Jenack v Goshen Operations LLC
2023 NY Slip Op 35333(U)
January 10, 2023
Supreme Court, Orange County
Docket Number: Index No. EF008129-2018
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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WILLIAM JENACK, as Administrator of the Estate of MARY RICE and WILLIAM RAMLOW, as Administrator of the Estate of ADELINE RAMLOW, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

GOSHEN OPERATIONS LLC d/b/a SAPPHIRE NURSING AND REHAB AT GOSHEN, RICHARD PLATSCHEK, ESTHER FARKOVITS, MACHLA AMRAMCZYK and ROBERT SHUCK,

Defendants.

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DECISION AND ORDER
INDEX NO.: EF008129-2018
Motion Date: 9/16/2022
Sequence Nos. 11 & 12

SCIORTINO, J.

The following papers numbered 1 to 31 were read on this motion by plaintiffs (Seq. #11) to vacate the April 25, 2022 stay of discovery proceedings and to compel production by defendants; and the cross-motion of defendants (Seq. #12) for leave to renew a prior application for a protective order directing plaintiffs to bear the costs of defendants' compliance with ongoing discovery demands:

PAPERS	NUMBERED
Notice of Motion/Affirmation in Support (Finkelstein)/Exhibits 1-19/ Memorandum of Law in Support	1 - 22
Notice of Cross-Motion/Affirmation (Thompson-Tinsley)/Defendants' Memorandum of Law/Exhibits A-E	23 - 30
Plaintiff's Memorandum of Law in Opposition to Cross-Motion and in Reply	31

Background and Procedural History

This class action alleges that defendants provided unsafe and inadequate care in a nursing home facility in violation of Public Health Law § 2801-d. The lengthy procedural history is well-known to the parties and amply outlined in the record. It will not be repeated at length here. As is relevant to the within motion, on June 4, 2020, defendants moved (Seq. #8) to compel plaintiffs to bear "the incurred and ongoing expense of collecting, processing, hosting and producing electronic discovery," including photocopying, scanning and producing records for the members of the class. The motion papers outlined defendants' need to have retained outside vendors and counsel to handle the volume of documents and data they were required to produce. Defendants urged the Court to exercise its discretion to allocate costs. Among defendants' arguments was the anticipated exhaustion of defendants' $1,000,000 (inclusive of defense costs) insurance policy. Defendants also argued that the breadth of plaintiffs' demands carried the implication of a "fishing expedition." (NYSCEF Doc. 146)

By Decision and Order dated January 19, 2021, the motion, which was vigorously opposed by plaintiffs, was denied. (NYSCEF Doc. 184) The Decision noted a distinction between the then-current approaches of the First and Second Departments in allocating costs of discovery, including electronically-stored information (ESI), but that even the Second Department was "moving away from the strict application of 'requestor pays', the position urged by defendants," as exemplified in a recently-decided Westchester matter involving the same defendants and the same issues, *Allen v. Yertle Operations, LLC, et als*, 70 Misc. 3d 934 [2020]) The Court went on to mirror the analysis of the Supreme Court in *Allen*, weighing a host of factors including those outlined by the Federal Court in *Zubulake v. UBS Warburg*, 217 FRD 309 [SDNY 2004]) The Court concluded that it would be improper to allocate costs at that time.

Discovery, including depositions, continued, as outlined in the submissions of the parties. On December 8, 2021, plaintiffs served a Corporate Deposition Notice (Exhibit 8) requesting defendants to designate witnesses on various topics. Defendants responded on January 3, 2022

(Exhibit 9), identifying as witnesses, *inter alia*, Cindy van Voorst, RN, the Corporate Director of Nursing, and Jay Pepper, the Corporate Compliance Officer.

On April 6, 2022, defendants again wrote plaintiffs (Exhibit 10) seeking reimbursement of the costs of e-discovery incurred to date, noting that the $1 million policy limit had been exhausted. Plaintiffs did not respond. The parties thereafter met with the Court on April 25, 2022. Plaintiffs and defendants disagreed on the applicable policy limits with plaintiffs arguing that, in light of the class action and its multiple claimants, the policy's $3 million event limit should apply and defendants advising that coverage counsel denied that coverage limit. This Court directed the parties to exchange all documentation concerning coverage with each other and with the Court. Defendants were directed to produce coverage counsel at the next conference. Discovery was deferred for a determination of coverage limits.

