

Donnadelle v Smith

2008 NY Slip Op 31506(U)

May 28, 2008

Supreme Court, New York County

Docket Number: 0106787/2005

Judge: Joan Lobis

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

PRESENT: LOBIS
Justice

PART 20

DOUNADELLE, SHANYA

INDEX NO. 106787/05

- v -
SHARON SMITH, M.D.,
ETAL

MOTION DATE _____

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-17

18

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JUN 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION AND ORDER

Dated: 5/28/08

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 20**

-----X
SHAYNA DONNADELLE, as Administratrix of the
Estate of MARY RICE,

Plaintiff,

Index No. 106787/05

-against-

Decision and Order

SHARON SMITH, M.D., CONTINUUM FAMILY
HEALTH CENTER, and CONTINUUM FAMILY
HEALTH CENTER CORP.,

Defendants.

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
JOAN B. LOBIS, J.S.C.:

Defendants move, by order to show cause, for an order pursuant to C.P.L.R. § 3216(3), dismissing plaintiff's complaint for her failure to comply with discovery orders. Alternatively, defendants ask the court to issue a date certain by which plaintiff must inform the court of whether she will continue with the prosecution of this matter with new counsel or *pro se*, together with an order that, should plaintiff fail to apprise the court of this information, plaintiff's complaint be dismissed automatically on the merits with prejudice. This motion is not opposed, as plaintiff has defaulted on the motion.¹

This is an action for medical malpractice and wrongful death arising from the treatment of plaintiff's decedent, Mary Rice. The action was commenced originally under Index Number 110469/04 by the filing of a summons and complaint on July 19, 2004, with plaintiff named as the proposed administrator for the Estate of Mary Rice. Only defendant Sharon Smith, M.D., was served. Issue was joined on behalf of Dr. Smith by service of an answer and combined discovery demands on

¹ Although defendants have submitted a reply with the instant motion, neither plaintiff *pro se* nor her prior counsel submitted opposition papers.

August 18, 2004. Demands for authorizations were also served on August 20, 2004 and September 23, 2004. Subsequently, defendants moved for dismissal under C.P.L.R. § 3211(a)(3), on the ground that no letters of administration had been issued that would provide plaintiff with the legal capacity to commence the action. This motion was granted by the Hon. Justice Sheila Abdus-Salaam in a decision and order dated April 8, 2005, and entered on April 18, 2005.

Letters of administration for the Estate of Mary Rice were issued to plaintiff on March 10, 2005. On May 16, 2005, plaintiff again filed a summons and complaint under the instant index number, 106787/05, with plaintiff as Administratrix of the Estate of Mary Rice. Issue was joined as to all defendants by service of answers and combined discovery demands on June 22, 2005, and August 1, 2005.

In response to a 90-day Notice served on plaintiff on or about April 2, 2007, plaintiff filed her Note of Issue and Certificate of Readiness on June 27, 2007, setting forth that discovery was incomplete, depositions had not taken place, and the case was not ready for trial. On August 1, 2007, defendants moved to vacate plaintiff's note of issue and to dismiss for failure to prosecute; plaintiff cross-moved to strike defendants' answers for failing to comply with discovery. On August 21, 2007, the Hon. Justice Eileen Bransten, to whom this case was assigned originally, vacated the note of issue but declined to dismiss the action because plaintiff indicated a strong desire to pursue the action on the merits and to conduct discovery; additionally, plaintiff agreed to withdraw her cross motion.

The parties entered into a preliminary conference order (the "PC Order") on August 21, 2007, which set forth a schedule for discovery. Plaintiff was to exchange authorizations for all prior,

concurrent, and subsequent treating physicians within twenty (20) days, as well as appear for a deposition on or before October 21, 2007. The PC Order was confirmed in a letter from defendants to plaintiff, dated September 24, 2007. Plaintiff did not exchange any authorizations until October 19, 2007, and it appears that plaintiff only exchanged some of the authorizations related to decedent's pharmacy and Medicaid records. Accordingly, defendants' counsel contacted Justice Bransen's chambers to advise the court that defendants would not be able to proceed with plaintiff's deposition on schedule. The court adjourned plaintiff's deposition and advised all parties to continue with discovery; this conversation was memorialized in a letter to the court, copied to plaintiff, dated October 26, 2007.

On December 11, 2007, all parties appeared before Justice Branstien for a compliance conference. In the instant motion, defendants set forth that by this time, plaintiff had only provided authorizations for decedent's pharmacy and Medicaid record. Plaintiff had not provided a copy of the death certificate and letters of administration; authorizations for all prior, current, and subsequent treating physicians; or, payment for copies of defendant's records. Plaintiff was directed, by the compliance conference order dated December 11, 2007 (the "CC Order"), to provide the death certificate and letters of administration within seven (7) days and the outstanding authorizations within thirty (30) days. Additionally, plaintiff was directed to appear for her deposition on or before March 3, 2008, and a schedule was set for defendants to be deposed. A status conference was scheduled for March 4, 2008.

Defendants allege that between December 11, 2007 and March 4, 2008, plaintiff failed to exchange any discovery, nor did she appear for her court-ordered deposition. Due to inventory

changes, this case was reassigned from Justice Bransten to the undersigned on March 4, 2008. On that same date, the parties appeared for their scheduled status conference, at which plaintiff's attorney indicated that he intended to move for an order permitting him to withdraw as plaintiff's counsel. Accordingly, the status conference was adjourned to March 25, 2008; subsequently, by telephone conference, the parties requested a second adjournment to April 1, 2008, which was granted. On March 17, 2008, plaintiff moved, by order to show cause, for permission to withdraw as counsel (Motion Sequence Number 002). On March 28, 2008, defendant made the instant application. By decision and order dated April 2, 2008 (the "April Order"), this court granted plaintiff's counsel's motion to withdraw, without opposition from either plaintiff herself or defendants. The decision was conditioned on plaintiff's counsel serving a copy of the order with notice of entry upon the plaintiff at her last known address by regular and certified mail, return receipt requested, and on defendants by regular mail, within five (5) days of the date of entry of the order. The April Order was entered on April 4, 2008. On May 6, 2008, plaintiff's now former counsel filed an affidavit of service with the court, setting forth that on April 10, 2008, his office served the April Order, with notice of entry, on plaintiff and defendants by regular mail and by certified mail, return receipt requested. Plaintiff herself has not apprised the court that she has either retained new counsel or has elected to proceed *pro se*, and has not responded to the instant motion to dismiss.

C.P.L.R. § 3126 provides, in pertinent part, that

[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to [C.P.L.R. Art. 31], the court may make such orders with regard to the failure or refusal as are just, among them:

. . .
3. an order . . . dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

“The remedy of striking a complaint pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party demonstrates that the non-disclosure was willful, contumacious or due to bad faith.” Weissman v. 20 East 9th Street Corp., 48 A.D.3d 242, 243 (1st Dep’t 2008). A party’s long continued pattern of noncompliance with court orders and discovery demands gives rise to an inference of willful and contumacious conduct. Jones v. Green, 34 A.D.3d 260, 261 (1st Dep’t 2006). Since the commencement of this litigation, plaintiff has failed to comply with defendants’ discovery demands. Indeed, she has failed to comply since 2004, when the prior action was commenced, and has failed to comply with court-ordered discovery in this action since August 21, 2007. Authorizations have not been exchanged in accordance with either the PC Order or the CC Order. Plaintiff has also failed to appear for a deposition as dictated by both the PC Order and the CC Order. Moreover, plaintiff has not opposed the instant motion and has not offered any excuse, much less a reasonable excuse, for her failure to respond to court-ordered discovery. Id. Plaintiff’s long continued pattern of noncompliance establishes that plaintiff’s failure to produce discovery is willful and contumacious, and warrants dismissal.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the clerk of the Court.

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 28, 2008



 JOAN B. LOBIS, J.S.C.