Plaintiff also argues that contrary to defendants' assertion, the complaint alleges causes of action for negligence and medical malpractice. According to plaintiff, defendants failed to submit

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[2] Plaintiff's arguments with respect to discovery will be set forth in the discussion section below.

INDEX NO. 27558/2018E
RECEIVED NYSCEF: 03/18/2020

an expert affidavit in support of their motion, and only submits a self-serving affidavit of Ms. Weinstein, who states that Montefiore Health System and Montefiore HMO do not provide health care services to patients, and owed no duty of care to decedent. Plaintiff also avers that Ms. Weinstein's affidavit fails to demonstrate that Montefiore Health System is separate and distinct from Montefiore Medical Center, observes corporate formalities, and exercises no dominion or control over Montefiore Medical Center. Plaintiff further maintains that there are material issues of fact with respect to defendants' duty to decedent.

Moreover, plaintiff argues that the complaint properly alleges causes of action that sound in medical malpractice and negligence. Plaintiff highlights that her third cause of action alleges, *inter alia*, that beginning on or about January of 2011 to the present, decedent was under the care of Montefiore Medical Center, that Montefiore Medical Center had a duty to provide proper medical/nursing services to decedent, and that decedent relied upon Montefiore Medical Center's care and treatment. Plaintiff also notes that the complaint alleges that defendants' care and treatment of decedent was improper, negligent, and careless. As such, plaintiff maintains that these allegations sound in negligence since they do not require medical expertise to ascertain whether there was a breach of duty.

BestCare also opposes defendants' motion. BestCare advises that it has provided a disk with the records to defendants at a prior court conference, and that it has provided defendants with its insurance information on July 10, 2019.

In reply, defendants argue that after they filed the instant motion, plaintiff served a supplemental bill of particulars setting forth identical allegations of medical malpractice related to defendants' failure to perform proper wound care, failure to guard against decedent's development of pressure ulcers, and failure to properly order and perform a debridement procedure on decedent's pressure ulcers. In that regard, defendants submit that there are no causes of action for negligent hiring or negligent supervision, or for breach of contract so as to justify plaintiff's allegation of negligence against Montefiore Medical Center.

Moreover, defendants posit that plaintiff failed to dispute that Montefiore Health System owed no duty of care to decedent, and had no physician-patient relationship with decedent. Similarly, defendants reiterate that there was no physician-patient relationship between plaintiff and Montefiore HMO, and that Montefiore HMO did not render any medical treatment to decedent. Defendants also highlight that plaintiff fails to establish that Montefiore Health System

and Montefiore HMO deviated from the standard of care, or caused decedent to develop pressure ulcers and osteomyelitis. Defendants further note that letters and service plans reflecting that "Montefiore" performed or directed wound care is consistent with care provided by Montefiore Medical Center, and does not demonstrate that Montefiore HMO provided any care to decedent, or had a physician-patient relationship with decedent.

Finally, defendants reiterate that plaintiff has not provided outstanding discovery. However, defendants have withdrawn the branch of their motion with respect to BestCare.

DISCUSSION

I. Dismissal against Montefiore Health System and Montefiore HMO

Plaintiff failed to show that Montefiore Health System and Montefiore HMO had a physician-patient relationship with decedent such as to establish a claim for negligence or medical malpractice against either entity. "[I]t is generally recognized that liability for medical malpractice may not be imposed in the absence of a physician-patient relationship" (*Zimmerly v. Good Samaritan Hosp.*, 261 A.D.2d 614, 614 [2d Dept. 1999] citing *Lee v. City of New York*, 162 A.D.2d 34, 37 [2d Dept. 1990]). "Such a relationship 'is created when the professional services of a physician are rendered to and accepted by another for the purposes of medical or surgical treatment'" (*id.*; *White v. Southside Hosp.*, 281 A.D.2d 474, 475 [2d Dept. 2001] ["[L]iability for medical malpractice may not be imposed in the absence of a physician-patient relationship"]). Accordingly, "There must be some showing that the *physician affirmatively* treated the patient or *affirmatively* advised him to be treated" (*Lee*, 162 A.D.2d at 37, *supra* [emphasis added]).

Here, there is no showing that Montefiore Health System or Montefiore HMO rendered any medical care or treatment to decedent such as to establish a physician-patient relationship. Indeed, plaintiff has failed to demonstrate that Montefiore Health System and Montefiore HMO had any relations with decedent for the "purposes [rendering] medical or surgical treatment," or attended to decedent in any capacity of a physician or medical professional (*see*, *id.* quoting *Murphy v. Blum*, 160 A.D.2d 914, 915 [2d Dept. 1990] ["[S]ince the physician was retained by the NBA solely for the purpose of advising whether the plaintiff would be physically capable of performing his duties as a referee and not for treatment or to advise the plaintiff, no physician-patient relationship existed"]). To be sure, as defendants correctly point out, neither Montefiore Health System nor Montefiore HMO is licensed to practice medicine, and neither entity provided

any direct medical care or treatment related to decedent's pressure ulcers (*Ingber v. Kandler*, 128 A.D.2d 591, 592 [2d Dept. 1987] ["It cannot possibly be found that a relationship existed between the respondent and the plaintiff's decedent that gave rise to a duty on the part of the respondent toward the deceased infant" where there was no showing that respondent had any "contact with [decedent,] saw any records relating to the case, or even knew [decedent's] name."]).

Moreover, plaintiff's assertion that Montefiore HMO had a duty to assess decedent's condition and make specific determinations, arrangements, and supervisions through its credentialed providers is insufficient to create a physician-patient relationship between Montefiore HMO and decedent. Notably, by plaintiff's own concession, Montefiore HMO provided medical care, treatment, and/or health care services through its providers; however, there is no allegation or evidence that Montefiore HMO, as a corporate entity, was capable of, or "affirmatively" rendered any medical care and treatment to decedent (Ms. Weinstein's affirmation; *Zimmerly*, 261 A.D.2d at 614, *supra*; *Lee*, 162 A.D.2d at 37, *supra*).

Similarly, plaintiff's argument that Montefiore HMO made "treatment-related decisions" as to decedent's care by approving and/or denying various treatment and services does not constitute the provision of medical care and treatment. Rather, such transaction relates to an internal administrative decision-making process that occurs after a physician has recommended, provided, or advised a course of treatment to decedent. Furthermore, Ms. Marrero's statement that Montefiore Health System and Montefiore HMO provided direct care and treatment to decedent absent any mention as to the name of individual who Ms. Marrero spoke to, and whether said individual was a physician who directly treated decedent's pressure ulcers is insufficient to establish that Montefiore Health System and Montefiore HMO owed a duty of care to decedent. Moreover, Ms. Marrero's alleged complaints to Montefiore HMO about decedent's care and treatment alone cannot form the basis of a physician-patient relationship between Montefiore HMO and decedent since the subject patient in this matter was decedent, and not Ms. Marrero.

Accordingly, based on the lack of a physician-patient relationship between decedent and Montefiore Health System and Montefiore HMO, the court finds that Montefiore Health System and Montefiore HMO did not owe a duty of care to decedent such as to give rise to a claim of negligence or medical malpractice. As such, plaintiff's claims against Montefiore Health System and Montefiore HMO must be dismissed.

II. Dismissal of Negligence Claims against Montefiore Medical Center

Plaintiff's claims against Montefiore Medical Center sound in medical malpractice. It is well settled that, "[t]he 'distinction between ordinary negligence and malpractice turns on whether the acts or omissions complained of involve a matter of medical science or art requiring special skills not ordinarily possessed by lay persons, or whether the conduct complained of can instead be assessed on the basis of the common everyday experience of the trier of facts'" (*Russo v. Shah*, 278 A.D.2d 474, 475 [2d Dept. 2000] [citations omitted]). "The critical factor [when determining whether the action sounds in medical malpractice or in simple negligence] is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached" (*Lippert v. Yambo*, 267 A.D.2d 433, 433, [2d Dept. 1999]). "When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence" (*id.*; *Morales v. Carcione*, 48 A.D.3d 648, 649 [2d Dept. 2008] ["Conduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician'"] [citations omitted]).

Here, based on the allegations set forth in plaintiff's complaint and bills of particulars, plaintiff's claims against Montefiore Medical Center "arose out of [a] physician-patient relationship," and was "substantially related" to the medical care and treatment rendered by Montefiore Medical Center (*id.* ["Here, the incident which resulted in the alleged injuries to the plaintiff arose out of the physician-patient relationship and was substantially related to the rendering of medical treatment to combat her neuropathy and other neuromuscular ailments"]; *Lippert*, 267 A.D.2d at 433–34, *supra* [Supreme Court properly determined that the action sounds in medical malpractice where the "incident arose out of the physician-patient relationship . . . and the duty owed to the plaintiff in the aftermath of medical treatment derived from the same duty owed as a result of the doctor-patient relationship"]). Indeed, plaintiff's complaint alleges that "it was the duty of defendant(s) . . . to provide proper and adequate home medical and nursing services to [decedent]," that decedent "submitted himself to the care and treatment" of the defendant(s), and that defendants "failed to employ the skill, care and diligence commonly and ordinarily possessed by, and required of physicians, nurses, aides and physician's assistants in the community." Plaintiff's complaint also asserts that defendants "failed to provide the necessary care and services" to decedent, failed to "monitor" decedent's condition, including decedent's

development and deterioration of pressure ulcers, and failed to "guard against the development of pressure ulcers."

