SHORT FORM ORDER

INDEX No. 06-117
CAL No. 12-00122OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 9-11-13
ADJ. DATE 11-13-13
Mot. Seq. # 007 - MotD

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ARLENE MARX, as Administratrix of the Estate of RUTH WIENER, deceased,

Plaintiff,

- against -

THE ROSALIND AND JOSEPH GURWIN JEWISH GERIATRIC CENTER OF LONG ISLAND, INC., individually and d/b/a GURWIN JEWISH GERIATRIC CENTER and GURWIN JEWISH GERIATRIC CENTER,

Defendants.

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PARKER WAICHMAN LLP
Attorney for Plaintiff
6 Harbor Park Drive
Port Washington, New York 11050

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendants
1133 Westchester Avenue
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Upon the following papers numbered 1 to 28 read on this motion for costs and sanctions; Notice of Motion/ Order to Show Cause and supporting papers (007)1-16; Notice of Cross Motion and supporting papers _ Answering Affidavits and supporting papers 17-25; Replying Affidavits and supporting papers 26-28; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (007) by plaintiff, Arlene Marx, as the Administratrix of the Estate of Ruth Wiener, pursuant to CPLR 8106 and 22 NYCRR 130-1.1, for costs and sanctions as against the Defendants, is granted to the extent that costs are awarded to the plaintiff as set forth herein, and is denied as to sanctions; and it is further

ORDERED that the parties are directed to appear for a hearing for costs on 29th day of January, 2014, at 10:00 o'clock in the a.m., at which time the plaintiff will provide proof of payment and costs, and attorney's fees, and apprise this court as to whether the expert witness fees were one-time payments and if said fees cover the testimonies of experts Dr. Kelly Johnson-Arbor and Susan M. Cacciola at the time of future trial, in that they made no appearances at the time of the mistrial. Upon such determination of costs, plaintiff shall then submit judgment (***Panzella, P.C. v DeSantis***, 36 AD3d 734, 830 NYS2d 200 [2d Dept 2007]), and the action shall be remanded to the Calendar Control Part for jury selection and trial assignment.

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Defendants request for oral argument set forth in their opposing papers is considered pursuant to 22 NYCRR 202.8 (c) and is denied.

Plaintiff Arlene Marx is the daughter of the decedent, Ruth Wiener, who died while a patient at The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc. d/b/a Gurwin Jewish Geriatric Center, a residential health care facility providing nursing home/adult care, located in Commack, New York. Decedent, Ruth Wiener was a residential patient at defendant's facility from February 4, 2003 through February 18, 2005. It is alleged that during her admission, the decedent sustained various injuries, including pressure ulcers, and died on February 19, 2005. Causes of action for pain and suffering, wrongful death, negligence, and gross negligence with violation of the Public Health Law have been asserted. It is noted that the wrongful death cause of action was withdrawn by stipulation at the pre-trial conference conducted on August 12, 2013.

It is undisputed that the parties conducted jury selection which lasted for five days from July 23, 2013 through July 29, 2013, during which time a panel of six jurors and three alternates were selected. On August 12, 2013, the parties appeared before this court for pre-trial conference and resolution of certain motions in limine. Opening statements were made by both parties. On the morning of August 13, 2013, Eleanor Bazemore, an employee of defendant Gurwin Jewish Geriatric Center, was called to the stand by the plaintiff, at which time direct examination was conducted. Defendants' attorney, Elizabeth Sandonato, declined cross examination of Bazemore. That afternoon, Marissa Wiener, decedent's daughter-in-law, was called as a witness and direct examination was conducted by counsel for plaintiff. Thereafter, defendants' attorney, Elizabeth Sandonato, commenced cross examination, during which time the plaintiff raised 27 objections, characterizing the questioning as inappropriate, and prejudicial.

