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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

REGINA CHILDS-CACIOPPO,

Plaintiff,

-against-

ARENA ONCOLOGY ASSOCIATES, P.C. and FRANCIS P. ARENA, M.D.,

Defendants.

Motion Sequence #2
Submitted July 11, 2008

INDEX NO: 10348/07

The following papers were read on these motions:

Notice of Motion.....1
Affirmation in Opposition..... 2
Reply Affirmation.....3

Plaintiff, REGINA CHILDS-CACIOPPO, moves for an order compelling defendants, ARENA ONCOLOGY, P.C. (hereinafter referred to as "ARENA") and FRANCIS P. ARENA M.D., to comply with plaintiff's notices for discovery and inspection, and assessing costs and sanctions against the Law Office of Santangelo & Slattery for "stonewalling" plaintiff's ability to obtain documents which are material and necessary to the prosecution of the action. Counsel for defendants opposes the motion, which is determined as follows:

In this action for medical malpractice, plaintiff was diagnosed with inflammatory breast cancer (stage IV) and subsequently came under the care of the defendants for

treatment. Plaintiff alleges that, on August 11, 2006, defendants were negligent in the administration of the drug Abraxane, a vesicant chemotherapeutic agent, which caused the drug to enter the tissue of her chest wall resulting in a burn in her chest which required repeated hospitalizations for debridemnts of necrotic tissue and resection of a chest wall mass with reconstruction. It is plaintiff's position that she has and will continue to experience pain and suffering as a result of defendants' negligence.

Counsel for plaintiff states that defendants have engaged in a pattern of conduct which has prevented plaintiff from obtaining and/or completing discovery in a timely manner and, despite multiple Court orders, conferences and representations that requested items would be produced, the instant motion was necessitated by defendants continued "stonewalling" and delaying tactics. Counsel for plaintiff relates that the dates in the Preliminary Conference Order were ignored by defendants and a motion to strike defendant's answer was needed to pressure them to appear for depositions, which were held after the motion was adjourned five (5) times to afford defendants additional time to appear. Thereafter, counsel for plaintiff states that she served post EBT discovery demands for the production of items identified at the depositions. In particular, counsel for plaintiff requested 1) the production of ARENA's digital camera and memory card for inspection by a forensic expert, which was agreed to by counsel for defendants at the deposition, 2) copies of the contract between ACORN (Accelerated Community Oncology Research Network) and DR. ARENA and a copy of the ACORN logbook with the names of patients other than plaintiff redacted, 3) copies of the Abraxane folder maintained at ARENA as well as a copy of the cover and title pages of the chemotherapy reference book utilized, and the names of the nurses involved in the ACORN study. Plaintiff's counsel

contends that DR. ARENA testified that he was one (1) of a consortium involved in research to establish protocols for the administration of Abraxane, and the contract with ACORN set forth the reporting protocols in the event of an adverse event or complication and the logbook documented if the chemotherapy was interrupted. Additionally, Nurse Hamilton from ARENA testified that the office kept a folder for "Abraxane" and utilized a chemotherapy reference book, however, that she did not know the names of the other nurses at ARENA involved in the ACORN Study who prepared the drug by diluting the Abraxane powder prior to its administration. At the deposition, counsel for defendants agreed to provide the names of said nurses.

In support of the motion to compel and for sanctions, counsel for plaintiff asserts that, notwithstanding its demands and promises to produce, the digital camera and memory card have not been produced, the ACORN contract and logbook have not been produced, a copy of the Abraxane folder cover has been produced but not the contents of the folder, and the information about the chemotherapy reference book and the ACORN study nurses has not been produced. Moving counsel states that, in some instances, boiler plate objections to the discovery demand as "overbroad" have been provided and in other instances an absolute refusal to provide certain items has been made, even when defendants had previously agreed to provide same. It is counsel for plaintiff's position that costs and sanctions should be assessed against counsel for defendant because he has refused to comply with Court ordered discovery and because his boiler plate objections have been made in bad faith simply to delay and prolong the litigation, citing 22 NYCRR §130-1.1.

In opposition to the motion, one of the attorneys for defendants, James W. Jankowski, Esq., argues that he has only been responsible for the file since March 12, 2008, and since that time, in the last 100 days, he has responded to the PC order, provided a bill of particulars as to defendants affirmative responses, responded to plaintiff's "inordinate amount of discovery demands", held three (3) depositions (of DR. ARENA, Nurse Hamilton and Nurse Dooley) and exchanged over 500 pages of documents. Counsel Jankowski states that he has responded to the majority of discovery demands but has objected to poorly drafted discovery demands. He claims that he believed that the ACORN log book would not likely to lead to meaningful evidence, that counsel for plaintiff had not specified what specific contract with ACORN or which year was requested, that the 2006 research book was no longer in ARENA's possession, and that plaintiff had not established a reason to discover the ACORN contract, the logbook, or the names of all the nurses involved in the ACORN study. Nonetheless, he claims that, in the "spirit of cooperation", and the Court notes after receipt of the instant motion, he has forwarded the title of the 2006 Oncology Nursing Drug Handbook, the names of the two (2) research nurses involved with the plaintiff, the folder of Abraxane literature and the ACORN log book, and claims that he stands ready for plaintiff's expert to examine ARENA's digital camera and memory card, to which he has never objected. Counsel for defendants claims that he has complied with each and every demand of plaintiff's counsel and that sanctions and costs are not warranted because any delay is not the fault of present counsel, as plaintiff's discovery demands were just "too broad". The Court disagrees.

. CPLR 3101(1) provides for "full disclosure of all matters material and necessary in the prosecution or defense of an action. . . .". This provision has been liberally construed

to require disclosure of any information or material reasonably related to the issues "which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason". (*Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403, 288 NYS2d 449, 235 NE2d 430 [C.A. 1968]; *see also Titleserv, Inc. v Zenobio*, 210 AD2d 314, 619 NYS2d 769 [2nd Dept. 1994]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material . . . in the prosecution or defense". (*Allen v Crowell-Collier Pub. Co., supra*, [citations omitted]).

After a careful reading of the submissions herein, it is the Court's view that plaintiff, a very ill woman, has waited an inordinate period of time for defendants' responses to routine discovery demands for items identified at the defendants' depositions, some of which counsel had given his word to provide. Indeed, the instant motion was necessitated by defendants' counsel's boiler plate objections with no basis in law, and his repeated refusals and delays in providing the requested items. The Court finds that the requested items, as set forth above, are material and necessary to the prosecution of this action and will assist in the preparation for trial. While it appears that most of the demanded discovery has been provided, the ACORN contract still remains outstanding and Court directs that plaintiff is entitled to copies of the contracts which were in effect at the time of her treatment, as well as the contracts that set forth the protocols for the administration of Abraxane to the plaintiff during the period from April 2006 through November 2006.

As to plaintiff's request for sanctions, it is well settled that the nature and degree of sanctions, if any, to be imposed pursuant to CPLR §3126 for a party's willful failure to disclose information lies within the sound discretion of the court (*Milbrandt & Co., Inc. v*

Griffin, 19 AD3d 662, 798 NYS2d 908 [2nd Dept. 2005]). The Court finds that the conduct of Santangelo & Slattery, P.C., who have represented defendants since the commencement of this action in June 2007, was calculated to delay or prolong the litigation and that an award of costs in the sum of $1,500.00 for the necessity of bringing the instant motion is warranted. Accordingly, it is hereby

ORDERED, that no later than ten (10) days after service of a copy of this Order, with Notice of Entry, the attorneys for defendants shall provide the attorneys for plaintiff with copies of the ACORN contracts which were in effect at the time of plaintiff's treatment, as well as the contracts that set forth the protocols for the administration of Abraxane to the plaintiff during the period from April 2006 through November 2006, arrange for examination of ARENA's digital camera and memory card, and deliver any other outstanding discovery per plaintiff's demands not previously provided; and it is further

ORDERED, that defendant's failure to follow the directions set forth herein and in the prior orders of the Court may result in sanctions and an order of preclusion pursuant to CPLR §3126; and it is further

ORDERED, that plaintiff is awarded a judgment in the sum of $1,500.00 against the Law Firm of Santangelo & Slattery, P.C., for the costs of the instant action made necessary by defendants conduct in unnecessarily delaying and prolonging the instant litigation, payment of which shall be made no later than ten (10) days after service of a copy of this Order, with Notice of Entry, to the law firm of to the firm of David S. Pollack P.C., on behalf of plaintiff. (22 NYCRR §130-1.1, §130-1.2).

All further requested relief not specially granted is denied.

This constitutes the decision and order of the Court.

Dated: September 16, 2008

WILLIAM R. LaMARCA, J.S.C.

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