

Baez v Fishoff

2026 NY Slip Op 30976(U)

March 11, 2026

Supreme Court, New York County

Docket Number: Index No. 805348/2022

Judge: Kathy J. King

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY J. KING PART 06

Justice

-----X

RAFAEL BAEZ,

Plaintiff,

- v -

DR. KATHERINE FISHOFF, and NEW YORK
PRESBYTERIAN HOSPITAL,

Defendants.

-----X

INDEX NO. 805348/2022

MOTION DATE 11/21/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for DISMISSAL

Upon the foregoing documents, Defendants Dr. Katherine Fischkoff, s/h/a Dr. Katherine Fishoff (“Dr. Fischkoff”), and The New York Presbyterian Hospital (“NYPH”) (collectively “Defendants”) move for an Order, pursuant to CPLR 3126 and 3124,:

1. dismissing Plaintiff’s complaint for willful refusal to produce necessary discovery including but not limited to authorizations; proof of lost earnings and proof of special damages, as well as meaningful responses to multiple discovery demands; or in the alternative
2. compelling Plaintiff, Rafael Baez (“Plaintiff”), to provide all outstanding discovery referenced in the instant motion, within twenty (20) days from the date of an Order generated from this motion; or in the alternative
3. precluding Plaintiff from producing evidence of designated things or items of testimony at a trial of this action by virtue of issuance of a conditional order of preclusion.

Plaintiff opposes the motion.

BACKGROUND

This medical malpractice action arises out of a surgical procedure performed on December 14, 2021. Plaintiff alleges that during an attempted right inguinal hernia repair, Defendant Dr.

Fischkoff, acting as an employee or agent of Defendant NYPH, committed malpractice. As a result of the allegedly negligent surgery, Plaintiff claims to have sustained serious and permanent physical injuries, including significant scarring, abdominal swelling, and a deformity of the umbilicus.

Plaintiff commenced this action on October 31, 2022, by filing a Summons and Complaint. Defendants joined issue on February 2, 2023, by serving their respective Answers along with initial Combined Demands and Demands for Bills of Particulars.

On June 1, 2023, Plaintiff served a joint Bill of Particulars. Defendants subsequently objected to the joint nature of the filing, requesting separate and distinct Bills of Particulars for each defendant to clarify the specific allegations of negligence as to each. Throughout the remainder of 2023 and early 2024, Defendants served various demands for authorizations, including requests for records from physical therapists, collateral source providers, and employment records to substantiate a potential claim for lost earnings.

The discovery process has been marked by a series of Court-ordered deadlines and subsequent allegations of non-compliance. Following a Preliminary Conference on March 21, 2024, the Court directed Plaintiff to address the deficiencies in the Bills of Particulars. Plaintiff served an Amended Bill of Particulars on May 28, 2024, though Defendants maintained that the response remained silent on the issue of lost earnings and lacked necessary authorizations.

Between February 2025 and October 2025, this Court issued four separate Compliance Conference Orders directing Plaintiff to:

1. Provide updated HIPAA authorizations for all current treating providers;
2. Clarify whether a claim for lost earnings was being pursued;
3. Provide W-2 forms and employment record authorizations; and
4. Provide proof of special damages.

Defendants now move for an Order pursuant to CPLR 3126, contending that Plaintiff has engaged in a pattern of “willful and contumacious” neglect by failing to provide these items despite multiple good faith letters and judicial mandates.

Plaintiff opposes Defendants’ motion.

DISCUSSION

In support of their motion, Defendants contend that the efficient functioning of the judiciary depends on strict adherence to deadlines and that Plaintiff has flagrantly ignored no fewer than three Court orders and six good-faith letters. Defendants emphasize that a longstanding pattern of failing to produce material and necessary discovery—specifically authorizations for current treating providers and collateral source records—raises a clear inference of neglect that warrants the ultimate sanction of dismissal.

Finally, Defendants ask the Court to consider what they describe as a broader pattern of behavior by Plaintiff’s counsel. They point to a recent dismissal in a separate matter in a neighboring county where Plaintiff’s counsel allegedly raised the exact same excuse—an inability to locate the client—to justify discovery defaults. Defendants maintain that this “client communication” defense is a recycled explanation used to excuse a lack of diligence. Given that Plaintiff’s counsel admits they still have not re-established consistent communication with the client, Defendants argue there is no reasonable expectation that discovery will ever be completed, necessitating dismissal to prevent further prejudice to the defense.

In opposition, Plaintiff asserts that the drastic remedy of striking a pleading or precluding evidence is unwarranted because his conduct has been neither willful nor contumacious. Counsel for Plaintiff represents that any delays in discovery were not intended to obstruct the litigation but were instead the result of significant practical challenges in maintaining consistent communication with Mr. Baez. Despite these difficulties, Plaintiff maintains that he has acted in good faith, as

evidenced by the substantial discovery already provided, including authorizations for hospital and pharmacy records, multiple Bills of Particulars, and the most recent December 3, 2025 Supplemental Response which included:

1. A formal withdrawal of any claim for lost earnings;
2. An authorization for a physical therapy provider; and
3. Photographs of the alleged injuries.

Plaintiff further contends that the motion is now substantially moot following the service of his December 3, 2025 response, which formally withdrew the claim for lost earnings and provided updated authorizations and photographs of the alleged injuries. Argument is made that because New York public policy strongly favors resolving actions on their merits rather than on procedural technicalities, the Court should deny the motion. Plaintiff asserts that Defendants have not been prejudiced by the timing of these disclosures and that an extension of time to resolve any remaining minor deficiencies is a more appropriate and equitable remedy than the ultimate sanction of dismissal.

Substantively, Defendants argue they are severely prejudiced because they remain unable to ascertain Plaintiff's current medical condition or verify claims of \$85,000 in special damages. They assert that Plaintiff's supplemental response provided in December 2025 is legally insufficient to moot the motion, noting it still lacks a valid collateral source authorization and the necessary Power of Attorney to process it. Furthermore, Defendants highlight a contradiction in Plaintiff's position: while Plaintiff now claims to have waived lost earnings, he simultaneously produced blank W-2 forms. Defendants argue this exemplifies a dilatory tactic intended to mask a continued defiance of the Court's directives to provide a complete picture of the alleged damages.

Accordingly, and upon consideration of the foregoing documents, it is hereby

ORDERED that Defendants' motion to dismiss the Complaint pursuant to CPLR 3126 is granted only to the extent that a Conditional Order of Preclusion is hereby issued in the event Plaintiff fails to timely comply with the foregoing directives; and it is further

ORDERED that Defendants' motion is denied in all other respects; and it is further

ORDERED that Plaintiff shall serve the following discovery upon Defendants within forty-five (45) days of service of a copy of this Order with Notice of Entry:

1. A properly executed and witness-signed Power of Attorney and corresponding Healthfirst collateral source authorization;
2. Duly executed HIPAA authorizations for all current treating providers or, in the alternative, a sworn affidavit or affirmation stating that Plaintiff is not currently receiving treatment for the injuries alleged herein; and
3. Itemized proof of the \$85,000 in special damages alleged in the Bill of Particulars, including all relevant medical and hospital invoices; and it is further

ORDERED that Defendants shall serve a copy of this Order with Notice of Entry upon Plaintiff within fourteen (14) days of the date of this Order; and it is further

ORDERED that in the event Plaintiff fails to timely comply with the foregoing directives, Plaintiff shall be precluded from offering any evidence at the time of trial related to the discovery sought in this motion.

This constitutes the Decision and Order of the Court.

<u>3/11/2026</u> DATE					<u><i>Kathy King</i></u> KATHY KING, J.S.C.	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>	