UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Original Filed By ECF

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DISABILITY ADVOCATES, INC.,

Plaintiff,

03 CV 3209 (NGG) (MDG)

- against -

ELIOT SPITZER, in his official capacity as Governor of the State of New York. RICHARD F. DAINES, in his official capacity as Commissioner of the New York State Department of Health, and MICHAEL F. HOGAN, in his official capacity as Commissioner of the New York State Office of Mental Health, THE NEW YORK STATE DEPARTMENT OF HEALTH, AND THE NEW YORK STATE OFFICE OF MENTAL HEALTH,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE EVIDENCE

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Dated: New York, New York
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Preliminary Statement

Plaintiff DAI has flagrantly ignored the most basic of rules governing discovery in federal civil litigation. It has submitted declarations of five fact witnesses whom it never before disclosed, in violation of Federal Rule of Civil Procedure 26(a)(1) and of a clear court order. Plaintiff also attempts to rely upon hearsay newspaper articles and upon hearsay reports that are up to thirty years old. Finally, in a transparent attempt to bolster its designated expert witnesses, DAI submits the opinion, albeit highly conclusory opinion, testimony of three purported lay witnesses. While this evidence is far too unsupported, conclusory and irrelevant to raise a genuine issue of material fact, it should nonetheless be excluded, to vindicate the law and policies underlying the rules of civil procedure and evidence, as well as to prevent undue harm and prejudice to defendants.[1]

ARGUMENT

THE UNDISCLOSED FACT AND EXPERT WITNESSES AND HEARSAY NEWSPAPER ARTICLES AND REPORTS ARE INADMISSIBLE

Standards Governing This Motion

It is axiomatic that evidence submitted in opposition to a motion for summary judgment must be admissible. Fed. R. Civ. P. 56 (e) provides that a "supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." A motion to strike is the

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[1] Defendants wrote to plaintiff promptly after receiving their opposition papers, raising the issues discussed herein concerning Ms. Rosenberg's affidavit. After several conversations, plaintiff declined to withdraw the affidavit. Defendants also wrote to plaintiff concerning the five new resident witnesses. Hathaway Decl. dated Jan. 31, 2008. Furthermore, throughout this litigation, defendants have taken the position that DAI could not prove its case through newspaper articles and outdated reports. See, e.g., Exs. Hathaway B&C.

appropriate vehicle by which to challenge evidence that fails to meet this standard. "A motion to strike is appropriate if affidavits contain inadmissible hearsay or are not made on the basis of personal knowledge .... Deposition testimony that contains hearsay, speculation or conclusory matter will also be subject to a motion to strike ...." 11 Moore's Federal Practice § 56.14[4][a] (3d ed. 2007).

Evidence may also be struck for noncompliance with discovery obligations, such as "expert affidavits submitted in support of summary judgment proceedings when those materials were not properly disclosed during discovery." Id. at 56-200. See also Johnson v. Scotty's, Inc., 119 F. Supp. 2d 1276, 1281 (M.D. Fla. 2000) (striking portions of affidavits that constituted opinion testimony by lay witness). A court may also strike affidavits that make generalized or conclusory statements. Hollander v. Am. Cyanamid Co., 172 F.3d 192, 198 (2d Cir. 1999). "When ultimate facts and legal conclusions appear in an affidavit, such extraneous material should also be disregarded by the court." Larouche v. Webster, 175 F.R.D. 452, 455 (S.D.N.Y. 1996). See also 11 Moore's Federal Practice § 56.14[1][d] at 56-197 (affidavits "must be sufficiently specific to support the affiant's position. Affidavits that contain nothing more than conclusory allegations or speculation are not sufficient to overcome a properly supported summary judgment motion.").

