

Kornblau v Sauter

2023 NY Slip Op 31323(U)

April 12, 2023

Supreme Court, New York County

Docket Number: Index No. 805344/2015

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY **PART** **56M**

Justice

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LYNN SARE KORNBLAU, AS EXECUTRIX OF THE
ESTATE OF JEFFREY M. KORNBLAU, and LYNN SARE
KORNBLAU, INDIVIDUALLY,

Plaintiff,

INDEX NO. 805344/2015

MOTION DATE 01/23/2023

MOTION SEQ. NO. 004

- v -

CRAIG SAUTER, M.D., MEMORIAL SLOAN KETTERING
CANCER CENTER, MEMORIAL HOSPITAL FOR CANCER
AND ALLIED DISEASES, FATIMA CONTEH, N.P., ROSINA
ROSARIO, P.A., JAMES YOUNG, M.D., ANN
JAKUBOWSKI, M.D., and JENNA GOLDBERG, M.D.,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 180, 181, 182, 183,
184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197

were read on this motion to/for DISCOVERY/PROTECTIVE ORDER.

In this action, inter alia, to recover damages for medical malpractice and wrongful death, the defendants move pursuant to CPLR 3103(a) for a protective order vacating the plaintiff's December 2, 2022 notice to admit. The plaintiff opposes the motion. The motion is granted, and the notice to admit is vacated.

On November 11, 2015, the plaintiff commenced the instant medical malpractice and wrongful death action, asserting 17 causes of action, including causes of action alleging breach of contract, negligent infliction of emotional distress, common-law negligence, and lack of informed consent. Between September 12, 2017 and March 21, 2013, the court issued nine case management orders. As of the latter date, the depositions of at least five nonparty witnesses, including two who formerly were employed by the defendant Memorial Hospital for Cancer and Allied Diseases, had yet to be conducted.

On December 2, 2022, the plaintiff served a notice to admit upon the defendants, requesting that they admit to 145 separately enumerated statements. Rather than responding with admissions or denials, the defendants, within six days of their receipt of the notice, made the instant motion for a protective order.

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]). Moreover, 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]; *Doe v Lenox Hill Hosp.*, 2023 NY Slip Op 30342[U], *3-4, 2023 NY Misc LEXIS 466, *5 [Sup Ct, N.Y. County, Feb. 1, 2023] [Kelley, J.]).

Here, the plaintiff's notice to admit improperly requested the defendants to admit legal conclusions and ultimate issues going to the core of the dispute. 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 defendants to provide responses, 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]).

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]). CPLR 3103(a) specifically provides 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] *aff'd* 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]).

Although CPLR 3123(a) provides that “[e]ach of the matters of which an admission is requested shall be deemed admitted unless within twenty days after service thereof, . . . the party to whom the request is directed serves upon the party requesting the admission a sworn statement . . . denying specifically the matter of which an admission is requested,” here, the

“notice to admit called upon the [defendants] to admit . . . fact[s] . . . as to which the plaintiff’s attorney 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 defendants] 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]). In any event, a motion pursuant to CPLR 3103(a) “shall suspend disclosure of the particular matter in dispute” (CPLR 3103[b]). Since the defendants made the instant CPLR 3103(a) motion before the 20-day period of CPLR 3123(a) had lapsed, they were and are under no obligation expressly to deny any of the statements that they were requested to admit, lest the statements be deemed admitted.

Generally, where discovery notices, demands, and requests are so unduly burdensome and prolix as to be oppressive, or contain numerous items that are palpably improper, the appropriate remedy is not judicial pruning, but vacatur of the notices, demands, or requests in their entirety (see *Apple Bank for Savings v Noah’s Route 110, Inc.*, 210 AD2d 277, 277 [2d Dept 1994] [document request]; *Mendler v Mendler*, 135 AD2d 469, 470 [1st Dept 1987] [interrogatories]; *Suffolk Business Ctr., Inc. v Applied Digital Data Sys.*, 128 AD2d 861 [2d Dept 1987] [interrogatories]; *Cramp v Cramp*, 114 AD2d 835, 835 [2d Dept 1985] [general discovery demands]; *Jonassen v A.M.F., Inc.*, 104 AD2d 484, 486 [2d Dept 1984] [notice of discovery and inspection]; *Matter of Nunberg*, 1996 NYLJ LEXIS [Sur Ct, Westchester County, Sep. 5, 1996] [notice to admit]).

The plaintiff's remaining contentions are without merit.

Accordingly, it is

ORDERED that the defendants' motion is granted, the plaintiff's December 2, 2022 notice to admit is vacated, and the defendants are granted a protective order excusing them from responding to any and all items enumerated in the plaintiff's December 2, 2022 notice to admit.

This constitutes the Decision and Order of the court.

4/12/2023
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE