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

PRESENT: Eileen Bransten PART 6

0104206/2002

JONES, REGINA VANNOSTRAND
VS
GREEN, IVAN D.D.S.

SEQ 7

SUMMARY JUDGMENT

INDEX NO. 104206/02

MOTION DATE 6/7/05

MOTION SEQ. NO. 07

MOTION CAL. NO. 10

The following papers, numbered 1 to 1 were read on this motion to/for Summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

FILED
AUG 01 2005
COUNTY CLERK'S
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7-18-05

Eileen Bransten J.S.C.
EILEEN BRANSTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

REGINA VanNOSTRAND JONES and
DR. RONALD JONES,

Plaintiffs,

-against-

IVAN GREEN, D.D.S., and
M. MARC LIECHTUNG, D.D.S.,

Defendants.

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Index No. 104206/02
Motion Date: 6/07/05
Motion Seq. Nos.: 7,8

PRESENT: EILEEN BRANSTEN, J.

Motion sequence numbers 07 and 08 are hereby consolidated for disposition.

In motion sequence number 07, defendant Ivan Green, D.D.S. ("Dr. Green") moves, pursuant to CPLR 3212, for summary judgment dismissal of the action commenced by plaintiffs Regina VanNostrand Jones ("Mrs. Jones") and Dr. Ronald Jones ("Dr. Jones").

In motion sequence number 08, defendants Dr. Green and M. Marc Liechtung, D.D.S. ("Dr. Liechtung") move, pursuant to CPLR 3126, for dismissal of the action commenced by Dr. and Mrs. Jones based on their failure to respond to Court orders.

Plaintiffs only submit opposition in response to motion sequence number 08.

Background

Dr. Green rendered care to the upper right quadrant of Mrs. Jones's mouth on three occasions. Affirmation in Support of Motion ("Aff. 07"), at ¶ 15. On March 2, 2000, Dr.

Green cemented a bridge on teeth numbered three through five. *Id.* On March 20, 2000, Dr. Green prepared teeth six through eleven for laminate veneers, which he then bonded on March 29, 2000. *Id.* Thereafter, Dr. Green did not render any other dental treatment to Mrs. Jones. *Id.*

About January of 2000, Dr. Liechtung purchased the dental practice from Dr. Green, but Dr. Green continued to work on certain cases at the office until June of 2000. Aff. 07, at ¶ 16. Dr. Green notified his patients, including Mrs. Jones, that he would be leaving and that Dr. Liechtung would be taking over his practice. *Id.* He told the patients that Dr. Liechtung was a capable dentist, but if they were not happy with him, they could choose to use another dentist. *Id.*

On May 10, 2001, Mrs. Jones saw Dr. Liechtung for the first time. Aff. 07, at ¶ 17. At that visit, Dr. Liechtung examined her teeth and noted some inflammation around the crowns in the upper right side of her mouth. *Id.* He determined that she needed curettage under three of her crowns. *Id.*

On May 23, 2001, Mrs. Jones returned to see Dr. Liechtung and had her teeth cleaned by the hygienist. Aff. 07, at ¶ 18. She stated at that time that she was not experiencing any pain. *Id.* Dr. Liechtung again determined that Mrs. Jones had slight inflammation in her upper right quadrant and that she needed curettage. *Id.*

On May 31, 2001, Dr. Liechtung performed curettage on Mrs. Jones's upper right quadrant while she was under anesthesia. Aff. 07, at ¶ 19. He noted that the area under her bridge was slightly irritated and planned to do a filling of tooth fifteen on her next visit. *Id.* He also noted that Mrs. Jones's oral hygiene was not good, and he provided her with proxy brushes and super floss to use to clean under the bridge. *Id.*

On June 13, 2001, Mrs. Jones did not appear for her appointment. Aff. 07, at ¶ 20. Instead, she appeared on July 31, 2001 on an emergency basis, at which time Dr. Liechtung determined that she needed a root canal on tooth seven. *Id.* Dr. Liechtung prescribed an antibiotic for Mrs. Jones and urged her to have the root canal immediately. *Id.* Nonetheless, Mrs. Jones declined to have it performed that day and scheduled the root canal for another time. *Id.*

