

Cicero v Eger Health Care & Rehabilitation Ctr.

2021 NY Slip Op 33921(U)

March 8, 2021

Supreme Court, Richmond County

Docket Number: Index No. 152219/2019

Judge: Judith N. McMahon

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This opinion is uncorrected and not selected for official publication.

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

IAS PART 6

ORDER

JOHN CICERO, as Administrator of the Estate of
MARIA CICERO, deceased,

Plaintiffs,

- against -

Index Number: 152219/2019
Motion Sequence 001 & 002
Hon. Justice
Judith N. McMahon

EGER HEALTH CARE AND REHABILITATION CENTER,
NASHAAT L. MORGAN, M.D., FRANK M. CARDELLO, M.D.,
SALVATORE PRAINITO, D.O., DR. JANE/JOHN DOE,
DIAMOND PARTLOW, R.D., and MELANIE BLATTEIS, R.D.,

Defendants.

Defendant’s, Eger Health Care and Rehabilitation Center (“EGER”) and Melanie Blatteis, R.D. (“BLATTEIS”), motion seeking an Order pursuant to CPLR 2221(a) vacating this Court’s Order, dated January 26, 2021, requiring EGER to disclose employment files of its employees for an in camera review and pursuant to CPLR §3103(a) granting a Protective Order is granted in part and denied in part as detailed herein.

Plaintiff’s cross-motion seeking an Order Pursuant to §202.20-b(f) and (g), extending time to depose Defendants and non-parties beyond the seven hour limitation noted in a December 29, 2020 Administrative Order is denied as detailed herein.

This is an action to recover monetary damages as a result of the alleged negligent care and treatment received by Plaintiff Decedent Maria Cicero while she was under the care of Defendants. Plaintiff initiated this action by filing a Summons and Verified Complaint on September 23, 2019. The Complaint asserts causes of action including those sounding in Public Health Law §§2801-d and 2803-c, negligence pursuant to statutes, negligence as to granting and renewing employment and association privileges, common-law negligence, gross negligence, and wrongful death.

On February 25, 2020, Plaintiff served a demand seeking numerous items including, but not limited to: Personnel/employment files of all EGER employees; all documents and information relating to demotion of any personnel who treated Plaintiff Decedent. The demand specifically seeks personnel files for individuals identified as Jennifer Dicks, Jessica Tancredi, Casey Lundgren, Lauren Antos, Amanda Guardella, Angelina Lasorosa, Sharon James, and ‘Supervisor Maureen’. On December 7, 2020, Plaintiff filed and served a further set of demands which included Defendant BLATTEIS’ entire employment file.

Following a conference on January 26, 2021, this Court issued an Order directing EGER to supply the employment files for an in camera review.

EGER now moves to vacate that Order, arguing that the portions of the January 26, 2021 Order directing submission of employment records for inspection are not discoverable in this litigation as a matter of law, because (a) EGER has already admitted its employees acted within the scope of their employment; (b) there is no viable negligent hiring/training claim; and (c) there is no viable negligent credentialing claim as to EGER’s employees.

“Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee’s negligence under a theory of respondeat superior, and a plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention.” *Trotman v. New York City Transit Auth.*, 168 A.D.3d 1116, 93 N.Y.S.3d 89 (N.Y.A.D. 2nd Dept. 2019).

Absent special circumstances not present here, personnel records, even in the context of an in camera review, are not discoverable as related to negligence claims under a theory of respondeat superior, a claim which is mutually exclusive of claims for negligent hiring and retention. *See Neiger v. City of New York*, 72 A.D.3d 663, 897 N.Y.S.2d 733 (N.Y.A.D. 2nd Dept. 2010).

EGER efiled an Amended Answer on December 24, 2019, wherein EGER admitted that BLATTEIS was acting within the scope of their employment during the time periods at issue. However, EGER’s Amended Answer denied that Defendant Diamond Partlow was acting within the scope of their employment.

Additionally, since Plaintiff’s Complaint was silent as to the non-party EGER employees whose personnel files are being sought, likewise EGER’s Amended Answer neither admits nor denies that those

employees were acting within the scope of their employment. As of the making of the instant motion, EGER has not produced any documents making a declaration as to whether the subject employees were operating within the scope of their employment, nor did EGER choose to submit any documents in conjunction with its moving papers filed on the instant motion. In the Affirmation in Support of the instant motion, EGER's Attorney argued that the employees in question were working within the scope of their employment, but at oral argument on the motion, EGER's Attorney admitted that EGER has made no formal declaration of such.

The law is clear in this regard that the personnel file of BLATTEIS is not discoverable as EGER has admitted she was operating within the scope of her employment so that a claim of negligent hiring or retention is inapplicable. However, the remainder of the requested personnel files are discoverable because other than arguments made by Plaintiff's Attorney in their Affirmation in Support of the instant motion, EGER's position as to Plaintiff's respondeat superior allegations has not been established.