On August 14, 2013, the plaintiff called decedent's daughter, Arlene Marx, as a witness and direct examination was conducted. Counsel for the defendants thereafter conducted cross examination of the witness, during which time the plaintiff made 14 objections. The plaintiff thereafter moved this court for curative instructions to the jury based upon the alleged inappropriate conduct of counsel for the defendants, Elizabeth Sandonato. Oral argument was heard by this court, and a mistrial was declared pursuant to CPLR 4402 on the finding that "there were four questions asked that were substantially the same, the objection was sustained each time, and defendants' counsel's conduct was found to be sufficiently prejudicial, poisoning the jury to the extent that it was not curable by way of a curative instruction.

The plaintiff now seeks costs and sanctions on the basis that this Court determined that the defendants' counsel's conduct was the sole reason for the declaration of a mistrial, and that it would be unjust and inequitable to require plaintiff to bear the costs associated with this trial in light of the fact that the mistrial was granted solely as a result of the egregious conduct of defendants' counsel, Elizabeth Sandonato, over sustained objections. Attorney for defendants, Robert A. Spolzino, by affirmation, opposes this application for costs and sanctions on the bases that, because plaintiff's counsel, during opening statement, advised the jury that they would hear about the decedent's behavior; and that, at times, she was resistant to treatment, and was verbally harsh or verbally aggressive with the staff, attorney Sandonato had a legitimate interest in inquiring of the witnesses about these issues on cross examination, including decedent's prior psychiatric admission to Brunswick Hospital.

It is well settled that the scope of cross examination rests largely in the sound discretion of the court (***People of the State of New York v Kelly***, 124 AD2d 825, 509 NYS2d 44 [2d Dept 1986];). A trial court does not abuse its discretion in limiting the scope of cross-examination where the questions at issue are speculative, and lack a good faith basis, and the probative value of the matters sought to be elicited is outweighed by the danger that the main issues will be obscured and the jury confused (***People of the State of New York v Baker***, 294 AD2d 888, 742 NYS2d 749 [4th Dept 2002]).

In reviewing the instructions given by this court to the jury at the commencement of the trial, it is noted that the jury was instructed that "[t]he purpose of the opening statements is to tell you about each parties' claims so you will have an understanding of the evidence as it is introduced....what they say in their opening statements is not evidence. The evidence upon which you will ultimately base your decision will come from the testimony of witnesses that you hear here in court, or in an examinations before trial, or in the form of photographs, documents, or other exhibits that are introduced into evidence." The court continued that "[o]nce again, as in the opening statements, what the attorneys say in summation is not evidence." Thus, it is determined that plaintiff's counsel's opening statement did not provide Sandonato with a legitimate interest in inquiring about those issues as asserted by attorney Spolzino, as the opening statement does not constitute evidence.

Eleanor Bazemore, a nurse manager employed by Gurwin Jewish Geriatric Center (Gurwin) for 24 years, was called as plaintiff's first witness. Upon review of the transcript of the direct examination, it is ascertained that Bazemore was the charge nurse on the unit, Four North, where the decedent resided. Upon admission from Brunswick Hospital to Gurwin, the PRI (Patient Review Information) dated January 28, 2003, was reviewed and the decedent was noted to be wheelchairfast or bedfast, and relied upon others to move her about. She was cooperative and alert, but it was also noted that she was lethargic, sleepy, agitated, and disoriented, but not abusive, assaultive or depressed. No pressure ulcers or skin conditions were noted upon admission, and based upon the scoring system, she was not considered a high risk for skin breakdown necessitating certain preventive measures. The decedent needed total assistance for dressing, toileting, personal hygiene, and transfers from bed to chair, etc., but she was able to feed herself. The decedent was noted to be in fair, general health, but was hospitalized for a couple of days in the middle of February. The direct examination continued with a description of the decedent's condition and changes throughout her admission at Gurwin. On February 26, 2003, the decedent was noted to be at risk for pressure ulcers due to fragile skin and skin tears. The March 5, 2003 care plan was referable to the patient concerning a pressure ulcer involving her left heel. The remainder of the direct examination included the decedent's care and treatment. Defense counsel Sandonato declined cross examination of Bazemore.

Plaintiff's counsel called Marissa Wiener as plaintiff's next witness. Direct examination revealed that Wiener was the daughter-in-law of the decedent, having married decedent's son. Prior to decedent's admission to Gurwin, Wiener's husband and sister-in-law took care of her needs while she resided with her sister-in-law. She described the decedent as a very smart woman, down to earth, who began to need more care than her sister-in- law could provide. The decedent was admitted into Gurwin on February 3, 2003. She was unable to walk and was completely dependent upon people around her. She described the care and treatment provided to the decedent, her activities and pain, difficulty swallowing, and learned after the decedent's demise that she developed a bed sore on her left heel. She indicated that the decedent was very weak, could not do anything for herself, and that it was not possible for her to be physically aggressive. Wiener stated that she attended care plan meetings with the staff, but there was no discussion about the

pressure sore on decedent's heel at those meetings. Wiener discussed the disrespectful way the head nurse, Eleanor, spoke to the decedent, who did not have dementia or affected mental capacity.

Elizabeth Sandonato engaged in cross examination of Marissa Wiener upon completion of direct, and began questioning about prior injuries, conditions the decedent may have had, and medications the decedent was taking before being admitted to Gurwin. Her questions included inquiry about neuropathy. The witness stated that she did not know what neuropathy was. Sandonato then tried to impeach the witness with her prior testimony wherein Wiener stated that the decedent had neuropathy. She had Wiener read from the St. Catherine of Siena hospital chart, where the decedent was admitted to and died on February 19, 2005. When plaintiff's counsel objected to having Wiener read from that record, such objection was sustained on the basis that the witness was being asked to interpret the medical record. After Wiener testified that she did not know of any time that the decedent was abusive, plaintiff's counsel's objection was sustained when Sandonato began reading from the Gurwin record an entry about the decedent being verbally abusive. Objection was again sustained when Sandonato asked Wiener if she was ever advised that her mother-in-law exhibited inappropriate behavior during her admission. Objection was again sustained immediately thereafter when Sandonato asked Wiener "did your mother-in-law exhibit inappropriate behavior when you visited." Thereafter, objection was sustained when Sandonato then asked if Wiener ever observed her mother-in-law behave in an inappropriate manner. An objection was sustained when Sandonato inquired about the decedent not being able to swallow medication and the staff not returning to administer the medication later. Sandonato was then instructed not to approach the witness. When Sandonato thereafter attempted to have Wiener read out loud a handwritten medical professional note from the Gurwin record, plaintiff's counsel's objection was sustained as Wiener was a lay witness.

Thereafter, when Sandonato asked Wiener if she was aware that the decedent refused care, the plaintiff's objection was sustained on the basis that the same question was asked and answered. Sandonato then asked Wiener, "if I told you your mother-in-law refused care and treatment...," plaintiff's counsel's objection was sustained as the witness had already answered. Upon repeating the question and giving a date of February 7, 2003, plaintiff's counsel's objection was again sustained. When questioned if her testimony would change if she knew that efforts were made to repeatedly give care and treatment to the decedent on February 7, 2003, the objection was again sustained. When Sandonanto repeated the question using a different date of February 9, 2003, the objection was sustained. When Sandonato again questioned the witness about the decedent's noncompliance with taking medication and whether the staff returned with the medication, plaintiff's counsel's objection was sustained. When she then asked if there were times the staff did come back, objection was sustained as asked and answered. Sandonato asked Wiener how many times the call bell was not within reach of the decedent, and she responded that she could not accurately quantify it, and did not want to guess. Sandonato then asked Wiener if her testimony would change if she was told that the records reflected that a call bell was in place in the decedent's room. Plaintiff's counsel's objection to this question was sustained.

Objection was sustained when Ms. Sandonato then questioned Wiener about the decedent's admission to Huntington Hills and whether she was advised that the decedent rang the call bell incessantly. When Wiener was asked if the decedent developed a pressure ulcers prior to her admission to Gurwin, and she replied that she was not aware of any ulcers, Sandonato then asked if those are the only ones she was aware of. Plaintiff's counsel's objection was sustained. When asked if during any prior hospitalization to Gurwin if the decedent developed pressure ulcers at any hospital, the objection by plaintiff's counsel was

sustained. Objection was sustained when Sandonato then asked Wiener if she first became aware about the decedent having pressure ulcers when she passed away. Sandonato followed up with the question concerning if the decedent had any ulcers at any prior facilities or hospitals, that she was not aware of it, correct. This question was sustained. Sandonato then asked if her testimony would be different if the Gurwin records reflected that the decedent used inappropriate language, for which plaintiff's counsel's objection was sustained. Sandonato then added, "or profanities," to which plaintiff's counsel's objection was again sustained.

The trial was continued on August 14, 2013, at which time Arlene Marx, the decedent's daughter was called as a witness. Upon direct examination, Marx described the widowed decedent as a good person who provided for her and her brother as the only parent raising them, proud and independent, and who was loved by everyone. She testified that the decedent was living at home with her, but there came a time when the arrangement was no longer appropriate as he mother began needing 24 hour care. The decedent spent some time at another nursing home and had some hospital admissions, including Brunswick Hospital. She testified that Marissa Wiener arranged for the decedent's admission to Gurwin for February 3, 2003, upon discharge from Brunswick Hospital. The decedent was wheelchair bound, could not walk, but could move her upper extremities. Marx testified as to her expectations for her mother at Gurwin and stated that her mother never expressed wanting to leave Gurwin. She testified about having to ask to have her mother's diaper changed, about the call bell and phone not being in reach, and her mother being left in a wheelchair for hours and hours in agony, in pain, slumped over. She first learned her mother developed a bed sore about ten months prior to her death. When she spoke to the staff, she was advised that things would get better as they were short-staffed, doing reports, it's a holiday, or it would be taken care of. She stated her mother was in pain with her heel, and the pain was worse while sitting in the wheelchair. There were times that the staff was rough with her mother, hurting her, and the decedent would say "ouch", "get off of me," "get away from me," or "stop," or "I'm in pain." Sometimes the decedent could not take her pills because she just ate, and wanted to wait, or wanted to take the pills before she ate, or she was nauseous, or could not swallow right then. Sometimes, she just needed time. There was a discussion about the care plan meetings.

Attorney Sandonato, upon cross examination, asked repeated questions to Arlene Marx about what dates the decedent had been admitted to Huntington Hills, however, her questions were objected to twice and sustained. When Sandonato had Marx read a document, plaintiff's counsel's objection was sustained. Objection was again sustained when Marx was asked by Sandonato if her mother had a difficult time at Huntington Hills Center for Nursing and Rehabilitation. Objection was again sustained when Marx was asked if she was aware that her mother slapped a certified nursing assistant there. Objection was sustained when Sandonato asked Marx again if her mother had a difficult time at Huntington. When the question was repeated in full, objection by plaintiff's counsel was again sustained. When Sandonato asked if her mother was transferred from Huntington Hills on December 9, 2003, objection was sustained. Objection was again sustained when Sandonato asked Marx where her mother went when she left Huntington Hills. Objection was sustained when Sandonato then asked, "isn't it true that your mother was transferred to South Oaks Psychiatric facility. When Sandonato referred to a document not in evidence, objection was sustained. When Sandonato had Marx read a nursing note from a document, and asked her if it refreshed her recollection that her mother was transferred to South Oaks Psychiatric facility, objection by plaintiff's counsel was sustained. When Sandonato read from the Brunswick Hospital record in evidence and asked Marx if the document indicated that her mother was transferred from South Oaks Psychiatric Center to Brunswick Hospital on December 18, 2002, objection was sustained and Marx was directed by the Court

