

**Capitol Health Mgt., Inc. v Arnt Fox LLP**

2008 NY Slip Op 31780(U)

June 11, 2008

Supreme Court, Nassau County

Docket Number: 8519-07/

Judge: Daniel Martin

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**SHORT FORM ORDER**  
**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 31**  
**NASSAU COUNTY**

**CAPITOL HEALTH MANAGEMENT, INC.,  
BOULEVARD SURGICAL CENTER, INC., LIFEKO  
MEDICAL, P.C., BORO MEDICAL, P.C., BORO  
HEALTHCARE OF UNION, P.C., BORO MEDICAL  
OF NEW YORK, INC., BORO MEDICAL OF  
WESTCHESTER, INC., AQUINO HOLDINGS, LLC,  
and ROBERT J. AQUINO, M.D.**

**Plaintiffs.**

**- against -**

**Sequence No.: 001**  
**Index No.: 008519/07**

**ARENT FOX LLP.**

**Defendant.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	<b>X</b>
<b>Order to Show Cause and Affidavits Annexed</b>	
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

Upon reading the papers submitted and due deliberation having been had herein, defendant's motion for an order 1) dismissing the complaint for various defaults herein on plaintiffs' part; or 2) prohibiting plaintiffs from supporting their claims or defenses to defendant's counterclaims with any of the documents sought by defendant in its document demand or any testimony that would have been provided by plaintiffs at depositions is determined as set forth below.

Plaintiffs in the instant matter maintain causes of action for legal malpractice, fraud and breach of fiduciary duty against defendant in connection with their legal representation of plaintiffs. Defendant has answered and asserts counterclaims for breach of two separate contracts, account stated, *quantum meruit* and a declaratory judgment that defendant has a valid and enforceable lien against certain secured collateral in connection with arrears in legal fees allegedly owed to defendant.

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In his supporting affirmation defendant's attorney, Peter N. Wang, Esq., affirms the following. At the time defendant served its answer and counterclaims on August 6, 2007 it also served a demand for document production and notices of deposition. On August 21, 2007 he served subpoenas duces tecum and ad testificandum upon non-parties Jeanine Aquino and Robert Aquino and on August 31, counsel provided copies of same to plaintiffs' attorney, Harry Demiris, Esq., herein who had agreed to accept service of same on behalf of the non-party witnesses. Said depositions were scheduled for September 14, 2007.

Defendant's attorney also avers that plaintiffs did not respond to the document demands or serve a reply to the counterclaims by August 28, 2007. The non-parties did not respond to the subpoenas by producing the demanded documents and appearing to be deposed. When several exchanges of letters and e-mails between the attorneys for the parties herein did not resolve the issues of outstanding discovery and the reply to the counterclaims, defendant served a motion for a default judgment upon plaintiffs on September 18, 2007. On that date, affirms Mr. Wang, plaintiffs attorney first requested an extension of time to respond to the demands, subpoenas and counterclaims. On September 21, 2008 the parties agreed 1) plaintiffs' time to reply to the counterclaims was extended to September 24, 2007; 2) plaintiffs would begin producing documents by September 28, 2007, same to be completed by October 5, 2007; and 3) deposition dates for plaintiff Robert J. Aquino, M.D. and the two non-party witnesses was scheduled for September 25, 2007. On September 23, 2007 plaintiffs e-mailed defendant an unsigned reply to the counterclaims with a promise from plaintiffs' attorney that a signed copy would be provided at the preliminary conference. Defendant's attorneys thereafter sent e-mails to plaintiff's attorney attempting to reschedule depositions and provided seven open dates to which plaintiffs' attorney responded that the issue would be addressed at the preliminary conference and if necessary with the court.

Plaintiffs' attorney appeared at the September 25, 2007 preliminary conference and provided defendant with a signed reply to the counterclaims. The preliminary conference stipulation and order provided that plaintiff Aquino would be produced on October 22, 2007 for deposition and the two non-parties would be produced on October 31 and November 9, 2007.

