SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
--x Index # 01/112428

HISPANIC AIDS FORUM,

Plaintiff,

– against –

ESTATE OF JOSEPH BRUNO; THE TRUST UNDER ARTICLE SEVENTH OF THE LAST WILL AND TESTAMENT OF JOSEPH BRUNO; LOUISE HILDRETH, in her official capacity as Trustee; JOSEPHINE JOY GAPE, in her official capacity as Trustee; JOY L. HILDRETH, in her official capacity as Trustee; LOUISE E. GAPE, in her official capacity as Trustee; and DOE DEFENDANTS 1-10.

Defendants.
--x

MEMORANDUM OF LAW IN SUPPORT OF HISPANIC AIDS FORUM'S MOTION FOR A PROTECTIVE ORDER

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PRELIMINARY STATEMENT

Plaintiff Hispanic Aids Forum ("HAF") submits this memorandum of law in support of its motion for a protective order relieving plaintiff from having to respond to discovery requests seeking irrelevant information about HAF's clients, who are non-parties to this action. The information sought by defendants, as discussed more fully below, is highly personal and private information, which New York State law protects from compelled disclosure. Only HAF's clients have the right to determine when and to whom they will disclose highly personal information. Defendants' efforts to obtain this information are intrusive, palpably improper, and subject HAF and its clients to exactly the sort of prejudice courts are empowered to prevent by way of a protective order. Moreover, the information Defendants seek about non-party individuals is

clearly irrelevant and design only to harass and oppress. As such, HAF respectfully requests that its motion for a protective order be granted.

FACTS

The First Amended Complaint in this action alleges, *inter alia*, that defendants discriminated against HAF by refusing to renew HAF's commercial lease for office space in Queens because HAF provides services to transgendered clients. (First Amended Complaint ¶¶ 1-3, attached to the Affirmation of Kesari Ruza ("Ruza Aff.") as Exhibit A) Specifically, HAF alleged that defendants refused to continue leasing office space to HAF unless HAF agreed to prevent its transgendered clients from using common areas in the building, including the main entrance and the bathrooms. (First Amended Complaint ¶¶ 2, 23-24) The only alleged victim of discrimination in this case is HAF. HAF's clients are not parties to this action.

On May 6, 2002, defendants served their Demand for Verified Bill of Particulars (the "Demand") and Notice to Produce (the "Document Request," and together with the Demand referred to herein as the "Discovery Requests," attached to Ruza Aff. as Exhibit B). Request Nos. I(a)(2)(b), II(a)(3)(b), III(b) of the Demand and Request No. V of the Document Request seek information about HAF's clients, hereinafter referred to as the "Requested Information."

By way of example, Request No. III(b) of the Demand requests:

> **b) as to each HAF location, a complete list of all clients within each location since 1986, with particular attention drawn to clients within each HAF location from the years 1990 through 2001, including the following personal information as to each client separately provided for each year from 1990 through 2001:**
>
> > **i) name;**
> >
> > **ii) address;**

iii) age;

iv) anatomical sex at birth;

v) anatomical sex during each year;

vi) sexual identity during each year;

vii) specific physical description during each year.

As discussed more fully below, the Requested Information is not relevant to any claims or defenses in this action and seeks information about third-parties that HAF is prohibited from disclosing pursuant to New York law.

ARGUMENT

THIS COURT SHOULD GRANT A PROTECTIVE ORDER UNDER CPLR §3103(a) BECAUSE THE DISCOVERY REQUESTS ARE PALPABLY IMPROPER AND CONCERN INFORMATION THAT HAF CANNOT BE COMPELLED TO DISCLOSE

CPLR § 3103(a) provides that the Court may issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device in order to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person." This Court should exercise its power under CPLR § 3103 to: (a) protect HAF from being forced to violate confidentiality statutes; (b) to protect HAF from the potential civil and criminal penalties that would attach if HAF disclosed the Requested Information; (c) to protect HAF's clients' rights to privacy; and (d) to prevent the unreasonable annoyance, disadvantage and prejudice to HAF and its clients that would result from HAF's disclosure of the Requested Information.

HAF cannot be compelled to provide information to defendants that is clearly violative of some constitutional right, recognized privilege, or if the information sought is palpably irrelevant or improper. See Matter of the Estate of Carvel, 642 N.Y.S.2d 1012, 1014, 168 Misc.2d 442, 444 (N.Y. Surr. Ct., Westchester Cty 1996). A discovery request is "palpably improper" if it

seeks information "of a confidential and private nature, and irrelevant to the issues in the case," Watson v. Esposito, 647 N.Y.S.2d 233, 236, 231 A.D.2d 512, 516 (2d Dep't 1996), especially when the information sought pertains to third-parties. See Van Epps v. County of Albany, 706 N.Y.S.2d 855, 864, 184 Misc.2d 159,171 (N.Y. Sup. Ct. Albany Cty 2000), relying on Andon v. 302-304 Mott St. Assoc., 690 N.Y.S.2d 241, 257 A.D.2d 37 (1st Dep't 1999), and refusing to deviate from "traditional notions of plaintiff – centered discovery" by allowing "expansive and intrusive non-party disclosure" regarding their mental and physical condition.

The Requested Information seeks information about HAF's clients -- who are not parties to this litigation -- that is highly confidential and private, including information about HAF's clients' sexual identity and physical appearance. Indeed, the very disclosure of the identity of one of HAF's clients is tantamount to disclosing that the client is HIV positive, since a person is not likely to seek HAF's HIV/AIDS counseling services unless they are HIV positive. It is hard to imagine more private and intimate information than the information defendants seek about HAF's clients. Because HAF's clients are not parties to this action, the Requested Information clearly is "palpably improper" and HAF cannot be compelled to disclose it.

A. The Requested Information Is Irrelevant and "Palpably Improper"

Defendants have no need for information about HAF's client in order to present a defense in this action. This is a dispute about a landlord's eviction of a tenant. HAF has alleged that it was evicted for discriminatory reasons; defendants have denied that its motives were unlawful. More specifically, HAF contends that defendants refused to renew the lease because, as defendants' agents told a representative of HAF, "men who think they're women [are] using the women's bathrooms." (First Amended Complaint ¶ 21) Defendants' agents also specifically told HAF that they would not renew HAF's lease "unless HAF agreed that transgendered clients

would not be permitted to use the bathrooms." (Id. ¶ 24) The sole issue for trial is defendants' intent when they refused to renew HAF's commercial lease.

The Discovery Requests do not seek information relevant to establishing what defendants' intent was on this core issue. Instead, they seek information about the "anatomical sex" and "sexual identity," at birth and each year over an 11-year period, of non-parties to this litigation. Such information is not reasonably calculated to lead to the production of evidence relevant to establishing whether defendants acted with an unlawful discriminatory motive.

Information about HAF's clients is simply irrelevant because it is the intent of the discriminator -- not the actual anatomical status or sexual identity of the clients of the victim of discrimination -- that is relevant for the purpose of proving or defending a discrimination case. The New York City Human Rights Law, one of the statutes under which HAF brought this suit, makes clear that in the context of discrimination in commercial leasing, as in other discrimination cases, it is the landlord's knowledge or perception that is relevant to the issue of discrimination, and not the actual status of the victim:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessor. . . . to refuse to sell, rent, lease . . . commercial space . . . because of the *actual or perceived* . . . sex . . . [or] disability . . . of such person or persons.

N.Y. Admin. Code § 8-107 (emphasis added).

Romei v. Shell Oil Co. interpreting Executive Law 292.21(c), held that the plaintiff could maintain a claim for discrimination on the basis of disability where his former employer believed he was suffering from AIDS, despite the fact that plaintiff failed to allege that he was in fact suffering from this disability:

> it is . . . not necessary that [plaintiff] allege that he actually has a "disability" within the meaning of Executive Law 292.21(c) in order to state a cause of action [for discrimination] . . . . It is

> sufficient that he allege that he was regarded by the defendants as having a disability."

1991 WL 692884 (N.Y. Sup. Ct., N.Y. Cty, February 14, 1991).

Similarly here, HAF has alleged in its First Amended Complaint that the defendants discriminated against HAF because of HAF's clients' actual or perceived disability -- their transgendered status. (First Amended Complaint ¶¶ 40, 44, stating that defendants refused to "rent commercial space to HAF because of the actual or perceived disability of its transgendered clients"). The Requested Information, which seeks information about the actual anatomical gender and sexual identity of certain of HAF's clients, therefore is irrelevant to the disputed issues of fact in this case and must be protected from disclosure.

B. HAF Is Legally Prohibited From Disclosing The Requested Information And Would Be Subject To Potential Criminal And Civil Penalties

Even if defendants could demonstrate how information pertaining to HAF's client is in some way relevant to this case, the Requested Information still cannot be disclosed because HAF is legally prohibited from disclosing the Requested Information pursuant to New York law and statutory provisions, including:

1. N.Y. Public Health §§ 2780 *et seq.*

N.Y. Public Health § 2782 prohibits HAF from disclosing "confidential HIV related information" obtained in the course of providing social services. Even the disclosure of the identity of HAF's clients would violate this statute because the statute defines "confidential HIV related information" as "any information in the possession of a person who provides one or more health or social services . . . or information which identifies or *reasonably could identify* any individual as having one or more of such conditions . . . ." N.Y. Public Health Law § 2780 (emphasis added). Since HAF primarily provides HIV counseling services, disclosing the

identity of a HAF client reasonably could identify such person as HIV positive. Therefore, HAF's disclosure of the Requested Information would clearly violate the HIV confidentiality statute.

2. HAF Role as Custodian of the Records

As the custodian of records pertaining to HAF's clients, HAF has an obligation to its clients to preserve the confidentiality of the information contained therein. In Cynthia B. v. New Rochelle Hospital Medical Center, the Court of Appeals of New York held that:

> [w]hen a party moves to compel discovery of medical records…[the] institution who is custodian of the records may request a protective order on the ground that disclosure of all or part of the record may be seriously detrimental to the interests of the patient, to involved third parties, or to an important program of the custodian of the records, notwithstanding a valid waiver of the physician-patient privilege.

60 N.Y.2d 452, 462 (N.Y. 1983).

In the instant case, disclosure of HAF's clients' identity and other personal and medical information would be "seriously detrimental to the interests of HAF's [clients]." Id. at 454-455. Discrimination against people infected with HIV and AIDS persists in society, and for that and other reasons many patients choose to keep private their medical conditions. Disclosing information that would associate HAF's clients with HAF might have serious repercussions for HAF's clients. Additionally, clients might stop utilizing the services of HAF and other such social services for fear that their private information might be the subject of compelled disclosure.

Given these circumstances, HAF should be able to prevent the disclosure of its clients' private medical information, both to protect its clients' confidences and to protect the integrity and continuity of important social services.

C. Disclosure Of The Requested Information Would Violate The Privacy Rights Of HAF's Clients

New York courts have consistently recognized a right of privacy to protect individuals from having to disclose intimate aspects of their medical and sexual lives. The personal medical information requested here pertains to the identity, the medical records and the physical characteristics of HAF's clients, all non-parties to this action. New York courts have recognized that non-parties to an action have a particularly strong privacy interest against disclosure of personal matters requested in discovery. For example, in Van Epps the court held that defendants in a lead poisoning action were not entitled to discover private information from the plaintiffs' siblings and parents. 706 N.Y.S.2d at 859-860, 184 Misc.2d at 164.

Similarly, the court in In re New York County DES Litigation, held that defendants in a malpractice action could not obtain requested medical records of plaintiffs' relatives, because "the privacy interests of the nonparty relatives . . . are certainly deserving of protection since the broad discovery sought herein would necessarily (and indeed is intended to) invade the 'protected zone of privacy' that encompasses the avoidance of 'disclosure of personal matter." 570 N.Y.S.2d 804, 806; 168 A.D.2d 44, 48 (1st Dep't 1991).

New York courts utilize a balancing test to determine whether to compel disclosure of private information not protected by a specific privilege. In Washington v. Bayley Seton Hospital, the court held that information which "may not be privileged per se … is entitled to protection absent a showing that the defendants' need for disclosure outweighs the importance of protecting the non-parties' privacy." 1998 N.Y. Misc. LEXIS 579 at *3 (N.Y. Sup. Ct., N.Y. Cty April 24, 1998). Similarly, the Van Epps court held that "discovery requests that tend to broaden the scope of litigation and intrude upon the rights to privacy should not be permitted unless there

is a showing that the need for disclosure outweighs the importance of protecting non-parties' privacy." 706 N.Y.S.2d at 860, 184 Misc.2d at 164.

In balancing the interests here, it is important to recognize that HAF's clients are not parties to this litigation. This is a very different situation from a plaintiff who puts his or her own medical history or private life at issue by virtue of bringing a lawsuit. As non-parties, HAF's clients' privacy concerns must take precedence. See, e.g., In re New York County DES litigation, 570 N.Y.S.2d at 806, 168 A.D. 2d at 48.

The privacy interest at stake here is strong. The precedent this Court would set by requiring non-parties to disclose personal medical and sexual information may put those who identify themselves as transsexual and/or who are HIV positive at risk and erode their confidence in social services.

Whatever the nature of HAF's clients' anatomic gender, sexual identity, or physical appearance, the decision of if, when and to whom to disclose this information is the individual client's decision to make. None of these personal details are relevant or material to the sole issue that will be before the Court at trial: whether or not defendants acted with discriminatory intent. Defendants seek to infringe on HAF's clients' fundamental right to privacy, and effectively to compel them to share the most intimate details of their lives, with complete strangers. Defendants' request for such disclosure should not be countenanced.

CONCLUSION

For the above stated reasons, the Court should issue a protective order relieving HAF of any obligation to respond to Request Nos. I(a)(2)(b), II(a)(3)(b), III(b) of the Demand and Request No. V of the Document Request.

Dated: New York, New York
July 8, 2002

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By: ______________________________________

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