Hinds v Morgan
2017 NY Slip Op 33435(U)
December 22, 2017
Supreme Court, Nassau County
Docket Number: Index No. 600940/17
Judge: James P. McCormack

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

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JUDY E. HINDS, as Executor of the Estate of EARL H. CLARKE, and JUDY E. HINDS, Individually,

Plaintiff(s),

-against-

DANIEL J. MORGAN, M.D., MOUNT SINAI BROOKLYN, and SHEEPSHEAD NURSING AND REHABILITATION CENTER, LLC,

Defendant(s).

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TRIAL/IAS, PART 27
NASSAU COUNTY

Index No. 600940/17

Motion Seq. No.: 001, 002 & 003

Motions Submitted: 11/8/17

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX
Notice of Cross Motion.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendant, Sheepshead Nursing and Rehabilitation Center, LLC (Sheepshead), moves this court (Motion Seq. 001) for an order, pursuant to CPLR §3126, dismissing the complaint, or precluding Plaintiff, Judy Hinds, as Executor of the Estate of Earl H. Clarke, and Judy Hinds Individually (Hinds), from offering evidence at trial, for failure to

comply with discovery. In the alternative, Sheepshead seeks an order pursuant to CPLR §3124 compelling Hinds to comply with all outstanding discovery. Mount Sinai Brooklyn (Mount Sinai), cross moves (Motion Seq. 002) for the identical relief against Hinds. Defendant, Daniel J. Morgan, M.D. (Dr. Morgan) moves separately (Motion Seq. 003) for the identical relief against Hinds. Hinds opposes all three motions.

Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...", or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). Herein, all three moving papers contain an affirmation of good faith, and all three are insufficient. Sheepshead counsel refers to three "good faith" letters that were sent, but alludes to no other efforts made. As discussed, *infra*, letters alone do not satisfy the rule. Counsel for Mount Sinai states: "Defendant has, in good faith, followed up with plaintiff seeking to obtain this discovery, having left multiple telephone messages and having sent numerous

good faith letters." Though they provide the letters, the affirmation fails to provide the detail required by the rule. Further, their cross motion is procedurally defective as they cross move against a non-moving party. (CPLR §2215; *Terio v. Spodek,* 25 A.D.3d 781 [2nd 2006]); *Mango v. Long Is. Jewish-Hillside Med Ctr.,* 123 A.D.2d 843 [2nd Dept. 1986]). Dr. Morgan's counsel states "It is respectfully submitted that good faith attempts have been made by the moving defendant to obtain discovery. These attempts include demands regarding the outstanding discovery at court conferences, incorporating said demands into court orders, and serving a good faith letter for outstanding discovery." The fact that counsel have sent "good faith letters" does not satisfy the rule.

Courts have found letters alone do not satisfy the good faith requirement. (*See Eaton v. Chahal*, 146 Misc.2d. 977, 983 [N.Y.Sup. 1990] ("...the court interprets a 'good faith effort' to mean more than an exchange of computer generated form letters or cursory telephone conversation."); *Santiago v. Park Ambulance Serv., Inc.*, 53 Misc.3d 1201(A)[N.Y.Sup. 2016]("Merely sending letters...is not sufficient to satisfy the requirement of 22 NYCRR §202.7(c)."); *Amherst Synagogue v. Schuele Paint Co.*, 30 A.D.3d 1055, 1057 [4th Dept. 2006](sending only letters "'failed to demonstrate that they made a diligent effort to resolve this discovery dispute.'", *quoting Baez v. Sugrue*, 300 A.D.2d 519, 521 [2nd Dept. 2002]).

The problem with simply sending a letter is that a letter will rarely satisfy the requirement that the parties make a "diligent effort" to resolve the dispute. (*Deutsch v.*

Grunwald, supra). While a letter is considered "communication", the rule requires that the affirmation of good faith contain the "time, place and nature of the consultation and the issues discussed...". Clearly, the rule requires discussion, and an explanation of what was addressed during the discussion. This court can envision a series of letters, or perhaps emails, between the parties meaningfully addressing these issues and responding to one another's arguments satisfying this requirement, but letters from one party repeatedly pointing out how the other party's responses are deficient does not allow for the exchange of information and negotiation that the rule intends to occur.

The parties are required to confer, and consultation is expected to take place. Unless a compelling argument can be made that sending a letter rose to the level of conferring and consultation, the failure to confer is fatal to the affirmation of good faith or other efforts made. (*Murphy v. County of Suffolk, supra; Gonzalez v. International Bus. Machs., Corp.*, 236 A.D.2d 363 [2nd Dept. 1997]); *Matter of Greenfield v. Board of Assessment for Town of Babylon,* 106 A.D.3d 908 [2d Dept. 2013]; *Koelbel v. Harvey*, 176 A.D.2d 1040 [3rd Dept. 1991]. It cannot be argued that Defendants herein made "diligent efforts" to resolve the dispute, as required by 22 NYCRR 202.7 by sending letters.

For the all foregoing, the court is constrained to deny all three motions as defective. However, the court is mindful of the fact that the Defendants did make some attempt, via letters, to resolve these issues, and that Hinds only responded to the

discovery demands upon being served with the motions herein. While the motions are defective, it is Hinds' fault that motions had to be made at all. Why Hinds had to wait until three motions were brought before providing responses to the demands is frustrating and resulted in an unnecessary waste of this court's time, not to mention the parties' time as well. The court will not address whether or not Hinds properly responded to the demands, but acknowledges that at least one of the Defendants submitted a reply affirmation claiming she did not.

The motions will be denied without prejudice, but the court urges the parties to have an actual conversation about any further outstanding discovery. If the motions are brought a second time and the court believes that one or more parties did not make a good faith, diligent effort to resolve the issues raised in the motions, or if the court finds that any party failed to properly respond to a demand, the court will not hesitate to issue sanctions.

Accordingly, it is hereby

ORDERED, that Sheepshead's motion to strike and compel is DENIED, without prejudice with leave to renew upon proper compliance with 22 NYCRR 202.7 in its entirety; and it is further

ORDERED, that Mount Sinai's cross motion to strike and compel is DENIED, without prejudice with leave to renew upon proper compliance with 22 NYCRR 202.7 in its entirety; and it is further

ORDERED, that Dr. Morgan's motion to strike and compel is DENIED, without prejudice with leave to renew upon proper compliance with 22 NYCRR 202.7 in its entirety.

This constitutes the decision and order of the court.

Dated: December 22, 2017
Mineola, New York

Hon. James P. McCormack, J. S. C.

ENTERED

JAN 03 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE