

THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN,
Insurance Commissioner of the
Commonwealth of Pennsylvania,

Plaintiff,

v.

RELIANCE INSURANCE COMPANY,

Defendant.

No. 269 M.D. 2001

PALM SPRINGS GENERAL HOSPITAL
and BAPTIST HEALTH SOUTH
FLORIDA, INC.,

Objectors,

v.

M. DIANE KOKEN,
Insurance Commissioner of the
Commonwealth of Pennsylvania,

Respondent.

Before
JAMES GARDNER COLINS,
President Judge

RECEIVED AND FILED
COMMONWEALTH COURT
OF PENNSYLVANIA

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ORDER

AND NOW, this ____ day of _____, upon consideration of the Liquidator's Petition For Default Judgment Against Palm Springs General Hospital it is hereby ORDERED that the Liquidator's Petition is GRANTED, and that (1) Palm Springs Objection is dismissed with prejudice; and (2) the Liquidator is awarded costs and attorneys' fees associated with this Petition and the Liquidator's Petition to Compel Corporate Designee Deposition.

BY THE COURT:

_____, J.

THE COMMONWEALTH COURT OF PENNSYLVANIA

M. DIANE KOKEN,
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M. DIANE KOKEN,
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No. 269 M.D. 2001

Before
JAMES GARDNER COLINS,
President Judge

**LIQUIDATOR'S PETITION FOR DEFAULT JUDGMENT
AGAINST PALM SPRINGS GENERAL HOSPITAL**

Respondent M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania in her official capacity as Statutory Liquidator of Reliance Insurance Company (In Liquidation) ("Liquidator"), by and through her attorneys, pursuant to Rule 4019 of the Pennsylvania Rules of Civil Procedure, respectfully petitions this Court to enter default judgment against Palm Spring General Hospital, on the following grounds:

1. At issue in this matter, is whether Palm Springs General Hospital (“Palm Springs”) and Baptist Health South Florida, Inc. (“Baptist”) (collectively “the Hospitals”) can establish that they are entitled to direct payment of reinsurance proceeds under a reinsurance agreement entered into between Reliance and American Healthcare Indemnity Company. Palm Springs and Baptist filed joint Objections to the Liquidator’s Denial of a Request for Direct Payments.

2. On November 23, 2005, the Pennsylvania Supreme Court remanded this case for discovery relating to the issue of whether Palm Springs General Hospital and Baptist Health South Florida, Inc. are entitled to direct access to reinsurance proceeds from AHIC.

3. Palm Spring has only responded to requests for production and interrogatories.

4. The Liquidator requested the depositions of a few Palm Springs employees, its insurance broker, and a corporate designee. (See Exhibit 2 to Liquidator’s Petition to Compel Deposition of Palm Springs’ Corporate Designee).¹

5. Palm Springs has not produced any witnesses for deposition.

6. Specifically, after being served with a deposition notice requesting the deposition of its corporate designee(s) and several follow up requests from the Liquidator attempting to schedule the deposition, Palm Springs failed to identify or produce a corporate designee for deposition. (See Exhibits 3-10 to Liquidator’s Petition to Compel Deposition of Palm Springs’ Corporate Designee).

¹ The Liquidator was subsequently advised that the Palm Spring employees requested were no longer employees of Palm Springs.

7. Indeed, Palm Springs refused to authorize its counsel to identify a corporate designee. (See Exhibit 11 to Liquidator's Petition to Compel Deposition of Palm Springs Corporate Designee).

8. Palm Springs did not object to the deposition notices.

9. Palm Springs did not seek a protective order excusing it from producing a corporate designee.

10. Accordingly, on September 6, the Liquidator filed a Petition to Compel the deposition of Palm Springs corporate designee, which is currently pending before this Court.

11. Palm Springs opposition to the Liquidator's Motion to Compel Deposition of Corporate Designee of Palm Springs General Hospital was due on September 26, 2006.

12. To date, Palm Springs has failed to respond to the Liquidator's Motion to Compel.

13. To date, Palm Springs has not requested an extension to respond to the Liquidator's Motion to Compel.

14. On September 28, 2006, the Liquidator inquired whether Palm Springs intended to proceed in this matter and was advised by counsel for the Hospitals that Palm Springs might be withdrawing its objections.

15. Subsequently, the Liquidator followed up with Palm Springs regarding whether it would be withdrawing its objection. (See letter dated October 9, 2006 from Isla Luciano to Daryn Rush, attached as Exhibit 1).

16. In response, counsel for the Hospitals indicated that "as soon as [he] receive[d] instructions from Palm Springs" he would let the Liquidator know. (See email dated October 9, 2006 from Daryn Rush to Isla Luciano, attached as Exhibit 2).

17. Pursuant to Rule 4019(c)(3) of the Pennsylvania Rules of Civil Procedure, the Court may enter a default judgment as a sanction for a party failing to produce a corporate designee.

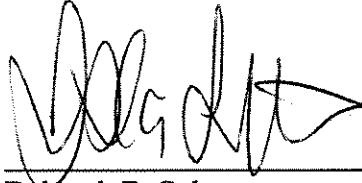
18. Pennsylvania courts consider the following factors in awarding sanctions for discovery violations: (1) the nature and severity of the discovery violation; (2) the defaulting party's willfulness or bad faith; (3) prejudice to the opposing party; (4) the ability to cure the prejudice; and (5) the importance of the precluded evidence in light of the failure to comply. *See, e.g., Philadelphia Contributorship Ins. Co. v. Shapiro*, 798 A.2d 781, 784-85 (Pa. Super. 2002) (dismissing claims against insurer as a sanction for firm's discovery violations).

19. All of the factors warranting the imposition of sanctions are present here.

20. The Liquidator requests that the Court enter a default judgment against Palm Springs as a sanction for its discovery violations.

21. The Liquidator also requests that the Court award costs and fees associated with this Petition, the Petition to Compel and award the Liquidator such other relief as the Court deems just under the circumstances.

WHEREFORE, the Liquidator respectfully requests that the Court enter the attached Order, granting the Liquidator's Petition for Default Judgment against Palm Springs General Hospital



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Attorneys for M. Diane Koken
Insurance Commissioner of the
Commonwealth of Pennsylvania
In Her Official Capacity as
Statutory Liquidator of Reliance
Insurance Company (In Liquidation)

Dated: October 16, 2006

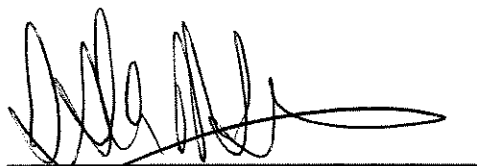
CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2006, a true and correct copy of the foregoing LIQUIDATOR'S PETITION FOR DEFAULT JUDGMENT AGAINST PALM SPRINGS GENERAL HOSPITAL and MEMORANDUM IN SUPPORT THEREOF was served upon the following:

Via First Class Mail and Email

Daryn E. Rush, Esquire
Funk & Bolton, P.A.
Bell Atlantic Tower
1717 Arch Street, Suite 4600
Philadelphia, PA 19103-2713

Attorney for Objectors Palm Springs General Hospital
and Baptist Health South Florida, Inc.

A handwritten signature in black ink, appearing to read 'Isla M. Luciano', written over a horizontal line.

Isla M. Luciano

THE COMMONWEALTH COURT OF PENNSYLVANIA

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Before
JAMES GARDNER COLINS,
President Judge

**LIQUIDATOR'S MEMORANDUM OF LAW IN SUPPORT OF HER PETITION
FOR DEFAULT JUDGMENT AGAINST PALM SPRINGS GENERAL HOSPITAL**

Pursuant to Rule 4019 of the Pennsylvania Rules of Civil Procedure, M. Diane Koken, Insurance Commissioner of the Commonwealth of Pennsylvania, in her official capacity as Statutory Liquidator of Reliance Insurance Company (In Liquidation), by and through her attorneys, petitions this Court to enter default judgment against Palm Springs General Hospital and award fees and costs to the Liquidator as a sanction for Palm Springs discovery abuses.

