

Jane Doe v Lenox Hill Hosp.
2023 NY Slip Op 30342(U)
February 1, 2023
Supreme Court, New York County
Docket Number: Index No. 159628/2016
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

JANE DOE,

Plaintiff,

- v -

LENOX HILL HOSPITAL, NORTHWELL HEALTH, INC.,
formerly known as NORTH SHORE-LONG ISLAND JEWISH
HEALTH SYSTEM, INC., and FRANCISCO JOSE LINARES
ALVARENGA, M.D.,

Defendants.

-----X

INDEX NO. 159628/2016
MOTION DATE 11/16/2022
MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 179, 180, 181, 182, 183, 184, 185, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 199, 200

were read on this motion to/for DISCOVERY.

In this action to recover damages for medical malpractice, the plaintiff moves pursuant to CPLR 3123 and 3124 to deem her notice to admit to have been admitted, or, in the alternative, to compel the defendants Lenox Hill Hospital (LHH) and Francisco Jose Linares Alvarenga, M.D. (together the cross movants), to provide legally sufficient, verified responses to her notice to admit. The cross movants oppose the motion, and each separately cross-moves pursuant to CPLR 3103(a) for a protective order precluding the plaintiff from obtaining responses to several of the demands set forth in her notice to admit. The plaintiff's motion is granted only to the extent that the cross movants shall, within 21 days of the entry of this order, each provide a sworn statement as to the matters that each of them had denied, and the motion is otherwise denied. The cross motion is granted to the extent that the cross movants are granted a protective order excusing them from responding to all items enumerated in the plaintiff's notice to admit that they had not expressly admitted or denied, those items are stricken, and the cross motions are otherwise denied.

On November 16, 2016, the plaintiff commenced the instant action, alleging that Alvarenga initiated and engaged in an inappropriate sexual relationship with her shortly after she was released from LHH's psychiatric unit, where Alvarenga was her treating psychiatrist. The plaintiff also asserted claims against LHH for negligent hiring, supervision, and retention, among other things. On December 13, 2021, the plaintiff served both of the cross movants with a notice to admit, which enumerated 125 statements that she requested them either to admit or deny. On February 10, 2022, LHH served its response, which included blanket statements that

“[d]efendant objects to Plaintiff's Notice to Admit to the extent it seeks to impose obligations or requirements beyond those imposed by applicable provisions of the CPLR and 22 NYCRR § 202.

“Defendant objects to Plaintiff's Notice to Admit to the extent it seeks information from other, separately represented defendants.

“Defendant objects to Plaintiff's Notice to Admit to the extent that the requests improperly address matters which are at the heart of the controversy at issue . . .

“Defendant objects to Plaintiff's Notice to Admit in that it does not seek an admission as to the ‘genuineness of any papers or documents, or the correctness or fairness of representation of any photographs. . . or of the truth of any matter or fact,’ within the scope of CPLR §3123(a) and to its reference to a vague and ambiguous time period. Moreover, this request is beyond the scope of a notice to admit because it detracts from its intended purpose.”

LHH nonetheless responded to each enumerated item, expressly denying the veracity of 6 of the statements, and objecting to the remainder. On February 15, 2022, Alvarenga served his response, denying the veracity of 63 of the enumerated statements, while also lodging objections to the plaintiff's request to admit or deny 20 of those 63 statements. He admitted to the veracity of 13 of the statements, although he also objected to the request that he admit or deny 3 of those 13 statements. Alvarenga objected to the remainder of the requests to admit or deny as “palpably improper, vague, overly broad, seeks legal conclusion, and seeks admission to a material issue of this litigation which is not proper subject matter of a Notice to Admit pursuant to CPLR § 3123 and the applicable case law” and/or “better directed at Defendant Lenox Hill Hospital. As such, no response is required or will be provided.”

CPLR 3123(a) provides, in pertinent part, that

“a party may serve upon any other party a written request for admission by the latter. . . of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry.”

"The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial" (*Lotrean v 3M Co.*, 2022 NY Slip Op 32679[U], *2, 2022 NY Misc LEXIS 3990, *3 [Sup Ct, N.Y. County, Aug 8, 2022]; see also *Tonkiwa Ltd. v Truesdell*, 155 AD3d 1479, 1481 [3d Dept 2017]; *Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770, 771-772 [2d Dept 2011]; *Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004]; *DeSilva by DeSilva v Rosenberg*, 236 AD2d 508, 508 [2d Dept 1997]). Stated differently, a notice to admit is designed to secure a stipulation regarding certain specific matters about which there is general agreement (see *Lewis v Hertz Corp.*, 193 AD2d 470, 470 [1st Dept 1993]; *Hodes v New York*, 165 AD2d 168, 170-171 [1st Dept 1991]).

A notice to admit is improper where it seeks admission of obviously disputed matters that go to the heart of the controversy between the parties (see *Village of Malone v Stone Mtn. Prime, LLC*, 204 AD3d 1148, 1150 [3d Dept 2022]; *Lewis v DiMaggio*, 151 AD3d 1296, 1298 [3d Dept 2017]; *Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664, 665 [2d Dept 2013]), or requests admission of material or ultimate issues of fact (see *Eddyville Corp. v Relyea*, 35 AD3d 1063, 1066 [3d Dept 2006]; see also *32nd Ave. LLC v Angelo Holding Corp.*, 134 AD3d 696, 698 [2d Dept 2015]; *Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]). Finally, a notice to admit may not be used to obtain information in lieu of other disclosure devices such as depositions, where those other disclosure devices are superior (see *Genna v Klempner*, 195 AD3d 444, 444 [1st Dept 2021]; *Voigt v Savarino Constr. Corp.*, 94 AD3d 1574, 1575 [4th Dept 2012]; *Falkowitz v Kings Hwy. Hosp.*, 43 AD2d 696, 696 [2d Dept 1973]).

Here, the plaintiff's notice to admit improperly requested all of the defendants to admit legal conclusions and ultimate issues going to the core of the dispute. For example, the plaintiff sought admissions of the following,

"In New York State, sexual relations between a patient and a current psychiatrist is unethical.

"During his career as a psychiatrist, Dr. Linares has been disciplined for conduct relating to sexual harassment prior to the 2013 Hospitalization.

"While Jane Doe was a patient at Lenox Hill Hospital during her 2013 Hospitalization, Dr. Linares developed sexual feelings towards Jane Doe.

"Dr. Linares had a sexual relationship with Jane Doe."

Moreover, most of the facts underlying many of the statements that the plaintiff requested the defendants to admit or deny were more appropriately discovered by means of a deposition. As such, the plaintiff's notice cannot be deemed admitted. Nor can this court compel the cross movants to provide responses, as requested by the plaintiff, since CPLR 3123 is self-regulating insofar as sanctions are concerned (see CPLR 3123[c]; see also *Spawton v James E. Strates Shows, Inc.*, 75 Misc 2d 813, 815 [Sup Ct, Erie County 1973]), and notices to admit are expressly excluded from the ambit of CPLR 3124, which provides a vehicle to compel a party to respond to discovery demands, as that section relates only to depositions, interrogatories, and matters arising out of various CPLR article 31 provisions other than CPLR 3123 (see *id.*; *Glasser v City of NY*, 265 AD2d 526, 526 [2d Dept 1999] [holding that the penalties of CPLR 3126 do not apply to CPLR 3123, since the latter is self-executing]).

The plaintiff argues that the cross movants' responses to her notice to admit were not sworn to by the party to whom the request was directed and, thus, must be deemed admitted. The court rejects that contention. The plaintiff is correct that CPLR 3123(a) requires a sworn party statement where the party is denying matters of which an admission is requested (see *Rosenfeld v Vorsanger*, 5 AD3d 462, 463 [2d Dept 2004]; *Great Am. Ins. Co. v Matzen Constr., Inc.*, 114 AD2d 625, 626 [3d Dept 1985]; *Constantino v Newman*, 47 AD2d 626, 626 [2d Dept

1975]). Here, LHH denied 6 statements enumerated in the plaintiff's notice to admit, and Alvarenga denied 63 statements. Nonetheless, even though the cross movants' responses were not sworn to by a party, but only signed by an attorney, the plaintiff's

“notice to admit called upon the [cross movants] to admit . . . fact[s] . . . as to which [their] attorney[s] could not reasonably have believe[d] there [could] be no substantial dispute at the trial . . . and which improperly went to the heart of the matter at issue. Therefore, [the cross movants] should not be bound by the notice to admit, even if [they] failed to properly respond to it”

(*Smith v County of Nassau*, 138 AD3d 726, 729 [2d Dept 2016] [citations and internal quotation marks omitted]). The cross movants, however, are directed to provide a sworn statement in connection with those denials, which must be executed by the party to whom the notice to admit was directed (see *Constantino v Newman*, 47 AD2d at 626).

CPLR 3103(a) allows the court, on its own motion or on motion of any party, to make a protective order denying, limiting, conditioning, or regulating the use of any disclosure device. A party may “seek a protective order if the requests in the notice to admit are claimed not to be the proper subject of inquiry under CPLR 3123(a)” (*Howlan v Rosol*, 139 AD2d 799, 801 [3d Dept 1988]; see *Jet One Group, Inc. v Halcyon Jet Holdings, Inc.*, 111 AD3d 890, 893 [2d Dept 2013]). Thus, in light of the cross movants' objections and the foregoing determination that the plaintiff's notice to admit improperly sought admissions of both legal conclusions and ultimate issues going to the core of the dispute, the cross motions for a protective order are granted to the extent that the cross movants need not respond to any of the items in the notice to admit that were neither admitted nor denied, but only objected to.

Contrary to the plaintiff's contention that the defendants did not timely seek a protective order, CPLR 3103(a) specifically states that the court may make such order “at any time” (CPLR 3103[a]; see also *Nader v Gen. Motors Corp.*, 53 Misc 2d 515, 517 [Sup Ct, N.Y. County 1967] *affd* 29 AD2d 632 [1st Dept 1967] [finding that the extremely broad language of CPLR 3103 is clear and unequivocal in permitting a court to rule in advance or trial or at any time on demands to any disclosure device, including a notice to admit]).

The plaintiff's remaining contentions are without merit.

Accordingly, in light of the foregoing it is

ORDERED that the plaintiff's motion is granted only to the extent that the defendants Lenox Hill Hospital and Francisco Jose Linares Alvarenga, M.D., shall, within 21 days of the entry of this order, provide sworn statements as to the statements that they denied in response to the plaintiff's notice to admit, and the motion is otherwise denied; and it is further,

ORDERED that the separate cross motions of the defendants Lenox Hill Hospital and Francisco Jose Linares Alvarenga, M.D., each are granted to the extent that those defendants are granted a protective order excusing them from responding to any and all items enumerated in the plaintiff's notice to admit that they had not expressly admitted or denied, those items are stricken, and the cross motions are otherwise denied.

This constitutes the Decision and Order of the court.

2/1/2023

DATE


JOHN J. KELLEY, J.S.C.

MOTION:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
CROSS MOTION 1:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE
CROSS MOTION 2:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE