

Munoz v Bogopa Service Corp.
2025 NY Slip Op 35528(U)
March 18, 2025
Supreme Court, Bronx County
Docket Number: Index No. 802509/2022E
Judge: Naita A. Semaj
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NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX: PART 27

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Yanine Grissell Montoya Munoz,
 - against -

Index No.: 802509/2022E

Bogopa Service Corp. d/b/a Food Bazaar
 Supermarket, Bogopa-Gates, Inc., and
 1580 Gates Co., LLC.,

Hon. Naita A. Semaj
 Justice of the Supreme Court

Respondents.

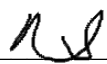
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The following papers numbered NYSCEF Doc. #68 to NYSCEF Doc. # 90, 92-95 were read on **Respondents' Motion** (Seq. No. 1) for an Order compelling: (i) Respondents to produce witnesses for EBT; and (ii) Respondents to reply to Petitioner's discovery demands; and (iii) sanctions were noticed and duly submitted on **November 6, 2024**.

Sequence No. 1	NYSCEF Doc. Nos.
Notice of Motion - Exhibits and Affidavits Annexed	68 - 90
Answering Affirmation/Affidavit and Exhibits	92
Replying Affirmation/Affidavit and Exhibits	94

See attached decision and order dated **March 18, 2025**.

Dated: March 18, 2025

Hon. 
 Naita A. Semaj, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: PART 27

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Yanine Grissell Montoya Munoz,

Index No.: 802509/2022E

- against -

Decision and Order

Bogopa Service Corp. d/b/a Food Bazaar
Supermarket, Bogopa-Gates, Inc., and
1580 Gates Co., LLC.,

Respondents.

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HON. NAITAA. SEMAJ

On February 17, 2022, Petitioner filed this action seeking damages for injuries occurred while traversing property owned or maintained by Respondents. Respondents interposed an answer with demands on June 21, 2022.

About July 30, 2024, Respondents purportedly issued post-EBT demands; served subpoenas upon non-party witnesses Danny Ubierra and Freddy Rolando Munoz Ewens for appearance at deposition; and served a subpoena *duces tecum* upon Nicoletti Horning & Sweeny [“NHS”]; Cherny & Podolsky, PLLC [“CPP”]; and Elefterakis Elefterakis & Panek [“EEP”].

Now, Respondents move to compel Petitioner, NHS, CPP, EEP and non-party witnesses to comply with all post-EBT demands and outstanding discovery requests, and issuance of sanctions. Only NHS (a non-party Respondent) opposed, and Respondents replied.

Respondent argues that (i) Petitioner did not respond to post-EBT discovery demands; (ii) non-party witnesses failed to appear at depositions despite subpoena; (iii) Petitioner did not comply with subpoenas for documents; and (iv) sanctions for non-compliance. NHS opposes and contends that all non-privileged documents were provided, that it complied with subpoenas - thus no basis for contempt - and Respondents’ request for third-party medical records violates HIPPA protections. In reply, Respondents maintain that HIPPA does not apply to the law firm NHS and that NHS must provide a privilege log if any documents are being withheld. After review of all papers, the Court decides as follows:

Pursuant to CPLR § 3124, the Court may compel compliance upon failure of a party to provide discovery. It is within the Court's discretion to determine whether the materials sought are “material and necessary” (CPLR § 3124; *see Roman Catholic Church of the Good Shepard v. Tempco Systems*, 202 AD2d 257 [1st Dept., 1994]). The Court also may

interpret “material and necessary” liberally to require disclosure of facts bearing on the controversy. (*Forman v. Henkin*, 30 NY3d 656, [2018]). In addition, the New York Court of Appeals favors relief under CPLR § 3124 where the record supports the determination that Respondents, through delays and other strategies, engaged in a course of conduct designed to yield one-sided disclosure in Respondents’ favor, culminating in Respondents’ disregard of an order compelling Respondents to answer [questions] which were found to be relevant and appropriate (*see Richard Zletz v. Herbert Wetanson et al.*, 67 NY2d 711 [Ct Ap 1999], *cf. Fellner v. Texas Mexican Ry. Co.*, 76 AD2d 820; *Commissioners of State Ins. Fund v. News World Communications*, 74 AD2d 765). The Court of Appeals also holds that the credibility of court orders and judicial system integrity must be maintained and “a litigant cannot ignore court orders with impunity... [i]ndeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a ‘court may make such orders as are just.’” (*Zletz*, *supra*, citing CPLR § 3126).

Here, Respondents assert that Petitioner did not provide all post-EBT discovery responses, and NHS’s opposition does not sufficiently deny this assertion. Moreover, the firms of CCP and EEP did not submit opposition, and thus take no stance. The Court has authority to direct Petitioner to fully respond to Respondents’ requests to materials which the Court deems just and proper. As such, the Court is inclined to direct Petitioner to provide all outstanding discovery responses.

Respondents produce affidavits of service of subpoena *ad testificandum* upon non-party Danny Ubierra and non-party Freddy Rolando Munoz Ewens. Respondents seek to compel non-party Danny Ubierra and Freddy Rolando Munoz Ewens, who allegedly witnessed the accident, to appear at depositions. CPLR § 2308(a) allows the court to enforce compliance with a subpoena. The witnesses have not moved to quash the subpoenas nor provided any valid reason for their failure to appear. As such, the Court is inclined to direct non-party witnesses Ubierra and Ewens to appear at depositions.

Regarding the aspect of Respondents’ motion seeking that NHS comply with document production pursuant to a subpoena *duces tecum*, NHS argues that it produced all non-privileged documents but is withholding certain records based on HIPAA protections. However, as Respondents asserts, HIPAA applies only to covered healthcare entities, and opposing counsel law firm NHS does not fall under this category. (*See Affirmation in Reply NYSCEF Doc. No.: 94*). Specifically, in *McMahon v. N.Y. Organ Donor Network, Inc.*, (56 Misc. 3d 467, 471-72 [Sup. Ct. NY 2017]) as cited and summarized by Respondents:

“[W]here a party is not a covered entity, HIPAA does not prevent the disclosure of documents... if this court were to deny [party]’s motion based on HIPAA, then it would be, in effect, promulgating a new federal rule.” (*McMahon v. N.Y. Organ Donor Network, Inc.*, 56 Misc. 3d 467, 471-72 (Sup. Ct. NY 2017) *aff’d in part, modified in part* 161 A.D.3d 680, 681 (1st Dept. 2018) (affirming as to cited portion above).

Therefore, if NHS has medical records, HIPAA does not prohibit disclosure unless proper authorization is required. Furthermore, CPLR § 3122(b) requires that if any documents are being withheld, a privilege log must be provided, detailing what is being withheld and on what grounds. NHS did not produce such a log. As such, the Court is inclined to direct NHS to provide a privilege log, identifying any withheld documents and the basis for withholding. If documents are being withheld under HIPPA, Petitioner must provide evidence that authorization was requested but not provided.

The Court declines to impose sanctions at this stage of litigation and will first grant NHS an opportunity to comply. Accordingly, it is hereby,

ORDERED, that the part of Respondents' motion for seeking an order compelling Petitioner to provide all outstanding discovery is GRANTED, and it is further:

ORDERED, that the part of Respondents' motion for seeking an order compelling Nicoletti Horning & Sweeney to comply with the Subpoena Duces Tecum is GRANTED, and it is further:

ORDERED, that the part of Respondents' motion for seeking an order compelling Cherny & Podolsky, PLLC to comply with the Subpoena Duces Tecum is GRANTED, and it is further:

ORDERED, that the part of Respondents' motion for seeking an order compelling Elefterakis Elefterakis & Panek to comply with the Subpoena Duces Tecum is GRANTED, and it is further:

ORDERED, that Nicoletti Horning & Sweeney, Cherny & Podolsky, PLLC, and Elefterakis Elefterakis & Panek produce documents requested pursuant to the Subpoena Duces Tecum within **45** days of receipt of this Order, and it is further:

ORDERED, that Petitioner provide all outstanding discovery responses within **30** days of receipt of this Order, and it is further:

ORDERED, that the part of Respondents' motion seeking an order compelling Petitioner to produce non-party witnesses Danny Ubierra and Freddy Rolando Munoz Ewens at EBT is GRANTED, and it is further:

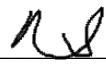
ORDERED, that non-party witnesses Danny Ubierra and Freddy Rolando Munoz Ewens appear for depositions to be scheduled within 30 days of service of this Order, and it is further:

ORDERED, that Nicoletti Horning & Sweeney provide a privilege log within 45 days detailing documents withheld and basis for withholding. If withheld documents are held under HIPPA, Nicoletti Horning & Sweeney is directed to provide proof that authorization was requested but not provided, and it is further:

ORDERED, that Respondents' request for sanctions is DENIED, without prejudice.

This constitutes the Decision and Order of this Court.

Dated: March 18, 2025

Hon. 
Naita A. Semaj, J.S.C.