

**Town & Country Adult Living, Inc. v Hearth at  
Mount Kisco, LLC**

2023 NY Slip Op 32227(U)

June 26, 2023

Supreme Court, New York County

Docket Number: Index No. 657551/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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TOWN AND COUNTRY ADULT LIVING, INC., THE  
WESTCHESTER RESIDENCE AND CLUB, LLC, ROBERT  
MISHKIN,

Plaintiffs,

- v -

THE HEARTH AT MOUNT KISCO, LLC, FORTUS MOUNT  
KISCO, LLC, FORTUS COMPANIES, LLC, HEARTH  
SENIOR CARE MOUNT KISCO, LLC, ADAM PROBST,  
CHRISTIAN SEXTON, CARL GUY, MAYNARD FAHS,  
DEBBIE PROBST

Defendants.

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INDEX NO. 657551/2017  
MOTION DATE 03/23/2023  
MOTION SEQ. NO. 012

**DECISION + ORDER ON  
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460 were read on this motion to COMPEL DISCOVERY.

Defendants’ motion to compel discovery is **granted**. Plaintiff Robert Mishkin (“Mishkin”) shall, within thirty (30) days of this decision and order, be made available for a deposition and produce any responsive non-privileged documents that have not already been produced.<sup>1</sup>

<sup>1</sup> The Notice of Motion seeks to compel the deposition and documents. The moving brief seeks to set the location of the deposition at the New York County Courthouse as well as rulings on hypothetical objections. The Court’s decision is limited to the relief sought in the Notice of Motion. The Court expects counsel to be able to resolve the question of where to take the deposition without Court intervention, and will not resolve disputes with respect to objections until a record has been made.

### **A. Background**

Defendants served a notice of deposition and request for documents on Mr. Mishkin on October 24, 2022 (NYSCEF 441). As discussed during the December 20, 2022 hearing, Mr. Mishkin's deposition was not completed while certain discovery disputes were pending (NYSCEF 433 [Transcript at 47-48]). The Court resolved the disputes and directed the parties to complete depositions promptly (Tr. at 58-59). The Court directed that no further Rule 14 letters be submitted and that the parties instead file motions to compel discovery if deemed necessary (Tr. at 60).

On January 31, 2023, Defendants moved to compel Mr. Mishkin's deposition (NYSCEF 420). On March 7, 2023, the motion was withdrawn because the parties reached an agreement to conduct Mr. Mishkin's deposition that same day (NYSCEF 434-435). However, the very next day, on March 8, 2023, counsel for Mr. Mishkin wrote that while he and Mr. Mishkin appeared on March 7, 2023 for deposition, counsel for Defendants failed to appear (NYSCEF 436). According to Mr. Mishkin's counsel, Defendants' counsel improperly refused to take the deposition because (1) Mr. Mishkin claimed to not possess any documents beyond what was exchanged in discovery and (2) counsel for Mr. Mishkin advised that he anticipated interposing an objection to questions pertaining to a certain time period.

On March 23, 2023, Defendants filed the instant motion to compel Mr. Mishkin's deposition (NYSCEF 437). No opposition was filed, and the motion was marked submitted on April 14, 2023 (*see* NYSCEF Docket).

### **B. Mr. Mishkin Shall Be Made Available For Deposition**

Mr. Mishkin's deposition is clearly warranted, and Mr. Mishkin does not object to being deposed. The Court cannot determine, and is not particularly interested in, which party is

responsible for the cancellation of the last deposition. But it should not happen again. Mr. Mishkin's deposition *shall* be held within thirty (30) days. Mr. Mishkin's counsel shall promptly propose dates for the deposition.

Mr. Mishkin shall produce any responsive non-privileged documents that have not been produced to date before or at the deposition pursuant to CPLR 3111. Defendants may inquire at the deposition about the search for and production of responsive documents to probe whether production is complete (*Penn Palace Operating, Inc. v Two Penn Plaza Assoc.*, 215 AD2d 231, 231 [1st Dept 1995]), but the deposition should not be cancelled or adjourned on that basis. Nor should the deposition be cancelled based on objections, which may be resolved in the ordinary course. Any objections at the deposition shall be made in accordance with CPLR 3115 and 22 NYCRR 221.1 (*Freidman v Fayenson*, 41 Misc 3d 1236(A) [NY Sup 2013], *affd sub nom. Freidman v Yakov*, 138 AD3d 554 [1st Dept 2016]).

### **C. Discovery Is Closed**

The July 30, 2019 Preliminary Conference Order (NYSCEF 130) provided for discovery to close on February 14, 2020. On December 27, 2019, the Court extended the time to complete discovery to April 17, 2020 (NYSCEF 148). On July 2, 2020 – during the pandemic – Defendants indicated their intention to move for summary judgment (NYSCEF 158). On July 8, 2020, Plaintiffs argued that discovery was incomplete, sought to stay summary judgment motion practice and requested a Rule 14 conference. The Court declined to stay summary judgment motions but cautioned that “Defendants are advised to assume that multiple summary judgment motions will not be allowed” (NYSCEF 166).

On February 17, 2021, the Court granted Plaintiffs leave to make a motion to strike Defendants' Answer for failure to produce discovery (NYSCEF 236). On February 22, 2021,

Defendants' motion for summary judgment was granted to the limited extent that the eighth and ninth causes of action were dismissed (NYSCEF 237). Thereafter, several discovery motions were filed and resolved on December 20, 2022 (NYCEF 433 [Transcript]. 415-418).

During the December 20, 2022 conference, the parties discussed the issues raised in numerous Rule 14 conferences held with the Court's staff (Tr. 6-7, 23, 27-28, 35-37, 43, 58). In response to the Court's inquiry about the discovery schedule, it was revealed that the parties could not even agree to submit a proposed discovery schedule as suggested by the Court's Principal Law Clerk (Tr. 58-59). Accordingly, as stated above, the Court excused further compliance with Rule 14.

The only motions that have been filed in the sixth months since the December 20, 2022 conference concern Mr. Mishkin's deposition. That issue has now been resolved. Thus, there are no remaining issues in discovery and the Court shall set a note of issue deadline and summary judgment deadline.

\* \* \* \*

Accordingly, it is

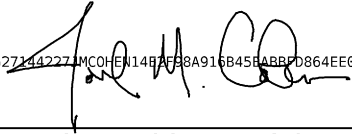
**ORDERED** that Defendant's motion to compel Mr. Mishkin's deposition is **GRANTED**. Mr. Mishkin shall be made available for deposition and produce any additional responsive non-privileged documents within thirty (30) days of this decision and order as specified above; it is further

**ORDERED** that the Note of Issue shall be filed on or by **August 18, 2023**; it is further

**ORDERED** that the deadline to move for summary judgment is **September 18, 2023**; and it is further

**ORDERED** that the parties submit a status update letter to the Court on or by **September 1, 2023**, including their preference for a Mandatory Settlement Conference as required by Rule 30(b) of the Commercial Division Rules; and it is further

This constitutes the decision and order of the Court.

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**JOEL M. COHEN, J.S.C.**

6/26/2023  
\_\_\_\_\_  
**DATE**

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>
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"/>	OTHER
			<input type="checkbox"/>	REFERENCE