Similarly, plaintiff's bills of particulars allege, *inter alia*, that Montefiore Medical Center failed to "treat" decedent in accordance with the "standards of care and treatment generally accepted in the community," failed to "adequately and properly examine" decedent, and failed to "perform a proper risk assessment" of decedent for the development of pressure ulcers (*see, Levinson v. Health S. Manhattan*, 17 A.D.3d 247, 247 [1st Dept. 2005] [allegations of damages resulting from physical therapy sounded in malpractice where the use of electrical stimulation employed by the therapist constituted an integral part of the rendering of professional medical treatment]; *Coursen v. New York Hosp.-Cornell Med. Ctr.*, 114 A.D.2d 254, 257 [1st Dept. 1986] [allegations with respect to Dr. Tiffany sounded in medical malpractice where it was alleged that as "part of the course of treatment and recuperation," Dr. Tiffany instructed plaintiff "to get out of bed and 'walk around' starting the same day as plaintiff's surgery"]; *see also*; *Scott v. Uljanov*, 74 N.Y.2d 673, 675 [1989]; *Mendelson v. Clarkstown Med. Assocs.*, P.C., 271 A.D.2d 584, 585 [2d Dept. 2000]). As such, based on plaintiff's allegations, a medical expert is necessary to opine whether Montefiore Medical Center's alleged acts or omissions constituted a departure from "sound medical practice" (*Coursen*, 114 A.D.2d at 257, *supra; McKinney v. Bellevue Hosp.*, 183 A.D.2d 563, 565 [1st Dept. 1992]). Therefore, defendants' application to dismiss plaintiff's claims of negligence against Montefiore Medical Center is granted.

III. Preclusion pursuant to CPLR § 3042

Plaintiff argues that defendants' application to preclude plaintiff from offering evidence at trial related to plaintiff's bill of particulars must be denied since defendants failed to submit an affirmation of good faith with their moving papers. Plaintiff also maintains that there is no showing that plaintiff willfully and contumaciously failed to provide discovery and/or supplement the bill of particulars. Specifically, plaintiff notes that while defendants never requested a supplemental bill of particulars until the instant motion, plaintiff served supplemental bills of particulars on July 25, 2019, which state that the date and location of defendants' alleged malpractice occurred from on or about January 1, 2014 and continuing through various periods to the present at decedent's home and at defendants' facility.

Defendants, however, argue that plaintiff's initial bill of particulars is unresponsive, broad, and vague, and that plaintiff's supplemental bills of particulars contain open-ended dates as to the alleged malpractice, as well as vague and general allegations of negligence as to all defendants.

Pursuant to CPLR § 3042(c), "If a party fails to respond to a demand [for a bill of particulars] in a timely fashion or fails to comply fully with a demand, the party seeking the bill of particulars may move to compel compliance, or, if such failure is willful, for the imposition of penalties."

Here, because plaintiff's claims against Montefiore Health System and Montefiore HMO are dismissed, *supra*, plaintiff need not supplemental the bill of particulars with respect to these defendants. However, plaintiff's supplemental bills of particulars served on July 25, 2019 contain nearly identical claims against Montefiore Medical Center and BestCare. Moreover, as defendants correctly highlight, plaintiff's supplemental bill of particulars vaguely identifies the dates of the alleged malpractice as "January 1, 2014 and continuing through various periods until the present," with no specification as to the relevant periods of time, or where the alleged malpractice occurred during the relevant periods.

Accordingly, plaintiff is directed to provide separate bills of particulars with specific allegations as to each individual defendant within 30 days of this decision. Plaintiff is further directed to identify the relevant dates or periods of time of the alleged malpractice, and where such malpractice occurred during the relevant periods of time within 30 days of this decision. However, based on the absence of any showing that plaintiff's conduct was willful or contumacious, defendants' application for preclusion pursuant to CPLR § 3042 is denied.

IV. Dismissal Based on Plaintiff's Failure to Comply with Discovery Demands

CPLR § 3101 mandates "full disclosure of all matters that are material and necessary." Parties to an action are entitled to reasonable discovery "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Fell v. Presbyterian Hosp. in City of New York at Columbia-Presbyterian Med. Ctr.*, 98 A.D.2d 624, 625 [1st Dept. 1983]). CPLR § 3124 allows a party to compel disclosure when a person has failed to comply with a request, notice, interrogatory, demand, question or order.

CPLR § 3126 gives courts the discretion to impose penalties including dismissal, upon parties who willfully fail to disclose information which the court orders to be disclosed. "A court

may, *inter alia*, issue an order 'striking out pleadings or ... rendering a judgment by default' as a sanction against a party who 'refuses to obey an order for disclosure or wilfully [sic] fails to disclose information which the court finds ought to have been disclosed'" (*Argo v. Queens Surface Corp.*, 58 A.D.3d 656, 656 [2d Dept. 2009]; *see also, Schwartz v. Suebsanguan*, 15 A.D.3d 565, 566 [2d Dept. 2005] ["[W]illful and contumacious conduct can be inferred from [plaintiff's] repeated failure to adequately respond to discovery demands and court directives to comply with the demands, and his inadequate explanations for his failures to comply"]; *Rowell v. Joyce*, 10 A.D.3d 601 [2d Dept. 2004] ["[T]he willful and contumacious character of the plaintiffs' failure to respond to discovery can be inferred from their repeated refusals to comply with the respondents' discovery requests, even after being directed to do so by court order, as well as the absence of any explanation offered to excuse their failures to comply."]).

Defendants argue that plaintiff has not served authorizations for prior hospitalizations, Medicare, and social security (in proper form), or other rehabilitation and nursing facilities at which decedent was hospitalized. Defendants also note that by correspondence dated August 12, 2019 and August 28, 2019, defendants served plaintiff with a demand for an authorization for the New York State Adult Protective Services. To date, defendants assert that plaintiff has failed to provide proper authorizations for social security, prior hospitalizations, and rehabilitation facilities at which decedent was hospitalized.

Based on the foregoing, plaintiff is directed to provide a properly executed authorization for social security within 30 days of this decision. Defendants shall send plaintiff a letter identifying the names of the relevant nursing homes at which decedent resided within 14 days of this decision, and plaintiff shall thereafter provide authorizations for said nursing homes within 30 days. Plaintiff is further directed to identify the dates and locations of any photographs provided to defendants within 30 days of this decision.

However, based on the lack of a proper foundation upon which to request authorizations related to any drug or alcohol rehabilitation facilities at which decedent may have received treatment, defendants' request for the same is denied. Likewise, defendants have not shown a sufficient basis upon which to demand an authorization for the release of records from the New York State Adult Protective Services (*Jordan v. City of New York*, 137 A.D.3d 1084, 1084 [2d Dept. 2016] ["A party is not entitled to unlimited, uncontrolled, unfettered disclosure"]; *Pomona Med. Diagnostic P.C. v. Adirondack Ins. Co.*, 36 Misc. 3d 127(A) [1st Dept. 2012] [Parties "will

not be allowed to use pretrial discovery as a fishing expedition when they cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions"] citing *Devore v. Pfizer Inc.*, 58 AD3d 138, 144 [1st Dept. 2009]). Accordingly, both requests are denied with leave to renew. Similarly, defendants' request to dismiss the complaint is denied.

Consequently, it is hereby

ORDERED that defendants' application to dismiss complaint and all claims against defendants MONTEFIORE HEALTH SYSTEM AND MONTEFIORE HMO pursuant to CPLR §§ 3211 and 3212 is GRANTED; and it is further

ORDERED that the clerk is directed to enter judgment, dismissing this case against MONTEFIORE HEALTH SYSTEM AND MONTEFIORE HMO, respectively; and it is further

ORDERED that the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX – PART 19A

NILDA MARRERO as Power of Attorney for DIEGO MARRERO, JR.,

Plaintiff,

- v -

BESTCARE, INC. and MONTEFIORE MEDICAL CENTER,

Defendants.

Index No. 27558/2018E
Motion Seq. No. 002

DECISION & ORDER

ORDERED that defendants' application to dismiss plaintiff's claims of negligence against MONTEFIORE MEDICAL CENTER is GRANTED; and it is further

ORDERED that defendants' application to preclude plaintiff from offering evidence at trial pursuant to CPLR § 3042 is DENIED; and it is further

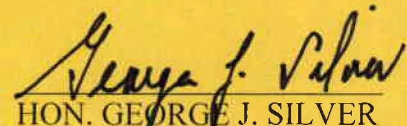
ORDERED that defendants' application to dismiss the complaint based on plaintiff's failure to comply with discovery demands is DENIED; and it is further

ORDERED that plaintiff is directed to comply with the court's directives as indicated above; and it is further

ORDERED that the parties are directed to appear for a compliance conference on June 24, 2020 at 851 Grand Concourse, Room 600 (Part 19A), Bronx, New York 10451, to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: March 16, 2020



HON. GEORGE J. SILVER

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

HON. GEORGE J. SILVER