I. INTRODUCTION

The Pennsylvania Rules of Civil Procedure do not allow Palm Spring General Hospital (“Palm Springs”) to act with impunity with respect to its discovery obligations and neither should this Court. Despite having the burden to establish that it, and not the Reliance Estate, is entitled to reinsurance proceeds under the reinsurance agreements between Reliance and American Health Indemnity Company (“AHIC”), Palm Springs General Hospital (“Palm Springs”) has brazenly ignored its obligations as a party to this dispute. Palm Springs has ignored the Liquidator’s requests for a corporate designee deposition, failed to respond to the Liquidator’s motion to compel the deposition of Palm Springs corporate designee, and generally acted as though it can pick and choose when it wants to be a party to this action. Palm Springs’ willful violation of its discovery obligations justifies stiff sanctions. Accordingly, the Liquidator requests that this Court enter a default judgment against Palm Springs and order Palm Springs to pay fees and costs associated with this Petition and the Liquidator’s Petition to Compel the Deposition of Palm Springs Corporate Designee, filed September 6, 2006.

II. LEGAL ARGUMENT

This Court has the discretion and authority to impose appropriate sanctions against Palm Spring for its discovery violations. “The decision whether to sanction a party, and if so, the severity of such sanction, is vested in the sound discretion of the trial court.” *McGovern v. Hospital Service Assoc. of Northeastern Pennsylvania*, 785 A.2d 1012, 1015 (Pa. Super 2001) (citations omitted). Rule 4019 of the Pennsylvania Rules of Civil Procedure expressly authorizes a trial court to enter default judgment as a sanction for discovery abuses. *See* Pa. R. Civ. P. 4019(c)(3). Pennsylvania courts consider the following factors in awarding sanctions for discovery violations: (1) the nature and severity of the discovery violation; (2) the defaulting party’s willfulness or bad faith; (3) prejudice to the opposing party; (4) the ability to

cure the prejudice; and (5) the importance of the precluded evidence in light of the failure to comply. *See, e.g., Philadelphia Contributorship Ins. Co. v. Shapiro*, 798 A.2d 781, 784-85 (Pa. Super. 2002) (dismissing claims against insurer as a sanction for firm's discovery violations).

First, the nature and severity of Palm Springs' discovery abuses cannot be overstated. After making the Liquidator wait for several months to take the deposition of its corporate designee, Palm Springs at the 11th hour refused to produce a corporate designee at all. Given that Palm Springs represented that its designated representative would be its only witness at any hearing in this matter, a witness should have been produced and it Palm Springs has not excuse for not doing so. Then, as if to thumb its nose at this Court and the Liquidator, Palm Springs did not even respond to the Liquidator's Petition to Compel that deposition. If Palm Springs is unwilling to respect this Court's authority and the integrity of the judicial process, then it is not entitled to continue a party in this matter. *See Luszcynski v. Bradley*, 1999 PA Super 85, *15, 729 A.2d 83, 88 (Pa. Super. 1999) (default judgment was an appropriate sanction discovery violations which are "a direct affront to the authority of the trial court and to the integrity of the judicial system and the rule of law").

Second, Palm Springs has no justification for its failure to identify and produce a corporate designee for deposition. Likewise, Palm Spring has not justification for its failure to respond to the Liquidator's Motion to Compel. Indeed, there are only two explanations for Palm Springs' conduct—willful malfeasance or gross negligence and indifference to its obligations as the party with the burden of proof in this matter. In either event, Palm Springs actions have corrupted the fact finding process in this matter and severely prejudiced the Liquidator.

