

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

D33008
W/prt

_____AD3d_____

Submitted - November 9, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
RANDALL T. ENG
L. PRISCILLA HALL
JEFFREY A. COHEN, JJ.

2011-00473
2011-05653

DECISION & ORDER

Hoi Wah Lai, etc., et al., respondents, v Charles Mack,
et al., defendants, Maria Codreanu, et al., appellants.

(Index No. 3895/10)

Kelly, Rode & Kelly, LLP, Mineola, N.Y. (Eric B. Betron of counsel), for appellants.

Gurfein Douglas, LLP, New York, N.Y. (Preston J. Douglas of counsel), for respondents.

In an action, inter alia, to recover damages for medical malpractice, the defendants Maria Codreanu and New York Hospital of Queens appeal (1) from an order of the Supreme Court, Queens County (O'Donoghue, J.), entered November 18, 2010, which granted the plaintiffs' motion pursuant to CPLR 3126 to strike their answer for failure to comply with certain discovery demands, and (2), as limited as their brief, from so much of an order of the same court entered April 12, 2011, as denied their cross motion for leave to renew and reargue their opposition to the plaintiff's motion.

ORDERED that the appeal from so much of the order entered April 12, 2011, as denied that branch of the cross motion which was for leave to reargue is dismissed, as no appeal lies from an order denying reargument (*see Barany v Barany*, 71 AD3d 613), and the appeal from so much of the same order as denied that branch of the cross motion which was for leave to renew is dismissed as academic in light of our determination on the appeal from the order entered November 18, 2010; and it is further,

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ORDERED that the order entered November 18, 2010, is reversed, on the facts and in the exercise of discretion, and the motion pursuant to CPLR 3126 to strike the appellants' answer is denied; and it is further,

ORDERED that one bill of costs is awarded to the appellants.

The Supreme Court improvidently exercised its discretion in granting the plaintiffs' motion pursuant to CPLR 3126 to strike the appellants' answer. A court may strike an answer as a sanction if a defendant "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; *see Thompson v Dallas BBQ*, 84 AD3d 1221; *Mazza v Seneca*, 72 AD3d 754). However, the drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful or contumacious (*see Polsky v Tuckman*, 85 AD3d 750; *Moray v City of Yonkers*, 76 AD3d 618; *Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654; *Dank v Sears Holding Mgt. Corp.*, 69 AD3d 557). Here, the plaintiffs failed to make such a showing. At the time the plaintiffs moved to strike the appellants' answer, the action had been pending for less than five months, the appellants had not missed any court-ordered deadlines, and, in fact, the appellants had already served a response to the plaintiffs' notice to produce (*see Palomba v Schindler El. Corp.*, 74 AD3d 1037, 1038). In addition, the motion was not supported by an affirmation of good faith, as required by 22 NYCRR 202.7 (*see Quiroz v Beitia*, 68 AD3d 957, 960; *Dennis v City of New York*, 304 AD2d 611, 613).

RIVERA, J.P., FLORIO, ENG, HALL and COHEN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court