

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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JACKLYN DEANS and FELIPE ORNER  
As Co-Administrators dbn of the Estate  
of LIVINGSTON MANDEL DEANS,

Index No: 26844/03  
Motion Date: 4/9/08  
Motion Cal. No.: 09  
Motion Seq. No.: 07

Plaintiff,

-against-

JAMAICA HOSPITAL MEDICAL CENTER,

Defendants.

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The following papers numbered 1 to 13 read on this motion for an order: (1) pursuant to NY Ct. Rules Sec. 202.21(f), as modified by the previous court orders not complied with by the defendant as to discovery not produced by the defendant, restoring this action to the ready trial calendar subject to the additional discovery as previously ordered on the defendant and not complied with by the defendant as of this date, or in the alternative, granting the plaintiff the right to file to a new Note of Issue because issue has been joined and plaintiff has fully complied with all discovery specifically ordered on plaintiff by court order of July 9, 2007; (2) striking the defendant's pleadings pursuant to CPLR §§ 3124 and 3126, because plaintiff has fully complied with TSP rules as to the restoration of this matter to trial calendar, and because defendant has already failed to obey fully 6 (six) discovery orders issued by this court including the last conditional order of July 9, 2007 to strike the defendant's pleadings, all of which evinced a willfully, contumacious conduct and/or bad faith now for over 3 (three) years in this case by the defendant; (3) granting an order of contempt of court against Dr. Jose Cervantes who was served subpoenas duces tecum and testificandum and has failed to abide and obey with such properly served subpoenas on a physician admitted and licensed to practice in the State of New York; (4) requiring the additional resulting requested discovery from defendant for plaintiff as per notices served on defendant on November 27, 2007 and the appropriate court order requiring such compliance; (5) granting partial summary judgment, pursuant to CPLR §§§ 3212, 3124 and 3126, against the defendant as to the liability of the defendant on the causes of action in the complaint as well as the striking of the pleadings of the defendant in this action and for preclusion for defendant's repeated, willful, contumacious and continuous failure to produce discovery items previously and specifically ordered by the six (6) discovery court orders and for deliberate misrepresentation by the defendant on these issues, all related to issue of liability of such defendant hospital for failure to appropriately restraint the plaintiff decedent to his bed at the defendant hospital while confined for treatment at such facilities of the defendant hospital on November 13 and November 14, 2001, before the plaintiff decedent suffered a fatal fall from his bed and died from a brain hemorrhage while at the defendant hospital facilities being treated for other

ailments; and (6) granting legal costs and sanctions against defendant and defendant's legal counsel pursuant to 22 NYCRR 130.1-1; and upon this cross-motion by defendant Jamaica Hospital for an order, pursuant to CPLR § 3126, dismissing the action for plaintiffs' failure to comply with previously issued court orders and discovery demands, or in the alternative, precluding plaintiffs from introducing any testimony or evidence at the time of trial concerning plaintiffs' claims as to the outstanding discovery which has been duly demanded by defendant and not provided, or in the alternative, pursuant to CPLR § 3124, compelling plaintiffs to provide the outstanding discovery within fourteen days of the Court's Order; and for the imposition of sanctions, pursuant to 22 NYCRR 130.1-1.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits.....	5 - 8
Affirmation in Opposition to Cross-Motion and in Support of Motion-Exhibits.....	9 - 11
Defendant's Reply Affirmation-Exhibits.....	12 - 13

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This negligence, medical and wrongful death action was commenced by Sharon Deans, the wife of Livingston Mandel Deans ("decedent"), and Valeria A. Gray, in their capacities as co-administrators of the Estate of decedent, by filing on November 13, 1993 against defendant Jamaica Hospital Medical Center ("Jamaica Hospital"), to recover damages arising out of the care and treatment provided by Jamaica Hospital to decedent from November 7 through November 15, 2001. It is alleged that decedent sustained an injury on November 13, 2001, as a result of a fall from his bed, and his subsequent death on November 15, 2001, was caused by an "acute subdural hemorrhage with herniation of brain due to blunt impact." Defendant was served with the summons and complaint on December 20, 2003, and the verified answer, with a demand for discovery and a bill of particulars, was served on January 15, 2004.