Counsel for defendants avers that plaintiffs continued to default. First, plaintiffs failed to begin responding to the document demands by September 28, 2007 as agreed upon by the parties. When plaintiffs first responded to the demands, as reflected by an e-mail from plaintiffs' attorney, they made a "first response" to same and would forward the remaining outstanding discovery in the future. On October 9, 2007 defendant's attorney affirms that he received a box of documents from plaintiffs which was an incomplete response to the demands and contained no objections. After several phone calls to plaintiffs' attorney about the remaining documents which Mr. Wang asserts went unanswered until October 18, 2007, Mr. Demiris informed defendant that plaintiff Aquino would not appear at his October 22, 2007 deposition and requested a new date. In response to this Mr. Wang wrote Mr. Demiris a letter dated October 19, 2007 in which he stated that defendant intended to make a motion to dismiss the complaint based upon plaintiffs' numerous defaults.

Defendant moves for the relief set forth above upon the grounds that plaintiffs have

repeatedly failed to comply with discovery demands, stipulations and the court's order and that same rises to the level of conduct which is sufficiently willful and contumacious as to merit dismissal or preclusion.

In opposition plaintiffs assert that the reply to the counterclaims was served and never rejected as untimely and even if plaintiffs did not respond to same it is not a willful failure to provide required discovery. Plaintiffs also contend that their failure to provide discovery responses was due to the length of defendant's request and volume of documents required to respond to it and was therefore not willful. Further, plaintiffs are continuing their search for documents responsive to the demand. Lastly, plaintiffs contend that the setting of Dr. Aquino's deposition for October 22, 2007 was unrealistic and further, that the attorneys handling this case for plaintiffs in the firm and Dr. Aquino were not available until October 29, 2007. Indeed, affirms Mr. Demiris, the parties have engaged in discussions of rescheduling the depositions and as a result, he asserts that defendant has waived the assertion of a default in connection therewith.

Pursuant to CPLR §3126 when a party refuses "to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just..." CPLR §3126(3) authorizes the court to strike pleadings or grant a default judgment against the disobedient party. The court may certainly impose sanctions or strike pleadings where a party fails to provide disclosure pursuant to an order. Siegel, Practice Commentaries, 3126:5. It is only proper to strike a pleading, however, where it appears that the failure to obey the court's order is "deliberate and contumacious." Sindebrand v. McCleod, 226 A.D.2d 623, 623 (2<sup>nd</sup> Dep't 1996). See, also, Orvits v. Weaver, 188 A.D.2d 290 (1<sup>st</sup> Dep't 1992).

The court is in disagreement with plaintiffs herein and the facts of this case's history reveals a pattern of defaults on their part in failing to respond to the discovery demands and appearing at scheduled depositions (the court shall not consider the issues of the reply as plaintiffs have demonstrated service of same which defendant does not dispute nor the subpoenas served on the non-party witnesses as the fact that plaintiffs attorney represents said non-parties does not mean they are under plaintiffs' control). The court will view plaintiff's pattern of failure to comply with its discovery orders as being sufficiently willful and contumacious so as to justify dismissal of the complaint. See, e.g., Frias v. Fortini, 240 A.D.2d 467 (2<sup>nd</sup> Dep't 1997). However, justice also disfavors defaults and prefers that matters be determined on the merits. See, Massachusetts Asset Financing Corp. v. DiLavia, 299 A.D.2d 948 (4<sup>th</sup> Dep't 2002).

Accordingly, it is hereby directed that plaintiffs are to produce all outstanding documents to defendant by July 11, 2008 and the deposition of defendant Robert J. Aquino is to be conducted on July 24, 2008 at 9:30 a.m. in the Nassau County Supreme Court Courthouse. In the event the documents which this court directs plaintiffs to produce are not in their possession or they are not able to obtain them, they are to provide defendant with an affidavit stating such by July 11, 2008.

In the event plaintiffs fail to comply with the directives herein, defendant may submit to the court on notice with proof in admissible form of plaintiffs' failure to comply, an order

dismissing the complaint and granting defendant judgment on its counterclaims.

So Ordered.

  
A.J.S.C.

**Dated:** June 11, 2008

**ENTERED**

JUN 20 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**