

Hutchison v Betancourt
2008 NY Slip Op 30078(U)
January 11, 2008
Supreme Court, New York County
Docket Number: 0114878/2000
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 57

Index Number : 114878/2000

HUTCHISON, ELEANOR J.

VS.

BETANCOURT, MARIA I., M.D.

SEQUENCE NUMBER : # 001

STRIKE

CB

INDEX NO. 114878-00

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

1 on this motion to/for Justice Peshig

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

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

Dated: 1-11-08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DO NOT POST REFERENCE

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

ELEANOR J. HUTCHINSON,

Plaintiff(s),

against

MARIA I. BETANCOURT, M.D., and
BETH ISRAEL MEDICAL CENTER,

Defendant(s).

Index No.: 114878/00

DECISION/ORDER

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this medical malpractice action, defendants each move to strike the pleadings of plaintiff for failure to serve a bill of particulars and for failure to respond to discovery demands. The motions are consolidated for purposes of their determination.

The instant action was commenced in July 2000. Defendant Maria I. Betancourt, M.D. answered and served a demand for a bill of particulars and for various discovery on or about July 21, 2000, and defendant Beth Israel Medical Center answered and served a demand for a bill of particulars and for various discovery on or about July 27, 2000. Plaintiff did not respond to defendants' demands. The instant motions were served in August 2007, and seek to strike the pleadings of plaintiff pursuant to CPLR 3126, 3042, 3216, and 3211.

"CPLR 3126 provides various sanctions for failing to comply with outstanding discovery requests or court-ordered discovery obligations, the most drastic of which is dismissal of a party's pleadings (CPLR 3126[3]). The striking of a party's pleadings should not, however, be imposed except in instances where the party seeking disclosure demonstrates conclusively that the failure to disclose was wilful, contumacious or due to bad faith." (Hassan v MBSTOA, 286 AD2d 303, 304 [1st Dept 2001]. See Postel v New York Univ. Hosp., 262 AD2d 40, 42 [1st Dept

* 3]

1999]) Further, it is well settled that the determination of an appropriate remedy under CPLR 3126 is within the discretion of the court. (See Palmeta v Columbia Univ., 266 AD2d 90 [1st Dept 1999]; Cavanaugh v Russell Sage College, 4 AD3d 660 [3d Dept 2004].)

Here, although plaintiff's attorney acknowledges that there was a "gross delay" in failing to respond to defendants' demands for seven years as the result of law office failure, defendants have not shown that this admittedly lengthy delay, by itself, was wilful, contumacious or in bad faith. (See Hassan, 286 AD2d at 304 [five year delay by itself does not show wilful or contumacious conduct]; Salamone v Wyckoff Heights Med. Ctr., 273 AD2d 117 [1st Dept 2000][law office failure is not evidence of wilful or contumacious conduct].)

Notably, neither defendant took any action to compel compliance with their demands for more than seven years. There were no requests to the court for a discovery conference, and there were no court orders regarding discovery. (Compare Herrera v City of New York, 238 AD2d 475 [2d Dept 1997][wilful and contumacious conduct inferred from repeated failures to comply with court orders and inadequate excuses for default].) It also appears that there was no motion practice in this case prior to the instant motions to dismiss. Although CPLR 3126 does not explicitly require that a motion to compel be made prior to seeking dismissal, courts have repeatedly held that "[t]he same due process protections in CPLR 3124 should apply when CPLR 3126 is invoked. Given the seriousness of the potential sanctions for discovery noncompliance, notice and an opportunity to be heard are desirable." (Postel, 262 AD2d at 42; Warner v Houghton, 43 AD3d 376, 381 [1st Dept 2007].) Moreover, plaintiff has offered a reasonable excuse for the default based on her attorney's acknowledgment of law office failure.

CPLR 3042 also does not warrant striking the pleadings "where, as here, defendants never moved to compel plaintiffs' service of a bill of particulars." (Hassan, 286 AD2d at 304.)

[* 4]

Nor is dismissal under CPLR 3216 warranted. A dismissal pursuant to 3216 requires, among other things, that a demand to prosecute be served (CPLR 3216[3]), which was not done in this case. To the extent that defendants argue that the complaint should be dismissed pursuant to CPLR 3211(a)(8), the court finds that argument to be without merit.

In view of the strong policy favoring resolution of disputes on the merits, the court finds it appropriate to afford plaintiff a last chance to comply with defendants' demands on condition that plaintiff pays each defendant's attorney \$1500 and provides defendants with the requested bill of particulars and disclosure. (See Salamone v Wyckoff Heights Med. Ctr., 273 AD2d 117, supra.)

Accordingly, the motions are granted only to the extent that it is

ORDERED that, within 30 days of service of a copy of this order with notice of entry, plaintiff shall serve a response to defendants' demands for a bill of particulars and shall serve responses to the discovery demands; and it is further

ORDERED that, within 30 days of service of a copy of this order with notice of entry, plaintiff shall pay to each defendant's attorney \$1500; and it is further

ORDERED that, in the event that plaintiff fails to comply with the above two paragraphs, the complaint shall be deemed dismissed; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 (Room 328, 80 Centre St., NY, NY) on March 27, 2008, at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York
January 11, 2008


MARCIA FRIEDMAN, J.S.C.

FILED
JAN 16 2008
NEW YORK
COUNTY CLERK'S OFFICE