The Declarations of Five Residents Who Were Not Disclosed During Discovery Must Be Excluded

Fed.R.Civ.P. 26 (a) (1) requires that a party must disclose the name of each individual likely to have discoverable information that the party may use to support its claims. In this case, after extensive motion practice during which defendants sought the names of adult home

residents whom DAI claimed were qualified for supported housing, Magistrate Judge Go ordered plaintiff to identify the adult home residents it intends to call as witnesses at trial by September 30, 2005. Judge Go advised the parties that "failure to identify any resident may result in preclusion." Ex. Hathaway-W. DAI thereupon provided a list of resident witnesses, Exs. Hathaway-X&Y, and defendants proceeded to depose each of those witnesses (except those later withdrawn by DAI). None of the five residents who have submitted declarations in opposition to defendants' motion, H.S., B.R.,. N.B., R.A. and O.J., were identified by DAI as witnesses.[2] Fed.R.Civ.P. 37 (c) provides that if a party fails to identify a witness as required by Rule 26(a), "the party is not allowed to use that ... witness to supply evidence on a motion, ... or at a trial, unless the failure was substantially justified or is harmless."

The preclusion of unidentified witnesses is automatic, unless the failure was substantially justified or is harmless. 8A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2289.1 (2d ed. 1994). Here, DAI cannot show substantial justification for its failure to comply with the federal rules and with Judge Go's order. Each of the five declarants has lived in an adult home since long before this action was filed, and nothing prevented DAI from locating and interviewing these witnesses, and disclosing their names, long ago.

It also cannot be disputed that defendants are prejudiced by the failure to disclose these names, and such failure was not harmless. Defendants diligently obtained records regarding each

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[2] When defendants inquired about these witnesses, plaintiff claimed that they were disclosed in response to an interrogatory seeking the names of all residents whom DAI claims are qualified for different housing. This position is specious. DAI disclosed well over 1,000 names in that interrogatory response. Ex. Hathaway - DD. Precisely because Judge Go recognized that defendants could not depose all such residents, she ordered DAI to disclose its resident witnesses. The interrogatory response gave defendants no notice that those individuals would testify and is no substitute for complying with Rule 26(a)(1) and Judge Go's order.

of the resident witnesses and took their depositions. These depositions disclosed in detail the nature of the residents' lives in adult homes, and revealed the freedom they have to participate in community activities and to have contact with non-disabled persons, thus undercutting plaintiff's premise in this litigation. For DAI to be permitted to submit conclusory, self-serving declarations from residents whom defendants had no opportunity to depose is unfair and would permit DAI to completely flout the rules governing discovery.

The Newspaper Articles Are Hearsay And Are Irrelevant

Plaintiff has also submitted a number of articles by Cliff Levy of the New York Times. Exs. 66 - 68 to Murray Decl. These articles are inadmissible hearsay and, in any event, are irrelevant. While it is far from clear what DAI claims that these articles prove, it is beyond cavil that they may not be used to prove the truth of the content therein. See, e.g., Eisenstadt v. Centel Corp., 113 F.3d 738, 742-43 (7th Cir. 1997); Horta v. Sullivan, 4 F.3d 2, 8-9 (1st Cir. 1993); Dowdell v. Chapman, 930 F. Supp. 533, 541 (M.D. Ala. 1996). Much of the information in the articles is on its face not based on the personal knowledge of the reporter, and any quotes contained in the articles constitute hearsay within hearsay. Moreover, this is not a situation in which the articles contain information that plaintiff could present in admissible form, because plaintiff withdrew the reporter, Mr. Levy, from its witness list after the New York Times indicated that it would contest any subpoena issued to Mr. Levy, for deposition or trial testimony. Ex. Hathaway-AA.

In any event, the articles are irrelevant. Plaintiff recites that the articles reported "abuse, neglect, negligent supervision, inadequate medical care and chaos." Pl. Mem. at 12. However, these are not the relevant issues in this disability discrimination case involving alleged non-

integration. Furthermore, a large part of the articles focused on adult homes that are now closed or under new operators, including the Leben Home, Brooklyn Manor, and Seaport Manor. To the extent that the articles discussed DOH's enforcement activities, DAI's withdrawal of its two claims related to inspections and enforcement renders this evidence irrelevant. Finally, in an injunctive case, articles from six years ago are of questionable probative value, where DAI has admitted the situation has improved. In conclusion, the articles add nothing of relevance to the issues in this case.

Reports That Are Hearsay, Outdated and Irrelevant Should Be Excluded

Plaintiff also submits a number of reports from public and private entities concerning adult homes, some dating from the 1970s. Many of these are hearsay, and lack any probative value due to their age. Still other reports are irrelevant because, inter alia, they concern adult homes that are closed. Accordingly, Exhibits 57, 69-70, 79, 86 and 125 to the Murray Declaration should be excluded.

While DAI does not even attempt to show how these reports are admissible and relevant, and fails to lay any foundation for their admission into evidence, the only possible basis for their admissibility is Federal Rule of Evidence 803 (8). Fed.R.Evid. 803 (8)(c) provides an exception to the hearsay rule for public records and reports setting forth "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." The rule is premised on the assumption that most reports written and published by government agencies pursuant to their official duties are reliable. The court must still determine whether the report's conclusions are sufficiently trustworthy, considering factors such as the timeliness of the investigation, the special skill or

experience of the officials, the procedures governing any hearings, any questions concerning motivation on the part of the investigators or other sources of information, and the finality of findings made in the report. Gentile v. County of Suffolk, 129 F.R.D. 435, 450 (E.D.N.Y. 1990) (Weinstein, J.).

Exhibit 57, a report from a private advocacy group known as the Adult Home Workgroup,[3] clearly falls outside of Rule 803 (8)'s exception, as it was written by a group composed overwhelmingly of private entities and individuals, although it included some local government representatives. This group did not act pursuant to any authority granted by law. Finally, the report reflects no trustworthy method of investigation or data-gathering.

Similarly, the 1979 reports from a Deputy Attorney General and a New York City Council Subcommittee should be excluded as hearsay. Exs. 69-70. These reports are also nearly 30 years old. Plaintiff does not even attempt to explain what possible relevance such outdated reports could have in an injunctive case, which must focus on the current state of affairs. See United States v. Durrani, 659 F.Supp. 1183, 1186-87 (D.Conn.), aff'd, 836 F.2d 410 (2d Cir. 1987)(finding two year lapse in time substantially undercut report's trustworthiness).

Two reports from the New York State Commission on Quality of Care for the Mentally Disabled ("CQC"), Exhibits 79 and 86, should also be excluded from evidence as hearsay and irrelevant. The first, known as the Layering Report, is hearsay and is five years old. More importantly, its conclusions concerning the costs in the 11 adult homes reviewed therein cannot be automatically applied to all adult homes. Even Karen Schimke, an advocate for adult home

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[3] This is a different group from the Adult Care Facilities Workgroup, which issued a report in October, 2002.

residents and member of the Adult Care Facilities Workgroup's payment subcommittee, expressed doubts that the Layering Report's conclusions were reflective of all adult homes. Ex. Saurack - 14. Walter Saurack, former Director of the CQC's Bureau of Fiscal Investigations/Cost Effectiveness and a major contributor to the report, testified that he saw no "inconsistency" in Ms. Schimke's assessment, since the report looked only at 11 homes. Saurack Dep. at 163. It is even more perplexing that plaintiff would submit Exhibits 86 and 125, since this report (included twice) concerns only one adult home that is now closed, Ocean House. There is absolutely no basis to conclude that the financial improprieties that occurred at Ocean House, which resulted in criminal prosecutions and other administrative and civil actions, have or are taking place in other homes, even assuming (without conceding) that such improprieties are relevant to the claims in this action.

The Testimony Of Undisclosed Experts Should Be Excluded

Plaintiff also presents the affidavits of several individuals who purport to opine on the ultimate issues in the case, often in completely conclusory fashion with no data or analysis to support their conclusions. These individuals, Clarence Sundram, Geoffrey Lieberman, and Linda Rosenberg, were never disclosed as expert witnesses and no expert disclosure was made as required by Fed. R. Civ. P. 26 (a)(2). That these affidavits are a blatant attempt to submit undisclosed expert opinion without complying with Rule 26 (a)(2) is clear from the many places in which DAI cites these witnesses and its expert witnesses in the same paragraph for the same proposition. Pl. Mem. at 62, 71-72, 74, 75 & 78. If the issue is a matter of expert opinion from one witness, it is expert opinion from another. Accordingly, the testimony should be disregarded.

This testimony is not admissible as lay opinion testimony under Rule 701. To fall within

that rule the testimony must be rationally based on the perception of the witness, helpful to a clear understanding of the testimony or the determination of a fact in issue, and not based on scientific or specialized knowledge. The 2000 amendments to Rule 701 were specifically designed to ensure that such evidence does not evade the reliability scrutiny mandated for expert opinion by Rule 702 or the pretrial disclosure requirements of Rule 26(a)(2). This evidence circumvents both rules. The affidavits do not include sufficient detail to show that the evidence is based on personal perception, as it does not describe the basis for the opinions at all. Most obviously, these witnesses were selected for their specialized knowledge in the mental health field, and their affidavits rely on this specialized knowledge. Thus, the testimony is inadmissible. See generally 4 Weinstein's Federal Evidence § 701.03[4]. This evidence is also inadmissible because the witnesses draw legal conclusions, such as whether adult homes are "integrated," and opine on the ultimate issues. Id. at § 701.04-701.05. The vague assertions of these witnesses, supported by no data or analysis, are also of no value to the court in determining any fact in this case. These witnesses are not truly fact witnesses, as they fail to provide the court with any factual evidence about adult homes. Rather, this evidence is simply a bold attempt to bootstrap DAI's experts' testimony with conclusory assertions agreeing with the experts.

Specifically, Mr. Sundram's affidavit, which begins with a detailed description of his credentials, including testimony before legislatures and his work as a court monitor, reads like an expert affidavit, albeit a completely conclusory one. Paragraphs seven through fifteen of his affidavit should be struck. Mr. Sundram, the former Chairman of the CQC, was never identified by DAI as an expert witness, and no expert disclosure by him was provided during discovery. Nonetheless, he provides opinion testimony on many of the issues in this case. He opines that

adult homes are "segregated institutions" that impede residents' opportunities "to live normal lives," although he does not detail how adult homes have this effect. Sundram Aff. ¶ 7. He asserts that "the true cost of segregating persons with mental illness in adult homes is approximately the same as providing them with supported housing in the community...." Id. ¶ 12. However, he provides no details of the comparative costs and no analysis of how he reached that conclusion. Mr. Sundram goes on to opine that "people who can survive in adult homes can thrive in supported housing and at roughly the same overall cost." Id. ¶ 13. Mr. Sundram does not indicate that he has any personal knowledge of the skills and functional abilities of adult home residents, or how he reached this conclusion. Needless to say, he does not indicate that he, an attorney by training, performed any clinical assessment of any adult home residents. As if it were not obvious enough that DAI is simply attempting to bolster its designated experts' testimony, the last paragraph of Mr. Sundram's affidavit constitutes nothing more than a blatant attempt to buttress their reports. He states that the experts' methodologies are "reliable, reasonable and appropriate" and "consistent with the manner in which such studies are done, and have a firm basis in professional practice." Plaintiff should not be permitted to insert an additional, undisclosed expert witness into this case in this manner, and at this late date in the litigation.

For similar reasons, paragraphs 4, 6, 7, and 8 of the declaration of Geoffrey Lieberman, Executive Director of the Coalition for Institutionalized and Disabled ("CIAD"), should be rejected. Mr. Lieberman asserts that adult home residents have been "effectively excluded" from mental health housing, and that the designation of adult home residents as target populations had "virtually no effect" on their access to housing. Lieberman Decl. ¶¶ 4, 6. He supports his

conclusion with no facts or data, and the conclusion is obviously contradicted by the undisputed statistics in the record about how many adult home residents have moved to mental health housing funded or licensed by OMH.[4] His opinion on the effectiveness of OMH's efforts constitutes improper, undisclosed opinion testimony. It is also far too conclusory to be admissible or to raise a genuine issue of material fact. It is particularly noteworthy that Mr. Sundram left State employ ten years ago. He has no relevant current information concerning this case.

