

Best v Guthrie Med. Group, P.C.

2021 NY Slip Op 32070(U)

April 2, 2021

Supreme Court, Steuben County

Docket Number: E2016-1292cv

Judge: Kevin M. Nasca

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

**JODY C. BEST, individually and as the
Administrator of the Estate of the deceased
DONALD L. BEST a/k/a DONNIE L. BEST,**

Plaintiffs,

-vs-

**GUTHRIE MEDICAL GROUP, P.C. and
ROBERT PACKER HOSPITAL,**

Defendants.

DECISION AND ORDER

Index No. E2016-1292cv

Upon reading and considering the notice of motion filed by Anna Czarples, Esq., counsel for plaintiffs, on September 4, 2020, with affidavit of Anna Czarples, Esq. in support of plaintiffs' motion to compel, filed September 4, 2020, with exhibits A-C; notice of motion filed by Eric G. Johnson, Esq., counsel for defendants, on October 14, 2020, with affirmation of Eric G. Johnson, Esq. in opposition to plaintiffs' motion to compel and in support of defendants' motion for a protective order limiting the scope of jurisdictional discovery, filed October 14, 2020, with exhibits 1-5; amended notice of motion filed by Anna Czarples, Esq. on October 22, 2020, affirmation of Anna Czarples, Esq. in reply, with exhibits A-B; affirmation of Karen G. Felter, Esq. in opposition to plaintiffs' amended motion for discovery sanctions against defendants, including striking defendants' answer, and in further support of defendants' motion for a protective order limiting the scope of jurisdictional discovery filed October 27, 2020; and this matter having come before this court.

DISCUSSION

This matter concerns claims of medical malpractice arising from alleged negligent treatment provided to decedent, Donald L. Best, while receiving care at Robert Packer Hospital, a facility located in Sayre, Pennsylvania.

In their motion, plaintiffs seek sanctions against defendants for failure to comply with prior court orders and to compel defendants to produce discovery responses. Defendants in response seek a protective order limiting the scope of discovery sought by plaintiffs.

Plaintiffs' Motion for Sanctions

Plaintiffs seek sanctions against defendant RPH for failing to comply with prior court orders directing defendant RPH to provide jurisdictional discovery.

Where a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed,” the court may order that “the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order.” CPLR 3126(1); *Wright v. Visiting Nursing Assn. of WNY, Inc.*, 743 NYS2d 918, 919 [4th Dept 2002].

Plaintiffs assert that both the Fourth Department Appellate Division and Judge Wiggins ordered defendant RPH to provide jurisdictional discovery to plaintiffs, which they intentionally failed to provide, and now seek to have the court find personal jurisdiction as a matter of law as a discovery sanction against defendant RPH. The Fourth Department decision stated that jurisdictional discovery against defendant RPH was warranted, and Judge Wiggins’ scheduling order directed that jurisdictional discovery be completed by February 28, 2020. Neither order directed defendant RPH to disclose specific documents. Moreover, plaintiffs waited until twenty-one days prior to the scheduling order deadline to serve their demands. Plaintiffs have made no showing of willfulness on behalf of defendant RPH, nor did plaintiffs move to compel said responses prior to the expiration of the scheduling order deadline or prior to seeking sanctions. Consequently, plaintiffs’ motion for sanctions against defendant RPH for failing to comply with a prior court order is denied.

Plaintiffs' Motion to Strike Answer

Plaintiffs additionally seek to strike defendant Guthrie’s answer for failure to comply with a prior scheduling order.

Where a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed,” a court may strike the disobedient party’s pleading. CPLR 3126(3). “It is well settled that the drastic remedy of striking an answer is

inappropriate absent a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith.” *Harris v. City of New York*, 211 AD2d 663, 664 [2d Dept 1995]; *Johnson v. Dow*, 56 AD3d 1288, 1289 [4th Dept 2008].

Here, plaintiffs allege that defendant Guthrie is in violation of the prior scheduling order issued by Judge Wiggins, which required document discovery to be completed by February 28, 2020. However, plaintiffs misconstrue the October 16, 2019 Scheduling Order. The scheduling order provides that “jurisdictional discovery shall be completed by February 28, 2020.” The scheduling order does not provide a deadline for all document discovery. Plaintiffs have made no showing of willfulness, contumaciousness, or bad faith on behalf of defendant Guthrie or that defendant Guthrie refused to obey an order for disclosure. Consequently, plaintiffs’ motion to strike defendant Guthrie’s answer for failure to comply with a prior scheduling order is denied.

Plaintiffs’ Motion to Compel

Plaintiffs further move to compel defendants to provide the requested discovery responses to their demand for a bill of particulars and CPLR 3101 demands.

A party seeking disclosure may move to compel compliance or a response, where the other party fails to respond to or comply with any request, notice, interrogatory, demand, question or order. CPLR 3124. However, no motion relating to disclosure shall be filed with the court unless an affirmation stating that counsel has conferred with the opposing party or counsel for the opposing party in a good faith effort to resolve the issues raised by the motion. 22 NYCRR 202.7(a); *Yargeau v. Laserton*, 74 AD3d 1805, 1806 [4th Dept 2010]. A motion to compel a party to produce certain documents is properly denied absent an affirmation of good faith effort to resolve disclosure dispute. *Yargeau*, 74 AD3d at 1806; *Romero v. Korn*, 236 AD2d 598, 598 [2d Dept 1997]; *Murphy v. County of Suffolk*, 115 AD3d 820, 820 (2d Dept 2014); *Grasso v. McCoy*, 113 AD3d 1096, 1097 [4th Dept 2014]. A diligent effort to resolve a discovery dispute must entail more than one or two letters to counsel demanding responses. *Amherst Synagogue v. Schuele Paint Co., Inc.*, 30 AD3d 1055, 1057 [4th Dept 2006].

Here plaintiffs assert that on February 7, 2020, they served defendants with a demand for a bill of particulars and CPLR 3101 demands. Plaintiffs assert that on June 3, 2020, counsel attempted a good faith effort at resolving this discovery dispute by issuing a letter to opposing counsel. Plaintiffs now contend that they have not received responsive pleadings. Counsel’s

affirmation fails to satisfy 22 NYCRR 202.7, as one letter requesting the responses to be furnished is insufficient to establish a diligent effort to resolve the present discovery dispute prior to bringing this motion. Moreover, plaintiffs' letter request was made after the jurisdictional discovery deadline and without having requested an extension of the scheduling order. Consequently, plaintiffs' motion to compel is denied.

Defendants' Motion for a Protective Order

The Fourth Department Appellate Division found that plaintiffs were able to proceed with jurisdictional discovery against defendant RPH. In compliance with the Fourth Department's decision, Judge Wiggins issued an October 16, 2019 Scheduling Order stating that "consistent with the Appellate Division decision of August 22, 2019; [sic] jurisdictional discovery shall be completed by February 28, 2020." On February 7, 2020, plaintiffs served various discovery demands upon defendants, to which defendants raised various objections in a responding letter dated March 4, 2020. Defendants now move for a protective order pursuant to CPLR 3103(a) to limit the scope of the jurisdictional discovery sought by plaintiffs.

Although parties are entitled to full disclosure of all matter material and necessary in the prosecution or defense of an action, a court may issue a protective order "denying, limiting, conditioning or regulating the use of any disclosure device." CPLR 3101(a)(1); CPLR 3103(a). A protective order is "designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." CPLR 3103(a). The party moving for a protective order bears the burden of demonstrating that the disclosure sought is improper. *Sage Realty Corp. v. Proskauer Rose, LLP*, 251 AD2d 35, 40 [1st Dept 1998], citing *Roman Catholic Church of Good Shepherd v. Tempco Sys.*, 202 AD2d 257, 258 [1st Dept 1994]. The moving party must put forth more than conclusory assertions that the requested disclosure is overbroad or unduly burdensome. *Sage*, 251 AD2d at 40; *New York State Businessmen's Group, Inc. v. Dalton*, 154 AD2d 801, 801 [3d Dept 1989]; *Sheldon v. Kimberly-Clark Corp.*, 111 AD2d 912, 913 [2d Dept 1985]. The CPLR provides that a party who has been served with a notice of disclosure, inspection, or examination, has twenty days to object to the demands. CPLR 3122(a)(1). The party objecting "shall serve a response which shall state with reasonable particularity the reasons for each objection." *Id.* The failure of the moving party to timely object to discovery demands "forecloses inquiry into the propriety of the information sought." *Woo v.*

Shimunov, 273 AD2d 303, 303 [2d Dept 2000]; *Hunt v. Odd Job Trading*, 44 AD3d 714, 716 [2d Dept 2007]. However, an exception is made regarding “material that is privileged pursuant to CPLR 3101 or requests that are palpably improper.” *Woo*, 273 AD2d at 303; *Holness v. Chrysler Corp.*, 220 AD2d 271, 722 [2d Dept 1995]. Palpably improper discovery demands are those that seek irrelevant information, are overbroad, burdensome, or fail to specify with reasonable particularity many of the documents demanded. *Jordan v. City of New York*, 137 AD3d 1084, 1084 [2d Dept 2016].

It is undisputed that defendant Guthrie conceded personal jurisdiction. Although the court’s scheduling order referenced jurisdictional discovery, there is no indication that discovery against defendant Guthrie was stayed pending jurisdictional discovery against defendant RPH. CPLR 3214(b). Consequently, plaintiffs’ outstanding demand for a verified bill of particulars and notice to produce directed to defendant Guthrie are not improper or premature, nor does defendants’ cross-motion seek to stay discovery against defendant Guthrie pending jurisdictional discovery relative to defendant RPH. Defendant Guthrie’s request for a protective order insofar as it relates to plaintiffs’ verified bill of particulars and notice to produce directed at defendant Guthrie is denied. However, plaintiffs failed to demonstrate the relevancy of their CPLR 3101 demands related to jurisdictional discovery against defendant Guthrie, in light of defendant Guthrie conceding personal jurisdiction. Plaintiffs’ assertion that defendant Guthrie has refused jurisdictional discovery in unrelated cases and that their strategy to avoid discovery being unfair to all other plaintiffs who have cases against the entity is unpersuasive and palpably improper. Accordingly, defendants’ request for a protective order precluding disclosure insofar as it relates to plaintiffs’ CPLR 3101 demands seeking jurisdictional discovery against defendant Guthrie is granted.

Defendant RPH, on the other hand, has not conceded jurisdiction. As the Fourth Department indicated, jurisdictional discovery is warranted against defendant RPH to determine whether jurisdiction over the hospital exists. At this time, discovery against defendant RPH is appropriately limited to disclosure relating to jurisdictional issues or calculated to lead to information and facts relating to jurisdiction. *Mariner Pac., Ltd. v. Sterling Biotech Ltd.*, 106 AD3d 667, 668 [1st Dept 2013], quoting *Peterson v. Spartan Indus., Inc.*, 33 NY2d 463, 467 [1974]. Moreover, this court agrees with defendant RPH that plaintiffs’ demands seeking disclosure covering the years 2010 to 2015 is overly broad in scope. Plaintiffs’ cause of action arose in

February 2015, and this action was commenced in November 2016. In New York, jurisdiction pursuant to CPLR 301 must be demonstrated at the time of commencement. *Lancaster v. Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 157-158 [1st Dept 1992]; *Edelman v. Taittinger, S.A.*, 8 A.D.3d 121, 121 [1st Dept 2004]. Under CPLR 302(a)(1), jurisdiction relates to a defendant's business contacts within the state and the cause of action arising out of those business contacts. *Lancaster*, 177 AD2d at 158. As such, this court limits the scope of jurisdictional discovery from 2014 to 2016; two years prior to and including the date of commencement, which also encompasses the date the cause of action is alleged to have arisen. *Deer Consumer Prods., Inc. v. Little*, 36 Misc3d 1221(A), *19 [New York Co, 2012]. As to defendant RPH's request for a protective order against plaintiffs' CPLR 3101 demands seeking jurisdictional discovery, the court will address each objection as raised.

Plaintiffs demand copies of defendant RPH's annual audited financial statements. Defendant RPH argues that plaintiffs' demand is over-reaching, irrelevant to the question of jurisdiction, and that its financial statements typically contain private, confidential, and proprietary financial information. The Fourth Department's decision indicates that the record contains evidence that defendant RPH derives substantial revenue from New York residents. As the moving party seeking a protective order, defendant RPH bears the burden of demonstrating that the disclosure sought is improper and must offer more than conclusory assertions. Defendant RPH has not met its burden of proving that disclosure of the financial statements would be unreasonably prejudicial. *Seneca Knitting Mills Corp. v. Wilkes*, 120 AD2d 955, 955 [4th Dept 1986]. However, it is well established that material that is confidential in nature, or subject to abuse if widely disseminated, shall be accorded judicial safeguards. *McLaughlin v. G.D. Searle, Inc.*, 38 AD2d 810, 811 [1st Dept 1972]; *Snyder v. Parke, Davis & Co.*, 56 AD2d 536, 536-537 [1st Dept 1977]; *Tymko v. K-Mart Discount Stores, Inc.*, 429 NYS2d 119, 120 [4th Dept 1980]. Plaintiffs' counsel indicates in her affirmation that:

...[A]ffiant receives regular communication from other plaintiffs' lawyers advising that Guthrie and RPH attempt to evade jurisdictional disclosure in other cases against them. Affiant has received at least one phone call per month regarding the same...This is unfair to all of the other plaintiffs who have cases against Guthrie and RPH...Thus, a protective order, sealing the record, or enforcing confidentiality impairs justice on a large scale against many plaintiffs...The Fourth Department

did not say that this discovery should happen confidentially. Keeping personal jurisdiction discovery confidential circumvents justice and gives RPH an advantage it should not be entitled to under the law. [Docket No. 19].

The record reflects that any confidential financial information contained in the audited financial statements if disclosed, is subject to abuse if widely disseminated by plaintiffs, and therefore should be afforded judicial safeguards. Defendant RPH's request for a protective order as it relates to the audited financial statements is granted to the extent that any party in the action, his/her/its attorney or representatives are barred from disclosing any confidential financial documents or information produced to anyone other than counsel working on this case, officers of the court, and any experts or consultants retained by the parties. Any responsive documents produced that contain confidential information shall be specifically labeled as confidential information by marking the word "confidential" on the face of the document and each following page as designated. Such limited discovery is necessary to protect any confidential information contained in defendant RPH's financial statements. Plaintiffs in response failed to show a need for further dissemination of the financial documents.

Next, plaintiffs demand defendant RPH's organizational charts. Defendant RPH does not assert any specific objection to plaintiffs' demand for defendant RPH's organizational chart. As such, this court denies any conclusory request for a protective order as it relates to RPH's organizational charts.

Plaintiffs further demand copies of federal and all state income tax returns, including schedules and attachments, from defendant RPH. Defendant RPH argues that it does not file returns or pay taxes in New York, and that it is required to make its three most recent Form 990 or 990-PF annual returns and supporting documents, as well as its Form 1023, public. Therefore, defendant RPH argues that its tax return information relevant to defendant RPH's contacts with New York are publicly available. "Disclosure of tax returns is not necessary if the information may be obtained from other sources." *Samide v. Roman Catholic Diocese of Brooklyn*, 5 AD3d 463, 465 [2d Dept 2003]; *Niagara Falls Urban Renewal Agency v. Friedman*, 55 AD2d 830, 830 [4th Dept 1976]; *Lauer's Furniture Stores, Inc. v. Pittsford Place Assocs.*, 190 AD2d 1054, 1055 [4th Dept 1993]; *Corporate Interiors, Inc. v. Pappas*, 293 AD2d 640, 641 [2d Dept 2002]. Plaintiffs in response fail to demonstrate a strong necessity for such disclosure considering

defendant RPH's public financial filings. Consequently, defendant RPH's request for a protective order precluding disclosure as it relates to its federal and state tax returns is granted.

Plaintiff also demands a copy of defendant RPH's W-3 forms ("Transmittal of Wage and Tax Statements"). Defendant RPH asserts that plaintiffs' request for W-3 Forms are overly broad and irrelevant to jurisdictional discovery, as they solely show the amount of wages withheld by an employer. Plaintiffs fail to address defendant RPH's objections or demonstrate that the demand will lead to the discovery of information bearing on jurisdiction. As such, defendant RPH's request for a protective order precluding disclosure as it relates to its W-3 forms is granted.

Plaintiffs demand a copy of defendant RPH's state employer filings from all states for which such filings are made, that indicate the total number of employees by state. Defendant RPH argues that plaintiffs' request is vague and overbroad by failing to specify which filings plaintiffs seek. Plaintiffs in response fail to identify with reasonable particularity the information sought or address the necessity of such disclosure. As such, defendant RPH's request for a protective order as it relates to state employer filings is granted and the demand is stricken without prejudice to plaintiffs serving a more narrowly-tailored demand. *Battease v. State of New York*, 129 AD3d 1579, 1580 [4th Dept 2015]; *Kregg v. Maldonado*, 98 AD3d 1289, 1290 [4th Dept 2012]; *Astudillo v. St. Francis-Beacon Extended Care Facility, Inc.*, 12 AD3d 469, 470 [2d Dept 2004].

Plaintiffs further seek any contracts or other written business agreements between defendant RPH and Arnot Health Inc. and/or Arnot Ogden Medical Center. Defendant RPH argues that no such contracts or agreements exist. As the moving party seeking a protective order, defendant RPH bears the burden of demonstrating that the disclosure sought is improper. Defendant RPH failed to satisfy its burden and made no argument that the demand itself was improper. Defendant RPH's request for a protective order as it relates to contracts or written business agreements with Arnot Health Inc. and/or Arnot Ogden Medical Center is denied; rather, defendant RPH should respond by a sworn statement with regard to the existence or nonexistence of such contracts or other written business agreements. *Sisters of St. Francis of Holy Name Province, Inc. v. Daemen College*, 168 AD2d 897, 898 [4th Dept 1990].

Plaintiffs demand a copy of any contracts or other written business agreements between any company providing life flight services for defendant RPH. Defendant RPH argues that such demand is improper and that it should be sufficient for defendant RPH to acknowledge the existence and number of any such agreements and the entity whom such agreements exist.

Defendant RPH failed to satisfy its burden of demonstrating that the disclosure sought is improper and offered merely conclusory assertions. Consequently, defendant RPH's request for a protective order as it relates to any contracts or other written business agreements between any company providing life flight services for defendant RPH is denied.

Plaintiffs also demand a copy of defendant RPH's marketing budget, plan, and/or any documents showing where and how much defendant RPH spent on marketing dollars each year, including all marketing expenditures, such as internet, TV, radio, and billboards. Defendant RPH avers that such should be produced subject to a confidentiality agreement. While there appears to be no dispute between the parties that plaintiffs are entitled to the information, as previously stated, the record reflects that confidential material disclosed by defendant RPH is subject to abuse if widely disseminated by plaintiffs and therefore should be afforded judicial safeguards. Defendant RPH's request for a protective order as it relates to the its marketing budget, plan or expenditures is granted to the extent that any party in the action, his/her/its attorney or representatives are barred from disclosing any confidential documents or information disclosed to anyone other than counsel working on this case, officers of the court, and any experts or consultants retained by the parties. Any responsive documents produced that contain confidential information shall be specifically labeled as confidential information by marking the word "confidential" on the face of the document and each following page as designated. Such limited discovery is necessary to protect any confidential information contained in defendant RPH's marketing budget, plan or expenditures. Plaintiffs in response fail to demonstrate a need for further dissemination of the documents.

