

Doe v Lenox Hill Hosp.
2019 NY Slip Op 31965(U)
July 9, 2019
Supreme Court, New York County
Docket Number: 159628/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 159628/2016

JANE DOE,

MOTION SEQ. NO. 005

Plaintiff,

- v -

LENOX HILL HOSPITAL, NORTHWELL HEALTH, INC., F/K/A
NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, INC.,
and FRANCISCO LINARES ALVARENGA, M.D.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to COMPEL

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this tort action, plaintiff Jane Doe moves, pursuant to CPLR 3120 and 3124, to compel defendants Lenox Hill Hospital and Northwell Health, Inc., f/k/a North Shore-Long Island Jewish Health System, Inc. (collectively "Lenox Hill") to permit Plaintiff entry onto the premises of the Lenox Hill Hospital building located at 100 East 77th Street in Manhattan ("the premises") for inspecting, documenting, photographing, or videotaping offices, viewing angles, rooms, and walkways. Lenox Hill opposes the motion. After considering the parties' arguments and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

Plaintiff commenced the instant action against defendants on November 11, 2016 by filing a summons and complaint. (Doc. 1.) In the complaint, plaintiff alleges that, on November 10, 2013, she was admitted to defendant Lenox Hill as a result of a severe panic attack and suicidal thoughts.

(*Id.* at 4.) During her stay, she was treated by defendant Francisco Linares Alvarenga (“Linares”) in the hospital’s Psychiatric Impairment Unit (“PIU”). (*Id.*) Although she was discharged on November 15, 2013, she was admitted for a second time on January 8, 2014, after experiencing severe anxiety. (*Id.*) During this stay at the PIU, Plaintiff was again treated by Linares. (*Id.*) Plaintiff was discharged on January 22, 2014, but continued ongoing treatments with psychiatrists at Lenox Hill, including Linares. (*Id.*)

The complaint further alleges that, while she was at Lenox Hill, Linares visited her alone “so as to groom Plaintiff for a sexual relationship.” (*Id.* at 5.) Plaintiff further asserts that Linares would stroke her arm and shoulder, linger in her room, and would exclude other resident-physicians at the facility. (*Id.*) Plaintiff alleges that, upon her discharge from Lenox Hill, Linares allegedly gave her his business card so that they could continue communicating and, from January through March of 2014, they shared nude photographs and had sexual intercourse. (*Id.*) The complaint asserts that Lenox Hill is liable for the acts of defendant Linares through respondeat superior (*see id.* at 7), that Lenox Hill negligently hired and supervised Linares (*id.* at 7–8), and that Lenox Hill was negligent in failing to have proper safeguards and procedures that would have prevented physicians from engaging in inappropriate contact with patients (*id.* at 8–9).

On December 28, 2018, plaintiff filed and served the Supplemental Notice of Discovery and Inspection at issue which, *inter alia*, requested entry into Lenox Hill for the purposes of inspecting and photographing the premises. (Doc. 110.) Plaintiff never received a response. (Doc. 109.) Between February and March of 2019, plaintiff communicated with Lenox Hill no less than seven times in an attempt to resolve the discovery dispute. (*See id.* at 4–5.) Plaintiff then filed this motion on April 18, 2019. (Doc. 107.)

In support of the instant motion, plaintiff argues that access to the hospital premises is material and necessary to prosecute her causes of action against Lenox Hill. Specifically, she insists that being able to photograph “viewing angles” is necessary to establish that defendant Linares’ actions should have been obvious to Lenox Hill doctors, nurses, and staff. (*Id.* at 7.) In addition, she argues that inspecting and photographing the relevant areas of the premises—for example, where she was admitted and defendant Linares’ workspace—are necessary to her trial preparation, and that such photographs or videos may serve as demonstrative aids to witnesses and the jury. (*Id.* at 9.)

In opposition, Lenox Hill asserts that the instant motion is a “fishing expedition” because the office space which Plaintiff seeks to inspect is no longer occupied by Linares.¹ (Doc. 118 at 2.) Lenox Hill also notes that it is uncertain whether the relevant offices are in the same condition as they were at the time of plaintiff’s treatments, which commenced in 2013, because Linares is no longer employed by the hospital. (*Id.*) Moreover, because plaintiff’s own deposition testimony reflects that she had no sexual contact with Linares until she was discharged from the hospital, Lenox Hill maintains that “an inspection of the layout of the unit is not central to the case.” (*Id.* at 3–4.) Further, Lenox Hill argues that allowing plaintiff to conduct an on-site inspection of the psychiatric unit would violate HIPAA protections to other patients’ privacy rights: “[R]evealing the location of a patient in a psychiatric unit would reveal their medical status as requiring mental health treatment, and that status is so particularly sensitive in nature that it is deserving of added protections.” (*Id.* at 5–6.)

¹ Regarding this allegation, this Court notes that Lenox Hill’s opposition papers to the motion do not include an affidavit by someone with personal knowledge of the same.