Soon thereafter, Sharon Deans and Valeria A. Gray voluntarily resigned as the co-administrators of the Estate of decedent and, by order dated January 7, 2005, the motion by plaintiffs' counsel to withdraw was granted, following which the Surrogate's Court, Queens County (Nahman, S.), appointed Jacklyn Deans, decedent's daughter, and Felipe Orner, Esq., as successor co-administrators D.B.N. of the Estate of Livingston Mandel Deans and issued them letters of administration on February 4, 2005. Jacklyn Deans and Felipe Orner, as co-administrators of the estate, were substituted as party plaintiffs herein and the caption was amended to reflect the substitution. Plaintiff Felipe Orner appears in the dual role of co-administrator of the Estate of and also as counsel for his co-plaintiff Jacklyn Deans, as co-administrator. On March 22, 2005, following the substitution, a preliminary conference was held. The earlier demanded bill of particulars was served on March 28, 2005, and a compliance conference was held on August 4, 2005; a Note of Issue was filed on November 3, 2005, pursuant to a "So Ordered" stipulation, dated

September 28, 2005, which, in accordance with 22 NYCRR 202.21(d), permitted discovery to continue while the case remained on the trial calendar, directed Jamaica Hospital to produce nurse Yvonne Williams for a deposition to be held on November 14, 2005, and the court directed that all motions for summary judgment be made returnable no later than March 28, 2006.

Subsequently, a March 1, 2006 “So-Ordered” stipulation directed Jamaica Hospital to produce at a deposition to be held on June 8, 2006, the physician in charge of the MICU on November 14, 2001, or if unavailable, the physician in charge of the MICU as of the date of the deposition, and the court extended the time for the parties to file motions for summary judgment until September 5, 2006 to accommodate the parties’ conducting of additional discovery.

#### Prior Discovery Motions

By order to show cause dated July 17, 2006, and made returnable on September 12, 2006, Jamaica Hospital moved to mark the case off the trial calendar and to vacate the note of issue on the ground that the case was not ready for trial due to outstanding discovery, including the failure of nonparty witness Sharon Deans to appear for a deposition. Jamaica Hospital also served a notice of motion, dated August 23, 2006, and made returnable on September 12, 2006, seeking, pursuant to CPLR § 3126, an order dismissing the action or precluding plaintiffs’ introduction of evidence through the testimony of Sharon Deans, regarding the decedent’s mental or physical condition, and damages, including claims based upon pecuniary loss; and pursuant to CPLR § 3212, an award of partial summary judgment in its favor. Plaintiffs opposed the motion and cross-moved, pursuant to CPLR 3212, for partial summary judgment on the issue of liability, and pursuant to CPLR § 3126, to strike Jamaica Hospital’s answer and preclude it from offering evidence in defense of the action for alleged discovery defaults, and to impose sanctions. Jamaica Hospital thereafter served plaintiffs with a separate amended notice of motion setting forth a new return date of September 19, 2006. At the pretrial conference held on September 12, 2006, Justice Schulman issued an order granting the motion to vacate the note of issue. Jamaica Hospital withdrew its motion, and as a consequence, plaintiffs’ cross motion was not entertained by the court.

Almost a year later, this Court (Satterfield, J.) by order dated July 9, 2007, determined a motion and cross motion pertaining to discovery, many issues of which are reiterated on the instant motion. Denied was Jamaica Hospital’s application for the imposition of the drastic sanction of dismissal or preclusion, pursuant to CPLR §3126, based upon Sharon Deans’ failure to produce documents or submit to a deposition on June 2, 2006 in response to the subpoena or notice. Also denied was the alternative relief sought by Jamaica Hospital to dismiss that portion of the wrongful death claim based upon pecuniary injury due to loss of financial support. That branch of plaintiffs’ application to punish Jose Cervantes and Quechi V. Wong, alleged contemnors who are not parties to the action, for their failure to comply with a subpoena was denied, as was that branch of the motion, pursuant to CPLR §§ 3124 and 3126, to strike the answer or to preclude Jamaica Hospital from offering any evidence at trial. That branch of plaintiffs’ motion to strike the answer or to preclude Jamaica Hospital from offering any evidence at trial was granted only to the extent of directing Jamaica Hospital to produce the physician presently in charge of the MCIU for the purpose

of plaintiffs' conducting a deposition at a place mutually agreeable to the parties, and provide plaintiffs with an affidavit, by someone possessing personal knowledge of the facts, as to the last date of employment of Yvonne Williams and her full name, including middle name, if known.

Plaintiff was granted a limited protective order, pursuant to CPLR § 3101, and was directed to provide Jamaica Hospital with an authorization for the release of records maintained by Louis Muelhgay, concerning decedent's income; authorizations compliant with the Health Insurance Portability and Accountability Act (HIPAA) for the release of the records of LI Radiology Associates, Empire Imaging, Dr. Ahuja Surinder, Health Now NY, Inc., Dr. Eric Hedrick, Dr. L. Palomba, Dr. Cervantes and Dr. Boykin, concerning the care and treatment of decedent; copies of income tax returns, 1065 forms and K-1 forms for Deans Shipping for tax years 1996-2001, which are in plaintiffs' possession; and a copy of income tax returns, including W-2 forms, for Sharon Deans for tax years 1996, 1997, and 1998 which are in their possession. The branches of the motion and cross motion for partial summary judgment were denied as being untimely made, having been served after the September 5, 2006 date contained in the March 1, 2006 "So Ordered" Stipulation. Finally, that branch of the motion by plaintiffs seeking leave to reinstate the note of issue previously vacated was denied, based upon the outstanding discovery sought by both parties that belied that the case was ready for trial at that time. That branch of the motion by plaintiffs seeking to impose sanctions was denied.

#### The Instant Motion and Cross Motion

Plaintiffs now move for an order restoring this action to the trial calendar; striking Jamaica Hospital's pleadings based upon its alleged failure to obey fully six discovery orders issued by this court including the last conditional order of July 9, 2007; holding Dr. Jose Cervantes in contempt for failing to respond to subpoenas duces tecum and testificandum; requiring the additional resulting requested discovery from Jamaica Hospital for plaintiff as per notices served on it on November 27, 2007, and the appropriate court order requiring such compliance; granting partial summary judgment, pursuant to CPLR §§ 3212, 3124 and 3126, against Jamaica Hospital as to its liability on the causes of action on the complaint; and granting legal costs and sanctions against Jamaica Hospital and its legal counsel, pursuant to 22 NYCRR 130.1-1. Plaintiffs allege that Jamaica Hospital has failed to produce for deposition Nurse Yvonne Williams, Dr. Patel and Nurse Grace Austin, and to respond to plaintiffs' Notice for Discovery and Inspection. In response to the motion, Jamaica Hospital contends that the motion is moot, and sets forth that Yvonne Williams, R.N. was produced for deposition on March 20, 2008; that Dr. Patel, the current head of MICU, is not under the control of the Hospital and that it thus cannot produce him for deposition; that the Court, in its July 9, 2007 decision, did not order the deposing of Nurse Austin, and that the response to the Notice of Discovery and Inspection was mailed to plaintiffs on March 18, 2008.

Jamaica Hospital cross moves, pursuant to CPLR § 3126, for an order dismissing the action for plaintiffs' failure to comply with previously issued court orders, or, in the alternative, precluding plaintiffs from introducing any testimony or evidence at the time of trial concerning plaintiffs' claims as to the outstanding discovery, or, in the alternative, pursuant to CPLR § 3124, compelling plaintiffs

to provide outstanding discovery within fourteen days of the Court's Order. Jamaica Hospital also seeks the imposition of sanctions, pursuant to 22 NYCRR 130.1-1. Jamaica Hospital alleges that it still has not received copies of income tax returns, 1065 forms and K-1 forms for Deans Shipping for tax years 1996-2001 which are in plaintiffs' possession, and a copy of income tax returns, including W-2 forms for Sharon Deans for tax years 1996, 1997 and 1998.

### Discussion

"CPLR § 3101(a) requires, in pertinent part, 'full disclosure of all matter material and necessary in the prosecution or defense of an action.' However, the principle of 'full disclosure' does not give a party the right to uncontrolled and unfettered disclosure, and the trial courts have 'broad power to regulate discovery to prevent abuse' ( Barouh Eaton Allen Corp. v. International Bus. Machs. Corp., 76 A.D.2d 873, 874, 429 N.Y.S.2d 33)." Gilman & Ciocia, Inc. v. Walsh, 45 A.D.3d 531 (2<sup>nd</sup> Dept. 2007). "What is 'material and necessary' is left to the sound discretion of the lower courts and includes 'any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason' (Allen v. Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406, 288 N.Y.S.2d 449, 235 N.E.2d 430)." Andon ex rel. Andon v. 302-304 Mott Street Associates, 94 N.Y.2d 740, 746 (2000). This action is marked by the contentiousness of the attorneys for the parties that has required far too much court involvement in the discovery process. The instant motion and cross motion are not geared to "sharpening the issues and reducing delay and prolixity," but are regurgitations of claims asserted on prior discovery motions, and each seeks sanctions against the other.

Notwithstanding the reciprocal claims that the other party has failed to provide the discovery required by prior court orders, it appears that there has been substantial compliance with discovery demands, as set forth in the various decisions and orders. Moreover, neither party has demonstrated that the claimed outstanding discovery is material and necessary to the prosecution or defense of this action. Accordingly, the motion is granted solely to the extent that this matter hereby is restored to the trial calendar, and all other branches of the motion and the cross motion are denied in their entirety. A copy of the Order with Notice of Entry shall be served on defendant, the Clerk of Queens County and on the Clerk of the Trial Term Office.

Dated: June 2, 2008

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J.S.C.