

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32265
G/kmb

_____AD3d_____

Argued - May 17, 2011

WILLIAM F. MASTRO, J.P.
THOMAS A. DICKERSON
CHERYL E. CHAMBERS
SHERI S. ROMAN, JJ.

2010-03123
2010-08177
2011-02152

DECISION & ORDER

Rose Ann Meyers, respondent, v Stephen T. Greenberg,
etc., et al., appellants.

(Index No. 10122/09)

Geisler & Gabriele, LLP, Garden City, N.Y. (Lori A. Marano, Colleen M. Buckley,
and Stacy Fitzmaurice of counsel), for appellants.

Ross, Legan, Rosenberg, Zelen & Flaks, LLP, New York, N.Y. (Clifford F. Zelen of
counsel), for respondent.

In an action, inter alia, to recover damages for medical malpractice, the defendants appeal (1), as limited by their brief, from so much of an order of the Supreme Court, Queens County (O'Donoghue, J.), entered March 2, 2010, as conditionally granted that branch of the plaintiff's motion pursuant to CPLR 3126 which was to strike the answer of the defendant Barbara Tabor unless that defendant furnished the plaintiff with certain court-ordered discovery on or before March 22, 2010, (2) from an order of the same court entered July 8, 2010, made upon a decision of the same court dated April 26, 2010, and (3), as limited by their brief, from so much of an order of the same court entered February 15, 2011, as, upon granting that branch of their motion which was to resettle the order entered July 8, 2010, unconditionally struck the answer of the defendant Barbara Tabor on the ground that only that defendant failed to comply with the directives set forth in the order entered March 2, 2010.

ORDERED that the appeals by the defendants Stephen T. Greenberg and Stephen T. Greenberg, M.D., P.C., from the orders entered March 2, 2010, and February 15, 2011, are dismissed; and it is further,

ORDERED that the appeal from the order entered July 8, 2010, is dismissed, as that order was superseded by the order entered February 15, 2011; and it is further,

ORDERED that the order entered March 2, 2010, is reversed insofar as appealed from by the defendant Barbara Tabor, on the law, and that branch of the plaintiff's motion pursuant to CPLR 3126 which was to strike the answer of that defendant unless that defendant furnished the plaintiff with certain court-ordered discovery on or before March 22, 2010, is denied; and it is further,

ORDERED that the order entered February 15, 2011, is reversed insofar as appealed from by the defendant Barbara Tabor; and it is further,

ORDERED that one bill of costs is awarded to the defendant Barbara Tabor.

The Supreme Court erred in conditionally granting that branch of the plaintiff's motion which was to strike the answer of the defendant Barbara Tabor unless she provided the plaintiff with certain court-ordered discovery. While the motion was pending, Tabor and the other defendants provided the plaintiff with all of the requested records in their possession and submitted an affidavit from an employee of the defendant Stephen T. Greenberg, M.D., P.C., Tabor's alleged employer, who attested that a diligent search had been undertaken and that these were the only records in their possession. Under those circumstances, Tabor was not guilty of willful and contumacious conduct in responding to the discovery request (*see Paul N. Greenberg, D.P.M., P.C. v Montalvo*, 290 AD2d 402; *LaManna v Cahn Woolen Co.*, 249 AD2d 451; *Citibank [S.D.] v Johnson*, 206 AD2d 942; *Forman v Jamesway Corp.*, 175 AD2d 514, 515).

Moreover, at this time, the plaintiff has failed to carry her burden of demonstrating that Tabor intentionally or negligently disposed of critical evidence that compromised her ability to prosecute her claim (*see Scordo v Costco Wholesale Corp.*, 77 AD3d 725, 727; *Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718).

Accordingly, the Supreme Court should not have conditionally granted that branch of the plaintiff's motion which was to strike Tabor's answer, and thereafter should not have stricken her answer.

The appeal by the defendants Stephen T. Greenberg and Stephen T. Greenberg, M.D., P.C., from the order entered February 15, 2011, must be dismissed, as those defendants are not aggrieved by the portion of the order appealed from (*see CPLR 5511*) and, in any event, the appeals by those defendants from the orders entered March 2, 2010, and February 15, 2011, have been abandoned.

MASTRO, J.P., DICKERSON, CHAMBERS and ROMAN, JJ., concur.

ENTER: 
Matthew G. Kiernan
Clerk of the Court