not to answer the question. Again Sandonato asked Marx, "[h]aving read the document, does it refresh your recollection that your mother was transferred from South Oaks to Brunswick Hospital?" Plaintiff's counsel objected on the basis that this was completely inappropriate. The Court called a conference. Thereafter, Sandonato asked Marx if her mother had a health care proxy, to which Marx answered, "I don't know." Objection was then sustained when Sandonato then asked Marx if her brother was the health care proxy.

A recess was taken and plaintiff's counsel reserved the right to move for a mistrial based upon Sandonato's cross examination of Marx and asked the Court for remedial instruction to the jury. Upon discussion, Sandonato asked the Court "[w]hy would the jury be sufficiently tainted?" The Court indicated that they heard her say this over and over again about something not in evidence. The court continued that it was not convinced, so far on the evidence, that the "behavior, or the conduct, of the decedent is at issue in this litigation." The Court continued to the extent that the action alleged negligence by the nursing home, and they are not dealing with a combative patient who needs restraints. The Court found no good faith basis for Sandonato continuing on the issue of South Oaks, South Oaks Psychiatric. Based upon the testimony, the complaint, and bill of particulars, for a case of alleged nursing home negligence, with no claim for emotional distress or physical abuse by the defendants, the case is limited with regard to bed sores and physical injury to the decedent's left heel. The Court states that "bringing up issues of psychiatric hospitalization-I think you're flirting with undue prejudice to the jury. It's inflammatory, and I don't see where it's reasonably related to the injuries for which the plaintiff is seeking compensation." The Court also discussed that if there was something in the Brunswick Hospital record that indicated that there were decubitus ulcers present at the time, it may change things a little bit. Otherwise, he did not see the relevance. The Court continued that there was some latitude on cross examination, but it is up to the Court to determine how far that latitude goes. Sandonato objected to any curative instructions being given to the jury by the Court.

After a recess, the Court granted a mistrial on the basis that there were four questions substantially the same, with objections sustained each time regarding the decedent's psychiatric history. The Court set forth that the conduct by Sandonato was sufficiently prejudicial and poisoned the jury to the extent that it is not curable by way of an instruction, no matter how strong that instruction might be. The Court then declared a mistrial. Sandonato objected to the mistrial being ordered.

Elizabeth J. Sandonato submitted an amended affirmation wherein she set forth the reasons she felt she was entitled to make inquiry into the decedent's prior hospitalizations, including those at South Oaks Hospital and Brunswick Hospital. However, she makes no mention of the relevance to the action wherein it is alleged that the decedent suffered serious and severe decubitus ulcers relating to negligence on behalf of the defendant Gurwin in failing to prevent such skin breakdown, irrespective of the decedent's psychiatric condition. Thus, she objects to the imposition of costs and sanctions.

Counsel for the defendants, Robert Spolzino, in opposing the plaintiff's application for costs and sanctions, attempts to justify Sandonato's inquiry into decedent's purported admission to South Oaks and continues to argue based on documents which are not in evidence, have not been submitted, and were not received into subpoenaed records. The mistrial was granted on the basis that Sandonato's continued questions over sustained objections regarding her ongoing references to South Oaks Hospital, which questions were deemed to be sufficiently prejudicial and poisoned the jury.

Plaintiff seeks costs pursuant to CPLR 8106 and costs and sanctions pursuant to 22 NYCRR § 130-1.1. Pursuant to CPLR 8106, costs upon a motion may be awarded to any party, in the discretion of the court, and absolutely, or to abide the event of the action. Pursuant to CPLR 8101, "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances. Here, no judgment has been entered.

22 NYCRR § 130-1.1 (c) provides that conduct is frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; (3) it asserts material factual statements that are false. Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party."

Counsel for defendants argues that there is no procedural or substantive basis for the imposition of costs in this action as the four questions resulting in the mistrial were not knowingly or willfully improper pursuant to 22 NYCRR § 130-1.1. This court notes that the direction counsel Sandonato was taking the questioning was to emphasize decedent's possible psychiatric history prior to her admission to Gurwin, whereas, the issue before the court and jurors was whether or not the defendants were negligent in causing or permitting the decedent to develop and suffer a severe decubitus ulcer to the heel of her left foot. While defendants' counsel asserts in his opposing affirmation that Sandonato asked the questions in good faith, he also stated that Sandonato was attacking the witness' credibility. However, the lay witness' knowledge of the decedent's historical information is not related to the allegations of defendants' negligence. The record demonstrates that Sandonato was attempting to solicit testimony from Marx, a lay witness, from a hospital record which was not in evidence, was not subpoenaed to the court, and not received by the court. While the court sustained plaintiff's counsel's objections to this line of questioning four times in succession, Sandonato intentionally and repeatedly continued this line of questioning, in a manner prejudicial to the plaintiff, poisoning the jury, resulting in a mistrial.

There was no apparent legal basis for continuing this line of questioning as the witness did not remember the hospitalization, and the hospital records were not before the court or in evidence. Thus, defendants' counsel, Elizabeth Sandonato, is determined to have engaged in frivolous conduct for which the imposition of costs is assessed against defendants' law office, Wilson Elser Moskowitz, Edelman & Dicker, LLP. Sanctions are deemed retributive in that they punish past conduct, and are goal oriented in that they are useful in deterring future frivolous conduct, not only by the particular parties, but also by the Bar at large, and prevent a waste of judicial resources (***Strunk v New York State Board of Elections***, 39 Misc3d 1203(A), 969 NYS2d 806 [Sup Ct, Kings County March 29, 2013]). Here, rather than impose sanctions for the frivolous conduct of counsel for the defendant, Elizabeth Sandonato, which resulted in a mistrial, the court is directing that the defendant's counsel or her law firm, reimburse plaintiff's counsel for the expenses incurred as a result of the frivolous conduct and mistrial (22 NYCRR § 130-1.1 (a); ***Greene v Merchant's & Businessmen's Mutual Insurance Company***, 259 AD2d 519, 686 NYS2d 454 [2d Dept 1999]; ***D.W. v R.W.***, 34 Misc3d 1222(A), 950 NYS2d 607 [Sup Ct, Westchester County, February 3, 2012]).

Accordingly, that part of motion (007) which seeks sanctions is denied, and that part of the motion which seeks the imposition of costs against counsel for the defendants resulting from the mistrial of the action is granted pursuant to 22 NYCRR § 130-1.1 (a) and § 130-1.2 .

The plaintiff seeks costs as follows: $12,000 for attorney appearance for jury selection (5 days @ eight hours/day @ $300/hour); $7,200 for attorney appearance for trial (3 days @ eight hours/day @ $300/hour); and $2,133.95 for trial transcripts, for a total of $21,333.95, in addition to costs in the amount of $5,500 for trial appearance of the nurse expert, and $9,000 for trial appearance of the medical expert.

Accordingly, the parties are directed to appear for a hearing on the issue of costs on January 29, 2014, at 10:00 a.m., at which time, the plaintiff will provide proof of payment and costs, and attorney's fees, and apprise this court as to whether the expert witness fees were one-time payments, and/or if said fees cover the testimonies of experts Dr. Kelly Johnson-Arbor and Susan M. Cacciola at the time of future trial, in that they made no appearances at the time of the mistrial. Upon such determination, plaintiff shall then submit judgment (***Panzella, P.C. v DeSantis***, 36 AD3d 734, 830 NYS2d 200 [2d Dept 2007]), and the action shall be remanded to the Calendar Control Part for jury selection and trial assignment.

Dated: JAN JAN 14 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**