At a conference on June 22, 2022, the insurer maintained its position regarding the $1 million limit. Plaintiffs agreed that, if the insurer would not increase the limit, a declaratory judgment action would be commenced. A further conference was held on July 18, 2022, and no consensus having been reached, plaintiffs represented they would commence the declaratory judgment action. Defendants indicated their intention to renew their prior application for cost-shifting. Although plaintiffs proposed continuing with the depositions of van Voorst and Pepper, defendants declined to go forward, citing the Court's stay of discovery.

These motions followed.

<u>Defendants' Motion to Renew</u> (Sequence #12)

For purposes of clarity, defendants' motion will be addressed first.

CPLR 2221(e) provides that a motion to renew must be (a) specifically identified as such; (b) based upon new facts not offered on the prior motion which would change the prior determination; and (c) must contain sufficient justification for the failure to have presented the facts on the initial motion. In general, a motion to renew must be based upon new facts not offered on the prior motion that would change the prior determination. It is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation.(*Serviss v. Incorporated Village of Floral Park*, 164 AD3d 512 [2d Dept 2018])

The requirement that a motion for renewal be based on new facts is a flexible one and renewal may be granted on facts known to the party seeking renewal, at the time the original motion was made. But that flexibility does not abrogate the requirement that a reasonable justification for failure to present the facts must be presented. Where the moving party omits a reasonable justification for failing to present the new facts on the original motion, the Court lacks discretion to grant renewal. (*id.* at 513)

Defendants' motion is based on two factors. The first is the exhaustion of insurance coverage. That eventuality was a principal basis for the prior motion. The Court accepted then that $300,000 had been spent, and now, two years later, the Court accepts that costs and legal fees have apparently exceeded the million-dollar mark. However, the lack of sufficient insurance coverage is not an established fact. Rather, it is an issue that must await the declaratory judgment action that has not, apparently, been commenced as of yet by either party. But even if the Court accepts, for purposes of the motion, that no further coverage is available, defendants have still offered no authority for charging discovery fees to *plaintiffs' counsel.*[1] (emphasis added)

In short, the potential for exhaustion of coverage was clearly known to defendants at the time of the original motion and cannot serve as a basis for renewal. As stated in the original decision, should defendants prevail at trial, they will be entitled to recover discovery costs in their judgment.

[1]Of note, the first motion included affidavits from the individual defendants purporting to deny their ability to bear the costs of litigation. This motion has no such support.

The second basis for renewal is the "discovery" of the so-called Halifax affidavit, which was submitted on a motion in the *Allen v. Yertle Operations* matter in Westchester, in September 2019. The defendants in *Allen* are largely the same as the defendants at bar and defendants' counsel in this matter also represents defendants in that matter. The Halifax expert affidavit, submitted in support of the motion for class certification in *Allen*, relies on "electronic, machine-readable MDS assessments for all....residents...sourced from a data expert who received these MDS assessments directly from CMS in anonymized form pursuant to a Freedom of Information Act request." (Exhibit E at page 17) Halifax further noted that the PBJ (payroll) data "is available online for 2017, 2018 and 2019 and shows number and types of staffing." (Exhibit E at pp. 16, 19)

While defendants assert that "these facts developed after the prior motion," the record does not bear that out. Even if the Court accepts the fact that the handling attorney in this matter may not have been aware of the documents submitted in the *Allen* matter, here, the same data was employed by plaintiffs' expert, Charlene Harrington, in her report, submitted May 13, 2019. (NYSCEF Doc. 59). Defendants offer no explanation for the failure to have offered that evidence in the original motion, thereby removing any discretion the Court has to consider an application for renewal.

The Court recognizes the harsh burden this decision places on defendants, as well as the potentially-catastrophic consequences of the exhaustion of insurance proceeds for both parties. However, for the reasons outlined above, the application for renewal must be denied.

<u>Plaintiffs' Motion to Vacate the Stay and Compel Disclosure</u> (Sequence #11)

The motion to vacate the stay is denied, without prejudice to renew.

Plaintiffs argue that the informal stay of discovery, imposed by this Court at the conference of April 25, 2022, has led to an "unreasonable delay in prosecuting plaintiffs' and the class's rights." As such, they assert that the stay does not serve the interests of justice. If a stay unreasonably stymies a party's ability to take discovery or otherwise proceed, it should be rejected. Plaintiffs assert that the continuing stay significantly prejudices them, in that litigating a declaratory judgment action may take years. Moreover, plaintiffs argue, defendants have postponed resolution through "frivolous" motion practice for years. There is no authority in New York law to impose a stay merely because a defendant claims exhaustion of insurance proceeds.

In opposition, defendants argue that the expense of discovery lies with the breadth of the demands and the volume of the documents, paper and electronic which they have been required to submit. Although plaintiff asserts it suggested that defendants could minimize discovery costs by omitting internal review of documents, that suggestion is neither reasonable nor would it meet counsel's responsibility to its clients. While plaintiffs argue that defendants' motion practice has been frivolous, equally important is the fact that documents produced by defendants were not even relied upon (or perhaps even reviewed) by plaintiffs' expert. Defendants reiterate that the stay should continue until determination of the insurance coverage.

The Court declines to follow either suggestion.

CPLR 2201 provides that a court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just. "The Court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources." (*Morreale v. Morreale*, 84 AD3d 1187, 1188 [2d Dept 2011], *quoting, Zonghetti v. Jeromack*, 150 AD2d 561, 563 [1989])

The Court does not consider defendants' motions, unsuccessful as they may have been, to have been "frivolous." Especially in considering the first cost-shifting motion, this Court undertook to discern the evolution of the law regarding e-discovery. While on balance, the Court found then that cost-shifting was inappropriate, considering the historical holdings of the Second Department, the application was hardly without basis.

Nor does the Court find that plaintiffs have been victimized by the proceedings. In the conference on April 25, 2022, and again at the conferences on June 22 and July 18, 2022, plaintiffs recognized the need to commence litigation against the insurer to determine whether coverage was available. Plaintiffs' moving papers acknowledge their agreement to undertake such litigation. But eight months after that initial agreement, it does not appear that any such action has been commenced.

Had this Court been in a position to undertake a second evaluation of the factors in *U.S. Bank v. GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58 [1st Dept 2012], the Court may well have considered the ability of the parties to bear the cost of the litigation, if the insurance proceeds were no longer available. While plaintiffs matter-of-factly assert that defendants have great personal wealth, they offer no evidence apart from one defendant's testimony that he earns $100,000 a year from one nursing home. The Court will not engage in speculation about the parties' finances.

The Court may have additionally considered the breadth of discovery sought before and again regarding MDS and PBJ data that was, apparently, unnecessary for their expert, at least on the motion for class certification. It may well be true that some other standard of proof requires the defendants to produce the same data again, but plaintiffs have not made that showing. Instead, having received the benefit of a finding that defendants must pay for their own production, plaintiffs have little incentive to narrowly tailor their demands to avoid the time and expense of duplication of effort.

The Court is cognizant of Public Health Law section 2803-c, which protects the rights of patients in certain medical facilities and provides, in relevant part, that "every patient shall have the right to receive adequate and appropriate medical care..." PHL §2803-c(3)(e) The principles enunciated in that section "are declared to be the public policy of the state..." PHL §2803-c(1) Further, the Court does agree that a declaratory judgment action may take years and acknowledges that a stay may not be appropriate throughout that entire process. But at this juncture, the parties are no closer to resolving discovery differences than ever.

On that basis, the application to vacate the stay is denied without prejudice to renew at an appropriate time.

An in-person status conference shall be held on Friday, February 17, 2023 at 9:15 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 10, 2023
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*