

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

D33166
H/prt

_____AD3d_____

Argued - November 15, 2011

REINALDO E. RIVERA, J.P.
JOHN M. LEVENTHAL
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2010-07836

DECISION & ORDER

Gangama Mangru, etc., appellant, v Schering Corp., etc.,
et al., defendants, Bayer Healthcare Pharmaceuticals,
Inc., et al., respondents.

(Index No. 21651/07)

Parker Waichman Alonso LLP, Port Washington, N.Y. (Jay L. T. Breakstone, Andres F. Alonso, and Roopal P. Luhana of counsel), for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, New York, N.Y. (Daniel S. Ratner of counsel), for respondents Bayer Healthcare Pharmaceuticals, Inc., and Berlex Laboratories, Inc.

Kaufman Borgeest & Ryan, LLP, Garden City, N.Y. (Joseph D. Furlong of counsel), for respondents Carmen A. Galvez and Esperanza Angeles.

In an action, inter alia, to recover damages for medical malpractice, the plaintiff appeals, as limited by her brief, from so much of a judgment of the Supreme Court, Queens County (O'Donoghue, J.), entered July 27, 2010, as, upon an order of the same court dated June 21, 2010, granting those branches of the motion of the defendants Bayer Healthcare Pharmaceuticals, Inc., and Berlex Laboratories, Inc., and the separate motion of the defendants Carmen A. Galvez and Esperanza Angeles, which were pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against each of them, is in favor of those defendants and against her dismissing the complaint insofar as asserted against those defendants.

ORDERED that the judgment is affirmed insofar as appealed from, with one bill of

December 6, 2011

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costs.

The nature and degree of the sanction to be imposed on a motion pursuant to CPLR 3126 is within the discretion of the motion court (*see Kihl v Pfeiffer*, 94 NY2d 118, 122-123; *Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654, 655; *Novick v DeRosa*, 51 AD3d 885). The drastic remedy of striking a pleading is warranted where a party's failure to comply with court-ordered disclosure is willful and contumacious (*see Batshever v Jafar*, 73 AD3d 1108; *Matter of W.O.R.C. Realty Corp. v Assessor*, 32 AD3d 860, 861). The willful and contumacious character of a party's conduct can be inferred from a party's repeated failure to comply with discovery demands or orders without a reasonable excuse (*see Commisso v Orshan*, 85 AD3d 845; *Morgenstern v Jeffsam Corp.*, 78 AD3d 913, 914).

Here, the plaintiff's willful and contumacious conduct can be inferred from her repeated failure, over an extended period of time, to appear for a deposition, to provide outstanding authorizations, and to adequately respond to the defendants' discovery demands in compliance with the Supreme Court's orders without a reasonable excuse. Accordingly, the Supreme Court providently exercised its discretion in granting those branches of the motion of the defendants Bayer Healthcare Pharmaceuticals, Inc., and Berlex Laboratories, Inc., and the separate motion of the defendants Carmen A. Galvez and Esperanza Angeles, which were pursuant to CPLR 3126 to dismiss the complaint insofar as asserted against each of them.

RIVERA, J.P., LEVENTHAL, ROMAN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court