The affidavit of Linda Rosenberg, paragraphs five to fifteen, should be struck for the same and additional reasons, including breach of OMH's attorney-client privilege. Ms. Rosenberg, who was Senior Deputy Commissioner of OMH when this case was filed, was at a number of meetings with senior OMH management and OMH counsel, at which this case was discussed. See In camera Declaration of Joseph Reilly. Her affidavit, like those of Mr. Lieberman and Mr. Sundram, is a blatant attempt to insert additional expert opinion into this case without complying with Rule 26(a)(2). Ms. Rosenberg, like Mr. Sundram and Mr. Lieberman, opines on the ultimate issues in the case. She describes adult homes as "more like institutions than community settings" which "impede the community integration" of residents. Rosenberg Aff. ¶ 6. She does not, however, provide any facts or data to back up this conclusion, which is belied by the testimony of DAI's adult home resident witnesses. Ms. Rosenberg also comments upon who is qualified for supported housing and upon defendants' fundamental alteration

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[4] Plaintiff's own evidence shows that hundreds of adult home residents have moved to OMH-funded and/or licensed housing. Raish Decl. Ex. 32. Plaintiff also cannot dispute that since April, 2005, approximately 200 residents State-wide have moved to mental health housing. Reilly Aff. ¶ 29.

defense. She states that "defendants could change the programs they administer" and that "virtually all adult home residents with mental illness are qualified for supported housing to live in supported housing." Id. at ¶¶ 11, 14. She asserts that supported housing would be less expensive than adult homes. Id. at ¶ 14. However, Ms. Rosenberg's opinions are completely conclusory. She does not indicate how she reached these conclusions and provides no facts or data to support them. For example, she does not indicate that she has performed any clinical assessment of adult home residents, or even that she has ever met an adult home resident. She has done no cost analysis of adult homes and supported housing, and her assessment of the costs is completely conclusory. She also asserts that supported housing is not designed for individuals who need little support, but she provides no information on exactly what types of support is typically provided in supported housing. Id. at ¶ 13. Again, she does not indicate that she has any personal knowledge of the needs of any particular adult home residents. Moreover, her unsupported assertion concerning the nature of supported housing is completely contradicted by the testimony and written admission criteria of the private providers who actually operate supported housing.

Ms. Rosenberg's affidavit also raises other serious issues militating against its admissibility. As noted, she was part of meetings at which the legal defense strategy for this case was discussed. The attorney-client privilege that attached to the discussions in those meetings belongs to OMH, and Ms. Rosenberg is not authorized to waive it. However, the conclusions presented in her affidavit are of necessity informed by and inextricably intertwined with what she heard in those meetings, and her affidavit thus intrudes upon privileged matter. More importantly, should this case proceed to trial and were she allowed to testify, defendants would

be utterly hamstrung in their ability to test and challenge her assertions. It would be impossible to cross-examine her without referring to privileged matters.

The affidavit also raises serious concerns under New York's Public Officers Law. Ms. Rosenberg worked on this very case. She is barred from ever providing specified services for compensation, including testimony, concerning matters "with respect to which such person was directly concerned and in which he or she personally participated ... or was under his or her active consideration." N.Y. Pub. Off. Law § 73 (8) (a)(ii). Under this statute, a public officer may not reveal confidential information gained during her employment or opine on whether the defendants met or did not meet general standards in a case in which she was directly involved. New York State Ethics Commission Advisory Opinions 94-18, 95-40. Exs. Hathaway BB &CC. Ms. Rosenberg has done precisely that. While the affidavit does not indicate whether Ms. Rosenberg has received compensation, even if she were not paid this affidavit, containing opinion on the ultimate issues in the case, would constitute a flagrant attempt to circumvent the lifetime ban on her providing expert testimony in this case.

Finally, while under some circumstances it is permissible to speak to a former official of an opposing party without that party's attorney present, this ability is not unlimited. Defendants were not privy to any discussions between plaintiff or plaintiff's counsel and Ms. Rosenberg that led to submission of the affidavit, but it would clearly have been improper for plaintiff's counsel to obtain confidential or privileged information from a former OMH official. Muriel Siebert & Co. v. Intuit Inc., 8 N.Y. 3d 506, 511-12 (2007) (the right to conduct ex parte interviews is not "a license for adversary counsel to elicit privileged or confidential information from an opponent's former employee.").

Therefore, the specified portions of the affidavits of Clarence Sundram, Geoffrey Lieberman and Linda Rosenberg should be struck.

CONCLUSION

FOR THE FOREGOING REASONS, THE EVIDENCE FROM WITNESSES WHO WERE NOT DISCLOSED AND HEARSAY NEWSPAPER ARTICLES AND REPORTS SHOULD BE EXCLUDED.

Dated: New York, New York
January 31, 2008

Respectfully submitted,

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