It is proper to direct the disclosure of the personnel files for in camera review because the "allegations set forth in the claims...were sufficiently broad to include causes of action sounding in negligent hiring and/or negligent training...[and] in the absence of a clear concession by Defendant that the [subject employees] acted completely within the scope of [their] employment...[Plaintiff is] entitled to plead incompatible theories of recovery in the alternative." *Pickering v. State*, 30 A.D.3d 393, 816 N.Y.S.2d 566 (N.Y.A.D. 2nd Dept. 2006).

"The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *N.Y. CPLR 3103*.

This Court finds it proper that the personnel file of BLATTEIS shall be protected from disclosure, but that the remainder of the protective order sought is denied.

Plaintiff also cross-moves for an order, pursuant to §202.20-b(f)and(g), extending Plaintiff and Defendant's time to depose Defendants and non-parties beyond the seven hour limitation noted in the December 29, 2020 Administrative Order.

BLATTEIS first appeared for a deposition in this matter on December 2, 2020. The deposition began at 10:24 a.m. and ended at 5:07 p.m.

By Order of the Chief Administrative Judge of the Courts dated December 29, 2020 as of February 1, 2021 and in light of the impact of COVID-19, unless stipulated by parties or by order of the Court, depositions are limited to 7 hours per deponent.

BLATTEIS' deposition was continued on January 21, 2021. The deposition began at 10:56 a.m. and ended at 4:58 p.m.

Plaintiff now seeks to continue the deposition of BLATTEIS, arguing that it is not complete. Plaintiff argues that the deposition has taken so long because of the constraints of conducting depositions via teleconference, but also due to improper objections by the parties. Plaintiff argues that there is likely to be the same issues in connection with future depositions, so in addition to seeking to continue the deposition of BLATTEIS, Plaintiff seeks permission to extend future depositions in this case beyond the 7 hour limit.

This Court has no intention of pre-emptively vacating the Order of the Chief Administrative Judge of the Courts based solely on Plaintiff's concern that future depositions may not be completed within the 7 hour limit.

At oral argument, this Court ordered BLATTEIS to appear for one more deposition, the remainder of Plaintiff's motion is denied as premature.

ORDERED Defendants Eger Health Care and Rehabilitation Center and Melanie Blatteis, R.D.'s motion seeking an Order pursuant to CPLR 2221(a) vacating this Court's Order, dated January 26, 2021, requiring disclosure of employment files for an in camera review is granted only to the extent that the requirement to produce the employment file of Melanie Blatteis, R.D. is vacated; and it is further

ORDERED the remainder of Defendants Eger Health Care and Rehabilitation Center and Melanie Blatteis, R.D.'s motion seeking to vacate this Court's January 26, 2021 Order is denied; and it is further

ORDERED Defendants Eger Health Care and Rehabilitation Center and Melanie Blatteis, R.D.'s motion seeking an Order pursuant to CPLR §3103(a) granting a Protective Order is granted as to the personnel file of Melanie Blatteis, R.D. only; and it is further

ORDERED the remainder of Defendants Eger Health Care and Rehabilitation Center and Melanie Blatteis, R.D.'s motion seeking an Order pursuant to CPLR §3103(a) granting a Protective Order is denied; and it is further

ORDERED Defendant Eger Health Care and Rehabilitation Center shall produce the documents ordered for in camera review in the January 26, 2021 Order by delivering the documents to the Courthouse located at 26 Central Avenue, Staten Island, NY 10301 on March 31, 2021, between the hours of 10 a.m. and 11 a.m. Due to COVID-19 courthouse procedures, the documents will have to be delivered by calling 718-675-8652 when outside the courthouse; and it is further

ORDERED Plaintiff's cross-motion seeking an Order Pursuant to §202.20-b(f) and (g), extending time to depose Defendants and non-parties beyond the seven hour limitation noted in a December 29, 2020 Administrative Order is granted only to the extent of the one additional day for the deposition of Melanie Blatteis, R.D. ordered at oral argument; and it is further

ORDERED the remainder of Plaintiff's cross-motion seeking an Order Pursuant to §202.20-b(f) and (g), extending time to depose Defendants and non-parties beyond the seven hour limitation noted in a December 29, 2020 Administrative Order is denied as premature; and it is further

ORDERED all other requested relief is denied; and it is further

ORDERED all parties shall appear for a conference to be conducted via Microsoft Teams on April 14, 2021 at 3 p.m.

THIS IS THE DECISION AND ORDER OF THE COURT.

Dated: March 8, 2021

So Ordered.

/s/ Judith N. McMahon

ENTER: _____

Hon. Judith N. McMahon, J.S.C.