

Telesky v Perrino

2019 NY Slip Op 34034(U)

December 23, 2019

Supreme Court, Sullivan County

Docket Number: 0935-2017

Judge: Julian D. Schreibman

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

SULLIVAN COUNTY

JAMES TELESKY,

Plaintiff,

-against

Decision & Order
Index No.: 0935-2017

DR. MICHAEL A. PERRINO,

Defendant.

Supreme Court, Sullivan County
Motion Return Date: October 18, 2019
RJI No.: 52-39610-17

Present: Julian D. Schreibman, JSC

Appearances:

Aaronson Rappaport Feinstein & Deutsch, LLP
Attorneys for Defendant
600 Third Avenue
New York, New York 10016
By: Nanor L. Terjanian, Esq.

Schreibman, J.:

This is a medical malpractice action commenced by Plaintiff James Telesky ("Plaintiff") in May 2017. Plaintiff filed a note of issue on or about May 7, 2019. He did not simultaneously serve his response to Defendant's expert disclosure demand and thereby violated a May 2019 Discovery Stipulation and Order.¹ Plaintiff was given two additional extensions of time to serve expert disclosure, with a final deadline of August 9, 2019 set by this Court's July 10, 2019 Trial Order which Plaintiff again failed to meet. On August 30, 2019, Defendant's counsel sent a good

¹ The May 1, 2019 Discovery Stipulation and Order required expert disclosure responses to be served on or before the date the Note of Issue was filed in accordance with the Third Judicial District's Expert Disclosure Rule.

faith letter requesting the outstanding expert disclosure within five days. Plaintiff did not respond, prompting the instant motion for an order precluding Plaintiff from offering expert disclosure and dismissing the complaint. The motion was returnable on October 18, 2019, and the Court has received no opposition thereto. The case is scheduled for trial by jury to begin on January 27, 2020.

The branch of Defendant's motion for preclusion is granted. Although drastic, preclusion of expert testimony is an appropriate remedy for a party's willful or intentional failure to timely serve expert disclosure. (*Silverberg v Community General Hosp. of Sullivan County*, 290 AD2d 788 [3rd Dept. 2002]). Plaintiff here failed to comply with three consecutive Orders² requiring him to serve expert disclosure and then disregarded Defendant's good faith effort to secure his compliance as the trial date grew closer. All told, Plaintiff was afforded nearly four additional months after filing his note of issue to avoid a preclusion motion. Having no explanation for his failure to do so, this Court concludes Plaintiff's non-compliance was willful. With the trial now only one month away, any sanction short of preclusion would prejudice Defendant and deprive him of the ability to adequately prepare for trial.

The branch of Defendant's motion to dismiss the complaint is denied. Defendant, relying primarily on *Macey v Hassam*, 97 AD2d 919 [3rd Dept. 1983], argues that dismissal is mandated because Plaintiff cannot make out a *prima facie* case of medical malpractice if he is precluded from offering expert medical proof. Defendant's reliance is somewhat misplaced.

² As noted, the May 1, 2019 Discovery Stipulation and Order required the expert disclosure to be served on or before the filing of the Note of Issue. Judge Schick issued a May 30, 2019 Discovery Stipulation and Order giving Plaintiff until June 30, 2019 to comply. This Court's July 10, 2019 Trial Order gave Plaintiff until August 9, 2019.

In *Macey*, the Third Department reiterated the principal that “[e]xpert medical testimony is required to establish proximate cause and make out a prima facie case of medical malpractice unless the causal relationship is readily apparent to the injury. In the absence of such expert testimony, the claim should be dismissed[.]” (97 AD2d at 919-920). Importantly, the dismissal of the complaint in *Macey* came *after* the plaintiff made an offer of proof at the beginning of the trial. (*Id.* at 919). While Plaintiff here is precluded from expert opinion testimony, it would be presumption on the part of this Court to conclude that Plaintiff has no other competent medical proof with which to make out his *prima facie* case at trial.

Next, Defendant argues that Plaintiff’s willful non-compliance with Judge Schick’s Orders and this Court’s Trial Order warrants the sanction of dismissal under CPLR §3126 [3]. The discretion to fashion the appropriate remedy for discovery violations rests with the trial court. (*D.A. Bennett LLC v Cartz*, 113 AD3d 945 [3rd Dept. 2014]). It appears from Defendant’s submissions that while Plaintiff failed to produce expert disclosure, he did produce, among other things, substantial medical authorizations and submit to an examination before trial. In view of the same, the Court concludes that dismissal is unwarranted in this case. It is hereby

ORDERED that the branch of Defendant Dr. Michael A. Perrino’s motion for an order precluding Plaintiff from offering expert testimony at the time of trial is granted and the branch of Defendant’s motion for an order dismissing the complaint is denied.

This shall constitute the Decision and Order of the Court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Sullivan County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing

under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: December 23, 2019
Kingston, New York

ENTER,



JULIAN D. SCHREIBMAN, JSC

Papers considered: Notice of Motion and Affirmation in Support by Nanor L. Terjanian, Esq. dated September 24, 2019, with attached Exhibits A-O.