This Court, in its discretion, finds that the motion must be granted. (*See Boutique Fabrice, Inc. v Bergdorf Goodman, Inc.*, 129 AD2d 529, 530 [1st Dept 1987] (“We . . . recognize that the trial court is vested with broad discretion to regulate pre-trial discovery.”) (internal citation omitted).) Pursuant to CPLR 3101(a), which governs the discovery process in civil actions, “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action” Our caselaw holds that “the words ‘material and necessary’ are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” (*Forman v Henkin*, 30 NY3d 656, 661 [2018] (internal quotations omitted).) “For purposes of disclosure, the threshold inquiry is not whether the materials sought are private but whether they are reasonably calculated to contain relevant information.” (*Id.* at 666.) Because the physical layout and attendant “sightlines” of the hospital are germane to plaintiff’s claim that Lenox Hill employees should have been aware of defendant Linares’ actions, plaintiff should be entitled to take photographs of the “viewing angles” from Linares’ and non-party Dr. Luther’s² offices, as well as the rooms and hallways common to plaintiff, Linares, and Dr. Luther during her admission at Lenox Hill. (*See Suchorzepka v Mukhtarzad*, 103 AD3d 878 [2d Dept 2013] (permitting plaintiff to conduct a limited on-site inspection of the Chemical Dependency Unit of defendant Flushing Hospital and Medical Center).)

² In plaintiff’s affirmation in support of her motion, she represents that she believes Dr. Luther to have been Linares’ boss at the time of the alleged conduct. (Doc. 109 at 9.) From the papers, it is unclear what Dr. Luther’s first name is. While the relevant portions of her deposition testimony pertaining to Dr. Luther have not been submitted in the motion papers, Defendant does not deny plaintiff’s representation that she testified about Dr. Luther at her deposition. (*See* Doc. 118.)

Defendant's arguments to the contrary are unpersuasive. It does not matter whether Linares no longer occupies the relevant workspaces or whether those spaces are in the exact same condition as they were when plaintiff was admitted in 2013. Rather, what matters is whether the structural integrity of the premises is the same. So long as the "viewing angles" from the relevant offices and hallways are the same, an inspection of the premises is not an unreasonable measure for plaintiff to take in proving her allegation that Linares' conduct was observable to other hospital employees. In this regard, Lenox Hill has not submitted any evidence indicating that the structural layout of the premises has changed so substantially that an inspection would be futile. (*See* Doc. 118 at 2.)

An inspection of the premises is also pertinent to the claims that plaintiff is asserting. Lenox Hill argues that the "requested inspection is irrelevant because there was no misconduct or 'deviant' behavior to observe" (*id.* at 7), since plaintiff testified at her deposition that "there was no sexual behavior or encounters until after her discharge from the hospital" (*id.* at 4). In this Court's view, Plaintiff identified several unusual incidents that, if true, should have alerted hospital staff that something was amiss. Specifically, plaintiff testified:

Q: When for the first time did, in your observation, Dr. Linares behave in a brazen way in front of the staff?

A: When we were in the hallway and he had his hand on my shoulder and was rubbing it and I was in line for medication and he came up to me and put his hand on the small of my back and whispered in my ear and he would be laughing with me. Jovial with me, flirtation with me [sic] coming into my room for long periods of time which, again, I have to emphasize the nurses' station is in full view, there is staff [sic].

(Doc. 122 at 3–4.) She also testified that there were “nurses that could see his arm on my shoulder and he kept talking to me as he was locking his door and we would usually walk down the hall together” (Doc. 121 at 6.) Again, plaintiff should be permitted to inspect the premises as there is an actual issue regarding whether Lenox Hill could be held liable for observable conduct that took place in the presence of its employees. (*See N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 253 [2002] (recognizing that hospital nurses have a duty to protect patients once there are acts or events suggesting inappropriate conduct is taking place).)

However, this Court is also cognizant of the risk to patients’ privacy interests that an inspection might pose. “[W]here a site inspection and photographs of an area may implicate the privacy interests of other individuals, the court should limit the scope of such an inspection to ascertaining the physical layout of the premises.” (*Harris v City of New York*, 2019 NY Slip Op 31450(U) at *6 [Sup Ct, NY County, May 23, 2019] (internal quotations and brackets omitted).) Accordingly, a site inspection may be conducted by plaintiff’s attorney, or a photographer hired by counsel, of only those areas and the “sightlines” specified in Plaintiff’s motion papers, which are the following:

1. The interior and viewing angles (sightlines) from the office used by Defendant Francisco Jose Linares Alvarenga, M.D. from January 1, 2013 through December 31, 2014;
2. The interior and viewing angles from the office used by Dr. Luther from January 1, 2013 through December 31, 2014; and
3. The rooms and walkways common to Plaintiff, Defendant Linares’ office, and Dr. Luther’s office, during Plaintiff’s admission at Lenox Hill in 2013 and 2014.

(See Doc. 109 at 1–2.) Further, no individuals or identifying personal information may be depicted within the photographs. If a patient is currently occupying the room in which Plaintiff was formerly admitted, the inspection should be scheduled between the parties during a changeover when the current patient is discharged and before a new patient is admitted. The photographs may not be disseminated to anyone and shall be maintained to the extent necessary for trial. Finally, if there are any disputes regarding the appropriateness of the photographs, the parties may present them to this Court for an *in camera* review before their use at trial.

In accordance with the foregoing, it is hereby:

ORDERED that the motion by plaintiff Jane Doe to compel discovery from defendants Lenox Hill Hospital and Northwell Health, Inc., f/k/a North Shore-Long Island Jewish Health System, Inc. is granted; and it is further


ORDERED that, within 30 days after this decision and order is filed with NYSCEF, plaintiff's counsel is to serve a copy of this order, with notice of entry, on defendants and on the Clerk of this Court; and it is further

ORDERED that, any photographs taken by plaintiff pursuant to this order may be submitted for an *in camera* examination of the same by this Court (*see* p. 6 of this decision and order); and it is further

ORDERED that the parties are to appear for a status conference on July 23, 2019, at 2:15 PM in Room 280 at 80 Centre Street; and it is further

ORDERED that this constitutes the decision and order of this Court.

7/9/2019
DATE


KATHRYN E. FREED, J.S.C.

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
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE