

**Huger v Sanz**

2020 NY Slip Op 34659(U)

August 12, 2020

Supreme Court, Bronx County

Docket Number: Index No. 21214/15

Judge: Joseph E. Capella

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This opinion is uncorrected and not selected for official publication.

**NEW YORK SUPREME COURT - COUNT OF BRONX  
PART 23**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX**

-----X  
**JOANN HUGER,**

Plaintiff,

- against -

**JAVIER SANZ, M.D., ANGEL SANZ SALVO, M.D.,  
THE MOUNT SINAI HOSPITAL, ICAHN SCHOOL  
OF MEDICINE AT MOUNT SINAI, and THE  
CARDIOVASCULAR INSTITUTE,**

Defendants.

-----X  
**THE MOUNT SINAI HOSPITAL and ICAHN SCHOOL  
OF MEDICINE AT MOUNT SINAI,**

Third-Party Plaintiffs,

- against -

**ACCESS PRIVATE DUTY SERVICES, INC.**

Third-Party Defendants.

-----X  
The following papers numbered 1 to 4 read on this motion, noticed on October 18, 2019, on the Motion Calendar of \_\_\_\_\_.

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION, AFFIDAVITS & EXHIBITS	1
ANSWERING AFFIDAVIT AND EXHIBITS	2 -3
REPLY	4

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THIS MOTION IS DECIDED AS FOLLOWS:

Plaintiff alleges that defendants have not provided a variety of discovery items, and seeks an order striking defendants' answer. (CPLR § 3126(3).) According to

Case Disposed   
Settle Order   
Schedule Appearance

Index #: 21214/15

**DECISION/ORDER**

Present:

**Hon. Joseph E. Capella**  
J.S.C.

plaintiff, the following items are allegedly outstanding:

- (1) Table of Contents for the Cardiovascular Institute/Cardiac MR/CT Program,
- (2) Table of Contents for Cardiology, or Affidavit stating that previously disclosed Table of Contents pertain to Cardiology,
- (3) Order for plaintiff's July 28, 2014-CTA,
- (4) Log book for plaintiff's July 28, 2014-CTA,
- (5) Name of Chief of Radiology,
- (6) Notarized affidavit of Nurse Cartwright,
- (7) Appointment book for plaintiff's July 28, 2014-CTA,
- (8) Employment contract for Nurse Smith,
- (9) Incident/Quality assurance report,
- (10) Affidavit stating that Field Service Reports previously provided were the ones from the Contrast Injectors used on plaintiff, and are a complete copy of said reports from January 1, 2013, through January 1, 2015,
- (11) Employment file for Nurse Smith,
- (12) Document(s) showing Nurse Smith's dates of employment,
- (13) Document(s) showing Nurse Smith's position during her employment,
- (14) Document(s) showing Nurse Smith's qualifications as a Registered Nurse,
- (15) Document(s) setting forth Nurses' duties, responsibilities and qualifications for the General Medicine Unit,
- (16) Copy of phone record for July 28, 2014, illustrating the time Dr. Sanz called Dr. Glasser,
- (17) Copy of Policies and Procedures for Radiology Department referenced in letter from plaintiff's attorney dated July 14, 2019.

According to defendants, they responded to plaintiff's discovery demands on May 3, 2019, including providing plaintiff a copy of the Table of Contents for Cardiology on May 3, 2019, a copy of which is annexed as an exhibit to their opposition papers. It is not clear from said copy that it is in fact the Table of Contents for Cardiology, and therefore, an affidavit from someone with personal knowledge attesting to its authenticity is required. Defendants also allege that they complied with plaintiff's request for an Incident and/or Quality Assurance Report as it pertains to plaintiff's July 28, 2014-CTA, when they provided a copy of their "Event Discovery Report" on May 3, 2019. A review of this report reveals that it is essentially an incident report.

As for the Quality Assurance documents sought, defendants allege that the are

privileged pursuant to Public Health Law (§ 2805), which shields from disclosure the records of a medical or quality assurance proceeding or malpractice prevention program. (*Logue v Velez*, 92 NY2d 13 [1998].) In shielding such records, it is believed that the objectivity of the review process would be enhanced, and the medical review committee(s) may frankly and objectively analyze the quality of the health services rendered. (*Lilly v Turecki*, 112 AD2d 788 [4<sup>th</sup> Dept 1985].) In other words, it is designed to encourage thorough and candid peer review of physicians and/or nurses, and ultimately improve the quality of medical care. It should be noted that defendants have not moved for a protective order, (CPLR § 3103(a)), and it is not abundantly clear on its face that the information sought is privileged. In addition, there is no affidavit submitted from someone with personal knowledge alleging either that the document does not exist or that the requested information is part of a medical or quality assurance proceeding or malpractice prevention program. Instead, the allegation that this information is privileged is made solely by defendants' attorney in very conclusory terms, and to the extent that this document does exist, these statements by defendants' attorney would be insufficient to establishing a privilege.

Defendants allege Nurse Smith was not under their control or employment on the date at issue (i.e., July 28, 2014), and argue that the demand for Nurse Smith's employment file is palpably improper. On May 3, 2019, however, defendants did provide a copy of their "payroll report" showing that for the pay period ending August 2, 2014, Nurse Smith was paid for working on the following days in July: the 27<sup>th</sup>, 30<sup>th</sup>, and 31<sup>st</sup>. As for Nurse Smith's employment file, while the Court is not convinced that the demand for this file is palpably improper, it is satisfied that the demand for the *entire* (emphasis added) employment file is overly broad. Moreover, Nurse Smith's employment file will contain a whole host of information, including such things as vacation requests and salary, which may not be relevant for purposes of this litigation. An in camera inspection of the employment file at the Courthouse would resolve this issue, and as soon as in-

person court operations resume, the Court will schedule such an inspection. On the other hand, the employment contract for Nurse Smith, and documents showing Nurse Smith's position, qualifications, duties and responsibilities, all of which may be contained in the employment file, are more specific and easily identifiable, but even these documents should be limited to the time in question (i.e., the week of July 28, 2014).

As previously noted, it appears that on May 3, 2019, defendants attempted to comply with plaintiff's discovery demands. In addition, defendants' attorney alleges that some of the items demanded do not exist; however, plaintiff is entitled to an affidavit from someone with personal knowledge attesting to same. Based on the aforementioned, plaintiff has not clearly demonstrated that any non-compliance by defendants was done willfully, contumacious or in bad faith such as to warrant striking defendants' answer. (*Harris v City*, 211 AD2d 663 [2<sup>nd</sup> Dept 1995].) Often, such a remedy is warranted only where the outstanding evidence constitutes the *sole means* (emphasis added) upon which to establish a claim(s), (*Alleva v United*, 112 AD3d 542 [1<sup>st</sup> Dept 2013]), which is not the case here where plaintiff has yet to depose Nurse Smith. Nurse Smith can provide specific details as to what transpired on the date in question, and also provide a copy of her employment contract, and specific information regarding her employer, position, qualifications, duties and responsibilities on the date in question. Instead, the more appropriate remedy is a conditional order of preclusion.

Therefore, defendants are ordered to provide plaintiff the following within 60 days:

- (1) Table of Contents for the Cardiovascular Institute/Cardiac MR/CT Program, or an affidavit that same does not exist,
- (2) Table of Contents for Cardiology, or Affidavit stating that previously disclosed Table of Contents pertain to Cardiology,
- (3) Order for plaintiff's July 28, 2014-CTA, or an affidavit that same does not exist,
- (4) Log book for plaintiff's July 28, 2014-CTA, or an affidavit that same does not exist,
- (5) Name of Chief of Radiology, or an affidavit that same does not exist,

- (6) Notarized affidavit of Nurse Cartwright,
- (7) Appointment book for plaintiff's July 28, 2014-CTA, or an affidavit that same does not exist,
- (8) Employment contract for Nurse Smith,
- (9) Quality Assurance Report, or an affidavit that same does not exist,
- (10) Affidavit stating that Field Service Reports previously provided were the ones from the Contrast Injectors used on plaintiff, and are a complete copy of said reports from January 1, 2013, through January 1, 2015,
- (11) Document(s) showing Nurse Smith's dates of employment for the period of July 27-31, 2014,
- (12) Document(s) showing Nurse Smith's position during her employment for the period of July 27-31, 2014,
- (13) Document(s) showing Nurse Smith's qualifications as a Registered Nurse for the period of July 27-31, 2014,
- (14) Document(s) setting forth Nurses' duties, responsibilities and qualifications for the General Medicine Unit for the period of July 27-31, 2014,
- (15) Copy of phone record for July 28, 2014, illustrating the time Dr. Sanz called Dr. Glasser, or an affidavit that same does not exist,
- (16) Copy of Policies and Procedures for Radiology Department referenced in letter from plaintiff's attorney dated July 14, 2019.

Any item not timely produced shall be precluded from introduction at trial or in any dispositive motion. Plaintiff is directed to serve a copy of this decision/order with notice of entry by first class mail upon all sides within 20 days of receipt of same. This constitutes the decision and order of this court.

8/12/20  
Dated

Hon.

  
Joseph E. Capella, J.S.C.