On August 8, 2001, Dr. Liechtung performed the root canal on tooth seven. Aff. 07, at ¶ 21. On August 20, 2001, Mrs. Jones again appeared in Dr. Liechtung's office, complaining of swelling in the upper right side of her face. *Id.* Dr. Liechtung found that Mrs. Jones had a fistula track above tooth number seven, put a Penrose drain above teeth three, four and five, and prescribed an antibiotic. *Id.* Mrs. Jones never returned to have the drain removed, but contacted Dr. Liechtung in October of 2001 requesting a prescription for antibiotics, which Dr. Liechtung prescribed. *Id.*

Some time in 2001, Dr. Green learned from either Dr. Liechtung or his staff that Mrs. Jones had complaints about her teeth. Aff. 07, at ¶ 22. He contacted Mrs. Jones to listen to her complaints and suggested that she see an endodontist, Dr. Lankowsky. *Id.*

In this dental malpractice action – commenced on February 28, 2002 – plaintiffs claim that defendants departed from accepted standards of dental care in treating Mrs. Jones. Aff. 07, at ¶ 11. Among other things, plaintiffs claim that Dr. Green failed to take impressions; failed to perform periodontal examinations and charting; failed to perform occlusal analysis and vitality testing; failed to adequately restore plaintiff's mouth; failed to provide adequate endodontic and/or surgical treatment; failed to adequately prepare for, fabricate and/or provide and install adequate dental prosthesis; and failed to obtain the plaintiff's informed consent. Aff. 07, Ex. G, at ¶ 5. With respect to Dr. Liechtung, plaintiffs claim, among other things, that he failed to properly diagnose the condition of Mrs. Jones's mouth, teeth and supporting structure; failed to take sufficient radiographs of her mouth; failed to take impressions for diagnostic casts; failed to perform a periodontal examination; failed to perform an occlusal analysis; did not adequately install a prosthesis; and did not inform Mrs. Jones of the pain she might experience. Dr. Liechtung Affirmation in Support of Motion ("Liechtung Aff. 08"), at ¶ 6.

In November of 2003, the Court granted plaintiffs' leave to serve an amended complaint adding a cause of action on behalf of Dr. Jones and to assert a claim of lack of informed consent. Aff. 07, at ¶ 6.

On March 4, 2004, defendants served a verified answer to the amended complaint and an amended demand for a bill of particulars. Aff. 07, at ¶ 7.

On March 9, 2004, the Court ordered plaintiffs to amend their bill of particulars by March 24, 2004. Dr. Green Affirmation in Support of Motion ("Green Aff. 08"), Ex. A, at ¶ 12. When plaintiffs did not serve their amended bill of particulars, the Court again ordered them to do so on May 11, 2004, July 7, 2004, August 17, 2004, September 5, 2004, and October 5, 2004. Green Aff. 08, Ex. A, at ¶¶ 13-14.

Plaintiffs additionally failed to comply with defendants' disclosure demands made on May 6, 2004, October 3, 2004, and November 24, 2004. Green Aff. 08, at ¶¶ 21, 23-25.

In a Decision and Order dated March 7, 2005, the Court directed plaintiffs to serve a certificate of merit with respect to Dr. Green, to file the Note of Issue, and to fully comply with all outstanding disclosure within fourteen days of service of notice of entry of the determination. Aff. 07, at ¶ 3. These materials were served by plaintiffs on March 16, 2005. Opp. 08, at ¶ 6.

Dr. Green now moves for summary judgment dismissal of the complaint, claiming that he did not depart from good and accepted dental practice in treating Mrs. Jones and that

his care and treatment did not proximately cause or contribute to her alleged injuries. Aff. 07, at ¶ 14.

Dr. Green relies on the affidavit of Jeffrey Rubin, D.D.S. ("Dr. Rubin"), a licensed dentist in the State of New York. *See generally*, Aff. 07, Ex. L. Dr. Rubin opines to a reasonable degree of dental certainty that the treatment Dr. Green rendered to Mrs. Jones was in accordance with accepted standards of dental care. Aff. 07, at ¶ 29. Specifically, Dr. Rubin claims that it was appropriate for Dr. Green to insert the bridge based on the radiographic studies of the right upper quadrant taken prior to the insertion of the bridge. *Id.* In addition, the radiographic films taken a year later show that the bridge Dr. Green inserted was well constructed and that the right upper quadrant had no abnormalities. *Id.* Dr. Rubin also opines that Dr. Green's restoration of Mrs. Jones's teeth with laminate veneers was in accordance with acceptable standards of dental care. Aff. 07, at ¶ 30. Furthermore, Dr. Rubin opines that Dr. Green's dental care and treatment did not cause Mrs. Jones's claimed injuries. Aff. 07, at ¶ 33.

Dr. Green and Dr. Liechtung also move to dismiss the action, arguing that plaintiffs' continued and willful disregard of Court orders and failure to comply with disclosure requests requires that the case be dismissed. Green Aff. 08, at ¶ 21; Licchtung Aff. 08, at ¶ 10. Dr. Green also claims that the submitted certificate of merit is insufficient to establish a meritorious action against him because it is speculative and conclusory. Green Aff. 08,

at ¶ 11. In addition, he alleges that the amended bill of particulars submitted by plaintiffs is incomplete and contains boilerplate, vague language. Green Aff. 08, at ¶ 27.

In opposition to the motions to dismiss for failure to comply with disclosure Orders and requests, plaintiffs generally state that all materials have been served without addressing the particulars of defendants' allegations. *See generally*, Opp. 08.

Analysis

Summary Judgment

Summary judgment is a "drastic remedy" that should not be granted if there is any doubt as to the existence of a triable issue. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978); *DuLuc v. Resnick*, 224 A.D.2d 210, 211 (1st Dep't 1996); *Byrnes v. Scott*, 175 A.D.2d 786, 786 (1st Dep't 1991). Indeed, because summary disposition serves to deprive a party of its day in court, relief should not be granted if an issue of fact is even "arguable." *Byrnes v. Scott*, 175 A.D.2d at 786.

Further, "on a defendant's motion for summary judgment, opposed by plaintiff, [the court is] required to accept the plaintiff's pleadings, as true, and [its] decision 'must be made on the version of the facts most favorable to [plaintiff].'" *Byrnes v. Scott*, 175 A.D.2d, at 786.

The proponent of a summary judgment motion has the burden of making a *prima facie* showing of entitlement to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant has made this showing, the burden then shifts to the opponent of summary judgment to establish, through competent evidence, that there is a material issue of fact that warrants a trial. *Id.*

In a medical malpractice action, the opponent of summary judgment must present evidence that defendant physician departed from good and accepted medical practice, *Lyons v. McCauley*, 252 A.D.2d 516 (2d Dep't 1998), and that defendant's wrongful conduct proximately caused plaintiff's injuries. *Hoffman v. Pelletier*, 6 A.D.3d 889 (3d Dep't 2004); *Hanley v. St. Charles Hosp. and Rehabilitation Ctr.*, 307 A.D.2d 274 (2d Dep't 2003). This evidence must generally be made through and expert affidavit. *Chase v. Cayuga Med. Ctr.*, 2 A.D.3d 990 (3d Dep't 2003).

If the nonmovant submits an admissible affidavit from a competent expert showing the existence of a triable issue of fact as to whether defendants were negligent, the summary judgment motion must be denied. *See, Cooper v. St. Vincent's Hosp.*, 290 A.D.2d 358 (1st Dep't 2002); *Dellert v. Kramer*, 280 A.D.2d 438 (1st Dep't 2001); *Morrison v. Altman*, 278 A.D.2d 135 (1st Dep't 2000); *Avacato v. Mount Sinai Med. Ctr.*, 277 A.D.2d 32 (1st Dep't 2000).

Negligent Treatment

With respect to plaintiffs' claim that Dr. Green negligently treated Mrs. Jones, Dr. Green submits an affidavit from Dr. Rubin, a dental expert who avers that Dr. Green did not depart from accepted standards of dental care in treating Mrs. Jones. Aff. 07, at ¶ 29. Specifically, Dr. Rubin states that it was proper for Dr. Green to insert the bridge based on radiographic studies and that the restoration of Mrs. Jones's teeth with laminate veneers was in accordance with acceptable standards of dental care based on the impressions. Aff. 07, at ¶ 29-30. This expert testimony is sufficient to establish a *prima facie* showing of entitlement to judgment as a matter of law.

In response, plaintiffs do not rebut the assertions of Dr. Green's expert and submit no evidentiary proof to raise an issue of fact warranting trial. Since plaintiffs did not meet their burden of establishing a material issue of fact, defendant's motion must be granted as to this claim. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986).

Informed Consent

Public Health Law § 2805-d states that lack of informed consent "means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such

alternatives thereto and the reasonably foreseeable risks and benefits involved ***." The statute further requires that plaintiff establish that a reasonably prudent person in the patient's position "would not have undergone the treatment or diagnosis" had she been fully informed. Public Health Law § 2805-d; *see also, Benfer v. Sachs*, 3 A.D.3d 781, 782-83 (3d Dep't 2004); *Dunlop v. Sivaraman*, 272 A.D.2d 570 (2d Dep't 2000); *Hylick v. Halweil*, 112 A.D.2d 400, 401 (2d Dep't 1985).

Here, Dr. Green has not established that he properly advised Mrs. Jones of the "alternatives thereto and the reasonably foreseeable risks and benefits involved." Public Health Law § 2805-d; *see also, Rozelle v. Hermann*, 215 A.D.2d 224 (1st Dep't 1995); *Canosa v. Abadir*, 165 A.D.2d 823 (2d Dep't 1990). Therefore, the burden never shifted to plaintiffs to raise a question of fact as to this issue and summary judgment must be denied as to their lack-of-informed-consent claim.

Failure to Respond to Disclosure Demands

Pursuant to CPLR 3126(3), the court can dismiss an action if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed." *See, Kihl v. Pfeffer*, 94 N.Y.2d 118, 118 (1999) (action dismissed because plaintiffs failed to respond to interrogatories); *Zletz v. Wetanson*, 67 N.Y.2d 711, 713 (1986) (action dismissed because plaintiffs failed to answer interrogatories pursuant to a prior order); *Laverne v. Incorporated Village of Laurel Hollow*, 18 N.Y.2d 635, 637

(1966) (action dismissed because plaintiff failed to appear for examination before trial), *appeal dismissed* 386 U.S. 682 (1967); *Ranfort v. Peak Tours, Inc.*, 250 A.D.2d 747, 747 (2d Dep't 1998) (action dismissed because plaintiffs failed to comply with a preliminary conference order and failed to appear at three court conferences), *lv. Denied* 92 N.Y.2d 817 (1998); *Frias v. Fortini,* 240 A.D.2d 467, 468 (2d Dep't 1997) (action dismissed because plaintiff failed to provide medical authorizations). Compliance with a disclosure order requires a timely response and a good faith effort to address all requests. *Kihl v. Pfeffer*, 94 N.Y.2d, at 123. When a party fails to comply with a court order and frustrates the disclosure scheme, it is within the trial judge's discretion to dismiss the case. *Kihl v. Pfeffer*, 94 N.Y.2d, at 122; *Zletz v. Wetanson*, 67 N.Y.2d, at 713.

Furthermore, if the non-complying party fails to provide a reasonable excuse for its delay in responding to or opposing the disclosure demands, the court may infer that the failure to comply was willful. *Ranfort v. Peak Tours, Inc.*, 250 A.D.2d, at 747; *Frias v. Fortini*, 240 A.D.2d, at 468.

Here, the Court ordered plaintiffs to comply with all outstanding disclosure demands on May 6, 2004, October 3, 2004, and November 24, 2004. Green Aff. 08, at ¶ 21. Plaintiffs, however, have still failed to comply with all defendants' disclosure demands. Specifically, plaintiffs have not complied with the Notice for Discovery and Inspection of May 6, 2004, which includes requests for a copy of plaintiff's letter to Dr. Green and copies

of medical/dental records and radiographic films in plaintiff's possession. *Id.* Furthermore, plaintiffs did not respond to the Notice to Produce dated October 3, 2004, which includes requests for: copies of Mrs. Jones's medical records in Dr. Jones's possession, copies of photographs of the alleged "bump" in possession of plaintiff, a copy of a letter by Dr. Smith attempting to obtain records from Dr. Liechtung, and a copy of correspondence sent by Dr. Green to plaintiff with respect to his physical disability. Green Aff. 08, at ¶ 23. Plaintiffs, moreover, failed to provide defendants with all of the authorizations demanded on May 6, 2004 and October 3, 2004. Green Aff. 08, at ¶¶ 21, 24.

In their opposition papers, plaintiffs fail to respond to defendants' claims that certain disclosure has not yet been exchanged and only resubmit their previous affirmation to the Court dated March 14, 2005. Opp. 08, at ¶ 6. Therefore, the Court can only conclude that these materials have not been produced to defendants and plaintiffs have completely failed to comply with the Court's orders and disclosure requirements. Because plaintiffs have not given any excuse for their extended delay in providing the Court-ordered disclosure, the Court may infer that plaintiffs' conduct is willful. *Ranfort v. Peak Tours, Inc.*, 250 A.D.2d, at 747. Therefore, the Court has broad discretion to dismiss the case. *Kihl v. Pfeffer*, 94 N.Y.2d, at 122.

Plaintiffs' contumacious disregard of the Court's prior orders shows their disrespect for the Court and warrants dismissal of the case. *See, Laverne v. Incorporated Village of*

Laurel Hollow, 18 N.Y.2d 635, 637 (1966) (dismissal of complaint proper because of "plaintiff's willful failure to purge himself of his disobedience of prior court orders compelling disclosure on matters relevant to his causes of action"). Over the past two years, plaintiffs have time and again willfully chosen not to comply with disclosure requests. On the rare occasions that disclosure is turned over, plaintiffs only provide the bare minimum. For example, in response to this Court's March 7, 2005 Order (which clearly indicated exasperation with plaintiffs' repeated noncompliance with court orders and disclosure requests), plaintiffs served a certificate of merit for Dr. Green and an amended bill of particulars. The bill of particulars, however, is generalized as to both defendants and fails to particularize the claims against each. *Miccarelli v. Fleiss*, 219 A.D.2d 469, 470 (1st Dep't 1995); *see also, Roth v. South Nassau Communities Hosp.*, 239 A.D.2d 332, 333 (2d Dep't 1997). Furthermore, plaintiffs' eventual submission of these papers does not excuse their failure to provide the demanded authorizations and disclosure. This Court will not approve of piecemeal disclosure that is provided only in response to several orders and extensive motion practice. The Court's patience here has run out. Since plaintiffs **still** have not responded to defendants' demands for disclosure and have not provided any excuse for this delay, their action is dismissed.

Accordingly, it is

ORDERED that Dr. Green's motion for summary judgment is granted in part and all causes of actions asserted against him except for the lack-of-informed-consent claim are dismissed; and it is further

ORDERED that defendants' motions to dismiss the complaint pursuant to CPLR 3126 are granted with prejudice and the Clerk of the Court id directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 18, 2005

ENTER

Hon. Eileen Bransten