Third, there is simply no question that the Liquidator is prejudiced by not being able to learn the factual basis for Palm Springs' request for direct payment. While, it is Palm

Springs' burden to establish that it falls within an exception to the general rule that reinsurance proceeds are an asset of the insolvent insurer's estate, the Liquidator is entitled during the discovery process to ascertain what factual basis, if any, Palm Springs has for its claim that it is entitled to direct payment of reinsurance proceeds.

III. CONCLUSION

Rather than comply with its discovery obligations, or withdrawing its objections, which Palm Springs indicated it might do, Palm Springs has forced the Liquidator to prepare pleadings thereby imposing fees on the Reliance Estate which could have been avoided. Accordingly, the Liquidator requests that this Court enter default judgment against Palm Springs and require Palm Springs to pay the fees and costs associated with the filing of this Petition and the Liquidator's Petition to Compel the Deposition of Palm Springs Corporate Designee.



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Attorneys for M. Diane Koken
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Commonwealth of Pennsylvania
In Her Official Capacity as
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Dated: October 16, 2006

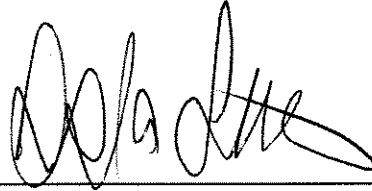
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Via First Class Mail and Email

Daryn E. Rush, Esquire
Funk & Bolton, P.A.
Bell Atlantic Tower
1717 Arch Street, Suite 4600
Philadelphia, PA 19103-2713

Attorney for Objectors Palm Springs General Hospital
and Baptist Health South Florida, Inc.



Isla M. Luciano

EXHIBIT 1

Pepper Hamilton LLP
Attorneys at Law

3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4000
Fax 215.981.4750

Isla Luciano
direct dial: 215.981.4120
luciano@pepperlaw.com

October 9, 2006

Via Email

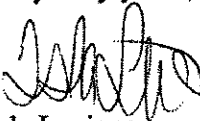
Daryn Rush
Funk & Bolton, P.A.
Bell Atlantic Tower
1717 Arch Street, Suite 4600
Philadelphia, PA 19103-2713

Re: *M. Diane Koken v. Reliance Insurance Company, (No. 269 M.D. 2001):*
(Objections of Baptist Health South Florida, Inc. and Palm Springs
General Hospital)

Daryn:

On September 28, after Joe Slaton's deposition, you indicated that Palm Springs likely would be withdrawing its objection to the Liquidator's denial of SCPIE's direct payment request. To date, Palm Springs has not done so. Palm Springs also has failed to respond to the Liquidator's Motion to Compel A Corporate Designee Deposition. Palm Springs utter disregard for its obligations as party to this action simply cannot continue. Accordingly, please file Palm Springs' motion to withdraw its objection with prejudice by Wednesday, October 11, or the Liquidator will have no alternative other than to seek dismissal of Palm Springs objection as well as costs and fees.

Very truly yours,



Isla Luciano

IL

PHLEGAL: #1927019 v1 (15@WB01!.DOC)

Philadelphia

Washington, D.C.

Detroit

New York

Pittsburgh

Berwyn

Cherry Hill

Harrisburg

Princeton

Tysons Corner

Wilmington

EXHIBIT 2

Luciano, Isla M.

From: Daryn Rush [drush@fblaw.com]
Sent: Monday, October 09, 2006 5:20 PM
To: Luciano, Isla M.
Subject: Re: SCPIE

Isla:

Just to be clear, I did not state that Palm Springs likely would withdraw its objection. I said that it might. As soon as I receive instructions from Palm Springs, I will let you know.

Daryn

----- Original Message -----

From: Luciano, Isla M. <luciano@pepperlaw.com>
To: Daryn Rush
Cc: Rothschild, Eric J. <ROTHSCHE@pepperlaw.com>; Cohen, Debbie <COHEND@pepperlaw.com>
Sent: Mon Oct 09 10:19:20 2006
Subject: SCPIE