Catalano v Wyandanch Union Free School Dist.
2007 NY Slip Op 31613(U)
June 7, 2007
Supreme Court, Suffolk County
Docket Number: 0010068/2004
Judge: Robert W. Doyle
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[* 1]

SHORT FORM ORDER

INDEX No. 04-10068
CAL. No. 06-02471-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-11-07
ADJ. DATE 4-5-07
Mot. Seq. # 005 - MD

ALEXANDRA CATALANO,

Plaintiff,

- against -

WYANDANCH UNION FREE SCHOOL DISTRICT and DARLENE WHITE, individually and as Principal of the Martin Luther King, Jr., Elementary School,

Defendants.

THOMAS F. LIOTTI, ESQ.
Attorneys for Plaintiff
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Garden City, New York 11530

McMAHON, MARTINE, et al.
Attorneys for Defendants
90 Broad Street
New York, New York 10004

Upon the following papers numbered 1 to 17 read on this motion to strike the note of issue ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 5 - 12 ; Replying Affidavits and supporting papers 13 - 15 ; Other 16 - 17 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (005) by defendants Wyandanch Union Free School District and Darlene White for an order pursuant to NYCRR 202.21 to strike the Note of Issue and Certificate of Readiness, and pursuant to CPLR 3116 to strike plaintiff's corrections to her deposition, opposed by plaintiff, is denied; and it is further

ORDERED that plaintiff is directed to provide two copies of the authorizations for plaintiff's providers as requested in defendants' Reply Affirmations, complete with names and addresses, within forty five days of the date of this order. Plaintiff is directed to serve defendants with any narrative reports concerning plaintiff's medical witnesses within forty five days of the date of this order. Plaintiff shall serve any expert disclosure in compliance with CPLR 3101(d). Plaintiff may serve a bill of particulars as to special damages, medical expenses, out of pocket expenses and a statement of lost earnings claimed in this action pursuant to CPLR 3043(b), if plaintiff is so advised.

Defendant has not submitted a copy of the pleadings or the Affirmation of good faith as required by 22 NYCRR §202.7. In fact, defendant has merely submitted an attorney's affirmation, copies of two letters from plaintiff's counsel, and a copy of a correction sheet, duly signed, notarized and sworn on August 17, 2006, in support of this motion. As gleaned from the attorney affirmation, this action sounds in wrongful termination of plaintiff from defendant school district, wherein plaintiff claims financial damages as well as physical damages resulting from the alleged exacerbation of plaintiff's pre-existing condition of multiple sclerosis.

It is interesting to note that defendants set forth in their Reply dated March 28, 2006, that they are amenable to withdrawing this motion and stipulating to an agreement premised upon their receiving two authorizations for the persons set forth in their Reply, a response pursuant to CPLR 3101(d), further bill of particulars setting forth special damages, and an IME. However, they have not submitted a signed stipulation to this Court and it does not appear the same was served upon counsel for plaintiff. It is apparent to this Court that this matter could have been resolved with a simple telephone call by defense counsel to plaintiff's attorney rather than consuming this Court's time with a frivolous motion. In the future, counsel for defendant is directed to comply with the requirements of 22 NYCRR §202.7 or face denial of the motion for failure to provide the same. However, the merits of this motion will be addressed at this time.

A Certification Conference Order, dated August 24, 2006, was agreed to and signed by both counsel for plaintiff and counsel for defendant. That order provided for a Note of Issue to be filed on or before October 26, 2006, and a pre-trial conference to be held on October 26, 2006 (Pines, J.). The stipulation annexed to the order and signed by both parties provided that plaintiff and defendant are to supply each other with remaining authorizations and discovery. Defendants reserved the right to an IME.

Counsel for defendants assert plaintiff served a Bill of Particulars on October 24, 2006. However, counsel for plaintiff asserts that defendants never served a demand for the same, and instead served "A First Set of Interrogatories and Notice for Production of Documents" to which plaintiff served defendant with a thirty nine page response, plus exhibits from A to UU on March 1, 2006, which included medical records of plaintiff.

Plaintiff also served supplemental discovery responses to defendants' demands on October 20, 2006 after plaintiff's examination before trial. Plaintiff's exhibit A and defendants' exhibit A reveal the following authorizations were provided to defendants for: Hackensack School District, Rockaway Boro School District; Jefferson Township School District, Islip School District, Middle Country School District, Tutor Time Learning School, Michael Scrimenti, M.D., Stony Brook Neurology, and South Shore Neurologic Associates, P.C.. Additional discovery was also provided to defendants as set forth in defendants exhibit A on October 20, 2006.

Defendants argue in their moving papers that because plaintiff complied with the outstanding discovery four days before filing the note of issue, that plaintiff is attempting to leave defendants with no recourse in the event that authorizations reveal the need for additional discovery. They further argue that

if the authorizations reveal information which requires further discovery, defendants' opportunity to conduct such discovery will be gone. Defendants also argue that plaintiff's conduct is an abuse of the discovery process.

It is determined by this Court that it is now approximately six months since plaintiff provided defendants with the aforementioned authorizations, and defendants have not supported this motion by articulating even one item of additional discovery which serves as a basis for striking the Note of Issue and Certificate of Readiness. It appears from the two Reply Affirmations submitted by defendants in which additional relief is sought, albeit improperly in a Reply, defendants have not even utilized the authorizations previously provided to them. It is only now, six months later, that defendants realized the authorizations did not provide addresses. Defendants do not argue that they even attempted to obtain the addresses over the last six months from plaintiff for the health care providers whose addresses they need, or that they even looked up their addresses in a phone book. It is very apparent to this Court that defendants have been far less than diligent on this issue and seek to prejudice plaintiff by having the Notice of Issue and Certificate of Readiness struck because of defendants' own inaction. Despite the same, plaintiff is directed to provide two copies of the authorizations requested for plaintiff's providers as requested in defendants' Reply Affirmations, complete with names and addresses within forty five days of the date of this order.

Accordingly, defendants have not demonstrated any basis for an order striking the Note of Issue and Certificate of Readiness on this issue of authorizations, and that part of their motion (005) is denied.

Defendants also argue that they may want a physical examination, and that an intelligent exam cannot be done without receiving plaintiff's medical records. As set forth above, authorizations for plaintiff's medical records were served upon defendants six months ago. Defendants do not support their motion with any claims that they have been unable to obtain copies of those medical records because plaintiff has prevented them from doing so. Medical records have been previously supplied by plaintiff. Defendants have not set forth that a demand to produce plaintiff for an IME has been made to date, and that plaintiff refused to appear for the same. Additionally, as evidenced by the stipulation dated August 24, 2006 signed by both sides at the Certification Conference, defendants reserved the right to conduct an IME of plaintiff, so defendants may demand the IME without leave of this Court.

Accordingly, defendants have not demonstrated a basis for an order striking the Note of Issue and Certificate of Readiness on this issue of an IME.

Plaintiff objects to the defendants having served two Reply Affirmations. While defendants have not received leave of the court to serve two Reply's, in comparing the two Reply Affirmations, it is determined that they are so very similar as not to prejudice plaintiff. The two Reply Affirmations served by defendants state plaintiff has not provided a statement of special damages, i.e., medical damages, statement of lost earnings, out of pocket expenses and any other special damages claimed. Counsel for defendants asserts in the moving papers that plaintiff served a Bill of Particulars on October 24, 2006. Plaintiff did set forth in her opposing papers that defendants never served a demand for a bill of particulars. It is not known if defendants' "First Set of Interrogatories and Notice for Production of Documents" set forth an inquiry as to special damages as a copy has not been provided with the moving

papers by defendants, nor has a copy of plaintiff's bill of particulars been provided either. It is not known if defendants made a demand for special damages as a copy of such demand has not been provided with the moving papers. It is not known whether plaintiff previously claimed special damages in their bill of particulars. Pursuant to CPLR 3043(b), a party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Therefore, plaintiff may serve a bill of particulars as to special damages, medical expenses, out of pocket expenses and a statement of lost earnings claimed pursuant to CPLR 3043(b), if plaintiff is so advised.

Accordingly, defendants have not demonstrated entitlement to an order striking the Note of Issue and Certificate of Readiness on this issue of special damages.

Defendants set forth in their Reply Affirmations that plaintiff has not designated their medical expert or a narrative report or a CPLR 3101(d) response. Counsel for plaintiff has set forth in the opposing papers that settlement discussions have been ongoing. The amended notice of motion, returnable January 11, 2006, was adjourned three times because defendants' counsel stated he would be meeting with his clients in an attempt to settle this matter, and promised to get back to plaintiff's counsel by March 22, 2007. On March 22, 2007, counsel for plaintiff sent a letter to Peter Cimino, Esq. by facsimile transmission and first class mail regarding the outcome of the settlement meeting with defendants, however, to date, plaintiff has received no response. Plaintiff has demonstrated good faith reliance upon the possibility of settlement of this matter. However, since the matter has not yet settled, and since defendants set forth in the Reply that they would withdraw this motion if the items set forth were provided by plaintiff, plaintiff is directed to serve defendants with any narrative reports or other disclosure in this regard within forty five days of the date of this order, and/or expert disclosure in compliance with CPLR 3101(d).

Accordingly, defendants have not demonstrated entitlement to an order striking the Note of Issue and Certificate of Readiness on this issue of expert disclosure.

Turning to that part of motion (005) wherein defendants seek an order pursuant to CPLR 3116 striking plaintiff's errata sheet to her deposition transcript, it is noted that CPLR 3116(a) provides "The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination."

Defendant argues that plaintiff's deposition was held on June 19, 2006. The correction pages were duly signed and notarized pursuant to the conditions imposed by CPLR 3116(a) on August 17, 2006, as demonstrated by defendants' exhibit C. Pursuant to the statute, no changes to the transcript were made by plaintiff more than sixty days after submission to the witness for examination. Defendant argues, however, that plaintiff failed to exchange the changes to the transcript within sixty days from August 17, 2006, as the changes were not served until October 20, 2006, three days late. Defendants have asserted no prejudice by this three day delay in returning the corrections to them. It is further noted

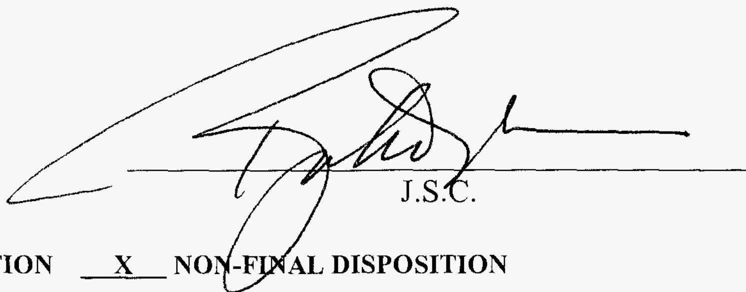
[* 5]

that this motion by defendants was made returnable January 11, 2007, almost three months after receipt of the sworn and notarized corrections. The moving defendants have not submitted an affidavit of service with the moving papers setting forth the date this amended Notice of Motion was made. Defendants have offered no explanation for failing to move for the requested relief within sixty days following receipt of the corrections.

In ***Principale v Lewner,*** 187 Misc2d 878, 724 NYS2d 575 (2001), the court reasoned, "As a deponent has 60 days from receipt of a deposition transcript to make corrections and sign the deposition transcript, N.Y. C.P.L.R. 3116(a), there is no reason why a motion to suppress premised upon an inaccurate transcript would not be considered reasonably prompt if made within that same 60 day period." Applying the same reasoning to these circumstances, it is determined that defendants have failed to demonstrate they were reasonably prompt in making the instant motion within the same 60 day period, or set forth any reasonable excuse for the delay. Additionally, and importantly, defendants do not argue that such corrections by plaintiff materially altered plaintiff's testimony. Defendants have failed to articulate any prejudice due to plaintiff's three day delay in returning the transcripts. Therefore, defendants have failed to demonstrate a basis for striking plaintiff's corrections to her transcript.

Accordingly, that part of defendants' motion (005) which seeks an order striking plaintiff's errata sheet for her deposition transcript is denied.

Dated: JUN 07 2007



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**