**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

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MARYLIN SYBALSKI and PAUL SYBALSKI,

Plaintiffs,

- against -

INDEPENDENT GROUP HOME LIVING PROGRAM INC., ALVIN DENNIS, CHRISTOPHER KLINGENBURGER, FRANKIE PIZZURRO, ROBERT ROEPER and TARA UNDERWOOD,

Defendants.

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TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 2893/07
Motion Seq. No.: 07
Motion Date: 04/24/12

**The following papers have been read on this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion, Affirmation and Exhibits, Affidavit and Exhibits | 1 |
| Affirmation in Opposition | 2 |
| Reply Affirmation | 3 |

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants Independent Group Home Living Program Inc. ("Group Home") and Robert Roeper ("Roeper") and non-party witness Lisa L. Gasstrom ("Gasstrom") move, pursuant to CPLR § 2304, for an order quashing the purported "Judicial Subpoena," dated March 23, 2011 and served on March 30, 2011, upon non-party Gasstrom; and move for an order restoring the action to active status so that a trial on the remaining causes of actions can be conducted. Plaintiffs oppose the motion.

The Court notes the lengthy procedural history of the instant matter. For purpose of this

motion, the Court will address only certain dates that are relevant to the issues before it. Plaintiffs commenced the action with the filing and service of a Summons and Verified Complaint on or about February 15, 2007. *See* Movants' Affirmation in Support Exhibit A. Issue was joined on or about April 4, 2007. *See* Movants' Affirmation in Support Exhibit B. In March, April and May of 2008, plaintiffs took depositions of six individuals produced by defendants. *See* Movants' Affirmation in Support Exhibits C-H. Defendants Roeper and Group Home and non-party witness Gasstrom submit that plaintiffs did not seek any further depositions of any individuals on behalf of defendants either pursuant to a Notice of Deposition, nor did plaintiffs seek any non-party depositions pursuant to subpoena prior to the close of discovery.

On or about October 6, 2008, plaintiffs filed their Note of Issue which stated that, "[d]iscovery proceedings now known to be necessary are completed. There are no outstanding requests for discovery. There has been a reasonable opportunity to complete the foregoing proceedings....The case is ready for trial." *See* Movants' Affirmation in Support Exhibit I. On March 12, 2009, the Honorable Daniel Martin, Acting Supreme Court Justice, issued a decision on defendants' motion for summary judgment. Acting Justice Martin granted defendants' motion with respect to plaintiffs' causes of action for defamation, libel, slander *per se*, negligent hiring and retention and assault as to defendants Group Home, Alvin Dennis ("Dennis"), Christopher Klingenburger ("Klingenburger") and Frankie Pizzurro ("Pizzurro"), as well as the cause of action of intentional infliction of emotional distress as to defendant Group Home. *See* Movants' Affirmation in Support Exhibit J. Defendants filed an appeal from that portion of the March 12, 2009 Order that denied defendants' motion with respect to defendant Roeper in connection with plaintiffs' cause of action for assault and that portion of the March 12, 2009 Order that denied summary judgment with respect to defendants Dennis, Klingenburger, Pizzurro, Roeper and Tara

Underwood ("Underwood") in connection with plaintiffs' cause of action for intentional infliction of emotional distress.

Plaintiffs cross-appealed the portion of the March 12, 2009 Order which granted defendants' motion for summary judgment with respect to plaintiffs' causes of action for defamation and assault as asserted against Group Home, Dennis, Pizzurro and Underwood, as well as the cause of action of negligent hiring and supervision.

On July 15, 2009, defendants filed an Order to Show Cause to stay jury selection and the trial of this matter. *See* Movants' Affirmation in Support Exhibit K. The Appellate Division, Second Department, granted defendants' Order to Show Cause and the instant matter was stayed pending appeal.

By Decision and Order dated May 11, 2010, the Appellate Division overturned the lower court's denial of defendants' motion for summary judgment with respect to the cause of action of intentional infliction of emotional distress as asserted against defendants Dennis, Klingenburger, Pizzurro, Roeper and Underwood. *See Marilyn S. v. Independent Group Home Living Program, Inc.*, 73 A.D.3d 892, 903 N.Y.S.2d 403 (2d Dept. 2010). With respect to plaintiffs' cross-appeal, the Appellate Division overturned the lower court's decision dismissing plaintiffs' cause of action for assault against defendant Group Home.

With respect to plaintiffs' cause of action sounding in assault, the Appellate Division held that, contrary to defendants' contention, the Supreme Court properly denied that branch of defendants' motion that was for summary judgment dismissing the assault cause of action insofar as against defendant Roeper. In addition, the Appellate Division held that the Supreme Court erred in granting the branch of defendants' motion dismissing the assault cause of action insofar as against defendant Group Home.

Accordingly, the only cause of action that remains in the instant action is the one based upon the alleged assault as to defendants Roeper and Group Home.

On February 23, 2011, defendants Roeper and Group Home moved to restore this action to the trial calendar. Defendants Roeper and Group Home and non-party witness Gasstrom now assert that it was only after defendants Roeper and Group Home moved to restore this action to the trial calendar that plaintiffs first attempted to seek the examination of non-party witness Gasstrom by serving a "Judicial Subpoena" seeking to compel non-party witness Gasstrom to appear for an Examination Before Trial ("EBT") on April 13, 2011. *See* Movants' Affidavit in Support Exhibit A. Defendants Roeper and Group Home and non-party witness Gasstrom contend that the subject subpoena fails to state the reasons or circumstances such disclosure is sought or required and fails to set forth the statutory authority upon it was issued. The EBT of non-party witness Gasstrom did not take place on April 13, 2011 and was adjourned without a date.

On May 31, 2011, the instant action was restored to the trial calendar. After several adjournments, on December 7, 2011, the instant action was marked off the trial calendar at the request of plaintiffs.

Defendants Roeper and Group Home and non-party witness Gasstrom argue that their counsel timely objected to the service of the subpoena on non-party witness Gasstrom and repeatedly asked plaintiffs to articulate what discoverable information they were seeking from non-party witness Gasstrom. *See* Movants' Affirmation in Support Exhibit L. They contend that they repeatedly informed plaintiffs' counsel that non-party witness Gasstrom had no first hand personal knowledge related to the alleged assault that took place on January 17, 2007.

Defendants Roeper and Group Home and non-party witness Gasstrom submit that, "[n]othwithstanding that the Subpoena had been essentially abandoned by Plaintiffs almost a year

prior, on March 16, 2012, Plaintiffs' counsel sent a letter to Ms. Gasstrom alleging that the Judicial Subpoena remained in full force and effect, instructing her to appear for oral examination on March 27, 2012 to give testimony in this matter." *See* Movants' Affidavit in Support Exhibit B. By correspondence dated March 22, 2012, defendants Roeper and Group Home and non-party witness Gasstrom objected to the production of Gasstrom as a non-party witness in this action since she has no direct personal knowledge of the January 17, 2007 incident. *See* Movants' Affirmation in Support Exhibit M. By letter dated March 23, 2012, plaintiffs' counsel refused to withdraw the subject subpoena and refused to delineate the basis of the reasons or circumstances such disclosure was sought or required. *See* Movants' Affirmation in Support Exhibit N.

In opposition to defendants Roeper and Group Home and non-party witness Gasstrom's motion, plaintiffs argue that the anticipated deposition of non-party witness Gasstrom is relevant to the instant matter. Plaintiffs contend, "[d]efendants would simply dismiss the need to have Lisa Gasstrom deposed by stating that she was not present on January 17, 2007. However, that approach is too simplistic. IGHL's [defendant Group Home] role in planning and formulating its employees' actions on January 17, 2007 is vital to establishing liability. The actions of defendant Roeper and the others were not necessarily done spontaneously. Their actions, very possibly, resulted from the additional restrictions that were placed on Marilyn Sybalski and from meetings conducted by IGHL. IGHL's actions in this regard, under the circumstances as just discussed are important to establishing its liability on the issues of malice and bad faith. This includes the planning and strategy that IGHL devised to follow Marilyn Sybalski in the manner described and to possibly plan the assaultive conduct. Lisa Gasstrom's testimony is vital to this issue and was not known about at the time that the original depositions occurred in the first half of 2008. It was not until 2009-2010 that plaintiffs, through testimony in a Surrogate's Court proceeding brought

by IGHL, in which it unsuccessfully sought to remove plaintiffs as Guardians of Paul II, that Lisa Gasstrom's role surfaced. In deposition testimony therein, Lisa Gasstrom's role became clear." Plaintiffs submit that, through the testimony in the Surrogate's Court proceeding, they learned that non-party witness Gasstrom was a "consultant" for defendant Group Home, that she was hired to help defendant Group Home with plaintiffs' son's care and that she attended monthly meetings with plaintiffs' son's team with respect to same. Plaintiffs assert, "[b]ased upon this testimony, it is clear that Ms. Gasstrom was brought in by IGHL to participate in planning strategy with reference to Paul II, plaintiffs and the litigation. She may be able to testify about IGHL's planning and strategy that directly led to the alleged assault on January 17, 2009 (*sic*) and matters that will be probative to issues involved herein, such as intent, malice, punitive damages and corporate liability."

Plaintiffs further add that, at no time prior to the return date of the subject subpoena, was a motion to quash made by defendants Roeper and Group Home or non-party witness Gasstrom. Plaintiffs submit that it was then necessary to adjourn the date of the deposition. The witness was notified of the adjournment by letter dated March 16, 2012. The letter indicated that the deposition would be held on March 26, 2012. Plaintiffs' counsel was informed by counsel for defendants Roeper and Group Home and non-party witness Gasstrom that non-party witness Gasstrom would not be appearing on March 26, 2012. On April 2, 2012, Defendants Roeper and Group Home and non-party witness Gasstrom served the instant motion to quash. Plaintiffs contend that, since defendants Roeper and Group Home and non-party witness Gasstrom did not make the motion to quash prior to the return date of the subpoena, the instant motion was not made in a timely manner and, therefore, defendants Roeper and Group Home and non-party witness Gasstrom should be barred from the relief they are seeking.

Plaintiffs add that the explanation as to the necessity of deposing non-party witness

Gasstrom as provided in their Affirmation in Opposition to the instant motion will satisfy the requirements of CPLR § 3101(a)(4) and render defendants Roeper and Group Home and non-party witness Gasstrom's arguments with respect to same moot.

In reply to plaintiffs' opposition, defendants Roeper and Group Home and non-party witness Gasstrom argue, "[a]lmost four years ago, Plaintiffs represented to this Court that this matter was ready for trial. This Court should hold them accountable to those representation and quash the subpoena upon Gasstrom and set this matter down for trial." They add, "[s]ince Plaintiffs first served the purported Judicial Subpoena on or about March 23, 2011 (which tellingly was not 'So-Ordered' by any justice of this or any Court), Defendants have repeatedly requested that Plaintiff (*sic*) articulate the areas which she seeks testimony from Gasstrom, particularly as they relate to the remain (*sic*) claims in this action. It was not until the remaining Defendants brought this instant application that Plaintiff (*sic*) even attempted to provide any basis for the need for the testimony of Gasstrom. The basis set forth by Plaintiff for the need for the non-party deposition of Gasstrom within their opposition is insufficient...The sole issues which remain in this action are related to the assault claim against Roeper and whether said assault arose out of the course of his employment with IGHL. Marilyn S., *supra*. Proof of 'malice' and/or 'bad faith' are not factors which are necessary to establish an assault action. Proof of 'malice' and/or 'bad faith' are not necessary to establish liability for an assault action under *respondent superior*....The need to establish 'malice' and 'bad faith' are not relevant to this action. 'Malice" and 'bad faith' are only elements of the claims that have already been disposed of by the Courts in this case....Plaintiff (*sic*) seeks Ms. Gasstrom's examination before trial for reasons that are neither material nor necessary for the prosecution of this action. Plaintiff (*sic*), in her opposition to this motion to quash, betrays her desire to depose Ms. Gasstrom on issues that are neither material nor necessary to establish an assault claims and/or vicarious liability on

behalf of IGHL through *respondent superior*. 'Malice' and 'bad faith' are not necessary components to an assault claim."

After the filing of the Note of Issue and Certificate of Readiness, there is generally no longer any basis for judicial intervention to allow further disclosure absent "unusual or unanticipated circumstances" and "substantial prejudice." *See Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007). Thus, in the absence of a showing of special, unusual, unanticipated or extraordinary circumstances...spelled out in factual detail in an motion supported by an affidavit, disclosure devices may not be permitted to be utilized after the certificate of readiness has been filed. *See Francis v. Board of Educ. of the City of Mount Vernon*, 278 A.D.2d 449, 717 N.Y.S.2d 660 (2d Dept. 2000).

In *Tirando v. Miller*, 75 A.D.3d 153, 901 N.Y.S.2d 358 (2d Dept. 2010) the Court held that "[t]he purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial ready calendar are, in fact, ready for trial.... CPLR 3402(a) provides that notes of issue may be filed any time after issue is joined, or 40 days after service of the summons irrespective of the joinder of issues, and must be accompanied by whatever data is required by the applicable rules of the court. 22 NYCRR 202.21(a) is an applicable rule of court which requires all notes of issue to be accompanied by certificates of readiness....A certificate of readiness certifies that all discovery is complete, waived, or not required and that the action is ready for trial....The effect of a statement of readiness is to ordinarily foreclose further discovery....Discovery that is nevertheless sought after the filing of a note of issue and certificate of readiness is governed by a different set of procedural principles than discovery that is sought prior to the filing of a note of issue....Post-note discovery, on the other hand, may only be sought under two procedural circumstances set forth in 22 NYCRR 202.21....one method of obtaining post-note discovery is to vacate the note of issue within 20 days of its service pursuant to 22

NYCRR 202.21(e), by merely showing that discovery is incomplete and the matter is not ready for trial. The second method, beyond that 20 days, requires that the movant, pursuant to 22 NYCRR 202.21(d), meet a more stringent standard and demonstrate 'unusual or unanticipated circumstances and substantial prejudice' absent the additional discovery."

As plaintiffs did not move to vacate the note of issue within 20 days of its service pursuant to 22 NYCRR 202.21(e), the Court's inquiry will be limited to whether plaintiffs can demonstrate "unusual or unanticipated circumstances and substantial prejudice" absent the additional discovery. *See Utica Mut. Ins. Co. v. P.M.A. Corp.*, 34 A.D.3d 793, 826 N.Y.S.2d 138 (2d Dept. 2006).

Ruling on a motion to quash a subpoena calls for an exercise of the courts discretion. The court is vested with broad discretion to control disclosure and its determination will not be disturbed absent an improvident exercise or clear abuse of that discretion. *See Maiorino v. City of New York*, 39 A.D.3d 601, 834 N.Y.S.2d 272 (2d Dept. 2007); *Nieves v. City of New York*, 35 A.D.3d 557, 826 N.Y.S.2d 647 (2d Dept. 2006).

As previously indicated, on or about October 6, 2008, plaintiffs filed their Note of Issue which stated that, "[d]iscovery proceedings now known to be necessary are completed. There are no outstanding requests for discovery. There has been a reasonable opportunity to complete the foregoing proceedings....The case is ready for trial." *See* Movants' Affirmation in Support Exhibit I. The fact that a significant period of time passed between the filing of said Note of Issue and the case being restored to the trial calendar does not change the fact that plaintiffs had indicated that they were "ready for trial." If not for the appellate process engaged in this matter, trial of said matter was scheduled for July 28, 2009. Plaintiffs had indicated that they were ready for trial at this time as discovery was complete.

The Court finds that, based upon the papers submitted before it, that there are no "unusual

or unanticipated circumstances" upon which to permit plaintiffs to engage in the post-Note of Issue deposition of non-party witness Gasstrom. The Court further finds that the reasons set forth by plaintiffs in support of their need for non-party witness Gasstrom's deposition are irrelevant to the remaining cause of action in the instant matter and, therefore, without merit. The Court also holds that plaintiffs will not sustain any substantial prejudice absent the additional discovery. There is no rational basis herein to permit further discovery in the form of a non-party deposition in light of plaintiffs filing a Note of Issue and Certificate of Readiness indicating all disclosure had been completed.

With respect to plaintiffs' argument that defendants Roeper and Group Home and non-party witness Gasstrom failed to make the instant motion to quash the subpoena in a timely fashion, CPLR § 2304 states that "[a] motion to quash , fix conditions or modify a subpoena shall be made *promptly* in the court in which the subpoena is returnable (emphasis added)." CPLR § 2304 does not specify the time within which a motion to quash, condition or modify has to be made. It only states that the motion should be made "promptly," which automatically makes the question of timeliness *sui generis*.

The original non-party witness "Judicial Subpoena" issued by plaintiffs on March 23, 2011, failed to satisfy the requirements of CPLR § 3101(a)(4). *See* Movants' Affidavit in Support Exhibit A. Plaintiffs did not purport to comply with said requirements until the submission of their Affirmation in Opposition to the instant motion. *See* Plaintiffs' Affirmation in Support ¶ 76. Defendants Roeper and Group Home and non-party witness Gasstrom demonstrated that they advised plaintiffs of their failure to comply with CPLR § 3101(a)(4) through a series of e-mail communications between counsel for the parties. *See* Movants' Affirmation in Support Exhibit I. L. Despite the fact that the requested deposition was scheduled for April 13, 2011, said deposition was apparently adjourned, with the next date for the scheduled deposition being

almost a year later - March 26, 2012. As indicated, as of March 26, 2012, plaintiffs still had not complied with CPLR § 3101(a)(4). Defendants Roeper and Group Home and non-party witness Gasstrom brought the motion to quash, by Notice of Motion, on April 4, 2012. Based upon the facts that plaintiffs failed to comply with CPLR § 3101(a)(4) and that there were several issues as to when, and if, the subpoenaed non-party witness deposition was ever to take place, the Court finds that the instant motion to quash has been made in a timely manner.

Accordingly, based upon the above, defendants Roeper and Group Home and non-party witness Gasstrom's motion, pursuant to CPLR § 2304, for an order quashing the purported "Judicial Subpoena," dated March 23, 2011 and served on March 30, 2011, upon non-party Gasstrom is hereby **GRANTED**.

All parties shall appear in the Trial Recertification Part of the Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on August 14, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

**ENTER:**

**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York
August 3, 2012

ENTERED
AUG 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE