

**Arrington v Dharia**

2023 NY Slip Op 35035(U)

October 4, 2023

Supreme Court, Queens County

Docket Number: Index No. 706330/21

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X  
Melissa Arrington,

Index  
Number: 706330/21

Plaintiff,  
- against -

Motion  
Date: 10/2/23

Prachi Dharia, M.D. and New York Health  
and Hospitals Corporation,

Motion Seq. No.: 3

Defendants.



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The following papers numbered E82-E110 read on this motion by Plaintiff for an order compelling Defendants to provide discovery and for a conditional order striking Defendants' COVID-19 affirmative defense if they fail to comply.

Papers  
Numbered

- Notice of Motion-Affirmation-Exhibits.....E82-93
- Affirmation in Opposition-Exhibits.....E96-104
- Affirmation in Reply-Exhibits.....E105-110

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Plaintiff for an order compelling Defendants to provide discovery and for a conditional order striking Defendants' COVID-19 affirmative defense if they fail to comply is denied.

Plaintiff allegedly sustained injuries as a result of medical malpractice stemming from Plaintiff's presentation at Queens Hospital in March of 2020. Plaintiff now moves to compel Defendants to produce COVID-19 related discovery requested in her demand dated April 13, 2023.

By way of background, Plaintiff first presented at Queens Hospital on the evening of March 6, 2020 with fever and chills. She was discharged on May 7, 2020 without being admitted. Plaintiff presented again at Queens Hospital on March 21, 2020. At that time, she was admitted and underwent care through May 22,

2020. Plaintiff allegedly suffered injury as a result of, inter alia, not being admitted during her first visit on March 6, 2020. One of Defendants' central defenses is immunity from liability pursuant to the Governor's Executive Order 202 issued on May 7, 2020, also known as the Emergency Disaster Treatment Protection Act (EDTPA). The Executive Order, among other things, granted hospitals permission to rapidly discharge and transfer patients.

On April 13, 2023, Plaintiff served a demand on Defendants, which included ten (10) requests for COVID-19 related records, including:

1. Any and all memorandums, emails, correspondence, and any other notices sent to any Queens Hospital employees regarding any and all protocols, policies, and/or procedures instituted in response to the COVID-19 pandemic on or prior to March 6, 2020.

2. Any and all documentation or other records evidencing the exact dates that any and all COVID-19 protocols, policies, and/or procedures were instituted at Queens Hospital on or prior to March 6, 2020.

3. Any and all records which would evidence the exact number of patients seen at Queens Hospital with a confirmed COVID-19 infection on March 6, 2020.

4. Any and all records which would evidence the exact percentage of patients seen at Queens Hospital with a confirmed COVID-19 infection on March 6, 2020.

5. Any and all records which would evidence the exact number of patients seen in the Queens Hospital emergency room with a confirmed COVID-19 infection on March 6, 2020.

6. Any and all records which would evidence the exact percentage of patients seen in the Queens Hospital emergency room with a confirmed COVID-19 infection on March 6, 2020.

7. Any and all records which would evidence the exact number of hospital employees who were required to miss work due to a confirmed COVID-19 infection on or prior March 6, 2020.

8. Any and all records which would evidence the exact percentage of hospital employees who were required to miss work due to a confirmed COVID-19 infection on or prior March 6, 2020.

9. Any and all records which would evidence the exact number of emergency room employees who were required to miss work due to a confirmed COVID-19 infection on or prior March 6, 2020.

10. Any and all records which would evidence the

exact percentage of emergency room employees who were required to miss work due to a confirmed COVID-19 infection on or prior March 6, 2020.

In their response dated June 20, 2023, Defendants objected to all 10 demands. However, over objection, Defendants did provide the records requested to demands 1 and 2. On August 15, 2023, Defendants served a supplemental response wherein all demands were again objected to. However, over objection, Defendants provided a response to each demand, stating "none" to demands 3 through 10. The instant motion was served on July 14, 2023, or in between when Defendants served their first response and their supplemental response.

In opposition, Defendants argue that they provided a response, and Plaintiff is merely not happy with it. In reply, Plaintiff's Counsel concedes that a supplemental response was served, but avers that clarification is needed. He reached out to Defendants' counsel for clarification on what "none" means, but received no response. Counsel contends that Queens Hospital could not possibly have zero records regarding their COVID-19 positive patients or employees since they were required to report all suspected and confirmed COVID-19 cases.


It appears from the reply affirmation that Plaintiff is simply unhappy by Defendants' response and requests the Court to compel Defendants to produce documents it claims it does not have. Plaintiff spends much time focusing on the viability of Defendants COVID-19 immunity defense by challenging the number of COVID-19 cases the hospital may or may not have had, notwithstanding the fact that EDTPA immunity appears to apply regardless of the number of COVID-19 cases a healthcare facility may have undertaken.

Accordingly, the Court cannot come to the conclusion that the Defendants have failed to comply with discovery pursuant to the CPLR, such that an order to compel is proper (see CPLR 3124). However, given the fact that Defendants took the position in their August 15, 2023 supplemental response that none of the records requested exist, Defendants shall provide, within 30 days of the date of service of a copy of this order with notice of entry, an affidavit detailing their efforts to locate the records numbered 3 through 10 in Plaintiff's discovery demand dated April 13, 2023 (see Donovan v. City of New York, 239 A.D.2d 461 [2d Dept. 1997]; Jackson v. New York, 185 A.D.2d 768 [2d Dept. 1992]).

In reply, Plaintiff made an additional request for the Court to compel Defendants to response to their post-EBT demand dated September 12, 2023 by a date certain. The forgoing request is denied, as Plaintiff improperly made said request in reply and without providing Defendants an opportunity to be heard.

Serve a copy of this order with notice of entry without undue delay.

Dated: October 4, 2023



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KEVIN J. KERRIGAN, J.S.C.