Plaintiffs also demand a list of real properties owned and rented by defendant RPH. Defendant RPH argues that it does not have any offices in New York, does not treat patients in New York, and that the demand is meant to harass defendant RPH. Defendant RPH failed to satisfy its burden of demonstrating that the disclosure sought is improper. Defendant RPH's request for a protective order as it relates to a list of real properties owned and rented by defendant RPH is denied; rather, defendant RPH should respond by a sworn statement with regard to the existence or nonexistence of such real property. *Sisters of St. Francis*, 168 AD2d at 898.

Plaintiff demands from defendant RPH any contracts or agreements with government entities regarding pricing or payment for medical services. Defendant RPH does not assert any specific objection to plaintiffs' demand for any contracts or agreements defendant RPH had with

government entities regarding pricing or payment for medical services each year. As such, this court denies any conclusory request for a protective order as it relates to the same.

Plaintiffs also demand a copy of any contracts or agreements concerning payment for medical services from New York and Pennsylvania based insurers, and any other state. Defendant RPH asserts that plaintiffs' demand is overly broad and contains proprietary and confidential information. Although defendant RPH failed to meet its burden of proving that the demand is improper, as previously indicated, the record reflects that confidential information contained in the contracts or agreements for medical services, if disclosed, is subject to abuse if widely disseminated by plaintiffs, and therefore should be afforded judicial safeguards. Consequently, defendant RPH's request for a protective order as it relates to a copy of any contracts or agreements concerning payment for medical services from New York and Pennsylvania based insurers, and any other state, is granted to the extent that any party in the action, his/her/its attorney or representatives are barred from disclosing any confidential documents or information disclosed to anyone other than counsel working on this case, officers of the court, and any experts or consultants retained by the parties. Any responsive documents produced that contain confidential information shall be specifically labeled as confidential information by marking the word "confidential" on the face of the document and each following page as designated. Such limited discovery is necessary to protect any confidential information in defendant RPH's contracts or agreements for medical services. Plaintiffs in response failed to demonstrate a need for further dissemination of the documents.

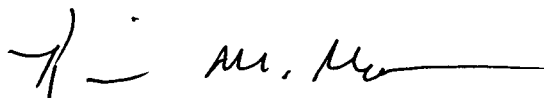
Plaintiffs further demand the total number of registered eGuthrie users by state, including interaction with Robert Packer Hospital by eGuthrie users with home addresses located in New York State. Defendant RPH argues that plaintiffs' demand is vague and overbroad. Plaintiffs in response failed to identify with reasonable particularity the information sought or demonstrate that the demand would lead to the discovery of information bearing on jurisdiction. This court agrees that plaintiffs' demand is overbroad rising to the level of palpably improper. *Jordan*, 137 AD3d at 1084. As such, defendant RPH's request for a protective order as to the total number of registered eGuthrie users with home addresses located in New York State is granted and the demand is stricken without prejudice to plaintiffs serving a more narrowly-tailored demand. *Battease*, 129 AD3d at 1580; *Kregg*, 98 AD3d at 1290; *Astudillo*, 12 AD3d at 470.

Plaintiffs lastly demand the number of referrals made by defendant RPH's service providers from a New York based practice to a Pennsylvania based practice and a Pennsylvania based practice to a New York based practice. Defendant RPH argues that plaintiffs' demand is overly broad. Defendant RPH's conclusory assertions are insufficient to demonstrate that the request was palpably improper. Defendant RPH's request for a protective order as it relates to the number of referrals made by defendant RPH's service providers from a New York based practice to a Pennsylvania based practice and a Pennsylvania based practice to a New York based practice is denied.

DECISION

Accordingly, it is the decision and order of the court that the plaintiffs' motion for sanctions and to compel discovery is **DENIED**, defendants' motion for a protective order is **GRANTED in part and DENIED in part**.

Dated: April 2, 2021



HON. KEVIN M. NASCA
Supreme Court Justice