

**Mabrouk v Jamaica Hosp. Med. Ctr.**

2009 NY Slip Op 30260(U)

January 26, 2009

Supreme Court, Queens County

Docket Number: 8682/2006

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19  
Justice

	x	
MABROUK M. MABROUK,		Index Number <u>8682</u> 2006
Plaintiff,		Motion Date <u>October 29,</u> 2008
- against -		
JAMAICA HOSPITAL MEDICAL CENTER, et al.,		Motion Cal. Number <u>15</u>
Defendants.		Motion Seq. No. <u>3</u>
	x	

The following papers numbered 1 to 12 read on this motion by Jamaica Hospital Nursing Home s/h/a Trump Pavilion for Nursing and Rehabilitation (Jamaica Nursing) to strike the complaint, dismiss the action and preclude plaintiff from offering evidence at trial of the items for which discovery has not been provided pursuant to defendants' demands; on this cross motion by Jamaica Hospital Medical Center (Jamaica Medical) to strike the complaint, pursuant to CPLR §§ 3042(c), 3042(d) and 3126, to dismiss the complaint and to preclude plaintiff from offering evidence at trial of the items for which discovery has not been provided pursuant to defendants' demands; and on this cross motion by plaintiff for a protective order limiting the discovery demands served by defendants.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-5
Notices of Cross Motions - Affidavits -Exhibits..	6-12

Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiff in this medical malpractice action seeks damages for personal injuries sustained when he was allegedly burned during a physical therapy procedure at defendants' facility. Defendants move and cross-move to dismiss the complaint and/or preclude

plaintiff from offering evidence at trial of the items for which discovery has not been provided pursuant to defendants' numerous demands. Plaintiff opposes the motion and cross motion and cross-moves for a protective order limiting the discovery demands served by defendants.

Plaintiff commenced this action on April 14, 2006. Jamaica Hospital Nursing Home s/h/a Trump Pavilion for Nursing and Rehabilitation ("Jamaica Nursing") appeared on May 1, 2006, and Jamaica Hospital Medical Center ("Jamaica Medical") appeared on May 8, 2006. After pre-answer motion practice, issue was joined by virtue of Jamaica Nursing's verified answer on November 8, 2006. Annexed to Jamaica Nursing's answer was its Demand For a Verified Bill of Particulars and various discovery demands. Jamaica Medical also joined issue by serving its Verified Answer dated June 23, 2006.

After a period of time within which plaintiff was to provide responses to Jamaica Nursing's discovery and Bill of Particulars demand, Jamaica Nursing sent correspondence to plaintiff requesting compliance with the demands as well as returning the two collateral source authorizations plaintiff provided, as being improper, and requesting provider-specific authorizations for plaintiff's collateral source records. On January 29, 2007, one day before the preliminary conference, plaintiff served a verified bill of particulars and responded to combined demands upon Jamaica Nursing. At the preliminary conference, the alleged deficiencies in plaintiff's discovery responses and verified bill of particulars were addressed. To wit, the Preliminary Conference Order required plaintiff to serve a Supplemental Verified Bill of Particulars and outstanding authorizations for plaintiff's various treating physicians within thirty days of the Preliminary Conference Order and, in any event, before plaintiff's deposition. The Preliminary Conference Order also directed that discovery shall be completed by June 6, 2007. When plaintiff failed to comply, a correspondence was sent to plaintiff requesting compliance pursuant to the said Order. Once again, plaintiff failed to respond and on May 7, 2007, attorneys for Jamaica Nursing corresponded with plaintiff's attorney requesting the court-ordered discovery.

Jamaica Nursing served several more demands for Authorizations, notably on July 30, 2007, August 22, 2007, December 5, 2007 and December 12, 2007. To date, plaintiff has not provided the authorizations responsive to Jamaica Nursing's demands. By correspondence dated February 7, 2007, June 12, 2007, July 30, 2007, August 16, 2007 and October 25, 2007, attorneys for Jamaica Nursing reminded plaintiff of the outstanding discovery, to no avail.

Plaintiff filed his Note of Issue and Certificate of Readiness on or before October 5, 2007. However, since plaintiff did not timely file a Notice of Medical Malpractice Action (required within sixty days after joinder of issue), it was rejected pending defendants' stipulation permitting the late filing. Notwithstanding plaintiff's discovery omissions, attorneys for the parties stipulated to permit plaintiff's late filing. However, upon receipt of plaintiff's Note of Issue and Certificate of Readiness, defendants once again requested compliance with the outstanding discovery demands and previous court orders under cover of a letter dated November 1, 2007. Thereafter, on November 19, 2007, a conference was held with the Court and counsel for the respective parties. The resulting discovery Stipulation, so-ordered by Justice Peter J. O'Donoghue, provided, inter alia, that plaintiff "shall comply with the outstanding provisions of the preliminary and compliance conference orders" and "shall respond to [Defendants'] outstanding demands for authorizations" on or before December 19, 2007. When plaintiff's discovery obligations were not received by Jamaica Nursing by the date required, Jamaica Nursing moved to dismiss for failure to provide discovery and a supplemental verified bill of particulars originally returnable January 18, 2008.

In the interim, plaintiff responded with one authorization permitting Jamaica Nursing access to records by Jamaica Nursing only and declining to provide authorizations for plaintiff's twenty-three other treating health care providers demanded by Jamaica Nursing. Also, plaintiff served a supplemental verified bill of particulars that Jamaica Nursing contends did not comply with the court's previous discovery order in that it did not clearly identify the device that allegedly caused plaintiff's injuries. On January 11, 2008, Jamaica Nursing once again corresponded with plaintiff detailing the alleged deficiencies in plaintiff's disclosures, to no avail.

Subsequently, on April 14, 2008, Justice O'Donoghue held a second pre-trial conference for which plaintiff's counsel failed to appear. Plaintiff's counsel was then reached by telephone and the outstanding discovery issues were discussed. The Court thereupon struck plaintiff's Note of Issue and ordered plaintiff to comply with the prior Court Orders including serving defense counsel with the outstanding authorizations and to provide a Supplemental Verified Bill of Particulars by April 21, 2008. Plaintiff was also instructed to be produced for a deposition within one month of the Conference. Jamaica Nursing corresponded with plaintiff again on April 15, 2008, reminding plaintiff of the court's directives, to no avail.

To date, defendants have yet to receive authorizations for various treating providers that the court ordered plaintiff to supply, including twenty-three for: Apria, Better Living Now, Inc., Blue Cross/Blue Shield, Bernard Boal, M.D., Imelda Buenaventura, M.D., Sudkeer Chaukan, M.D., Joseph Colasacco, M.D., David Cohen, Beppy J. Edasery, M.D., Alexander Gart, M.D., Svetlana Gavriolo, M.D., Bijan Golyan, M.D., Lisa Hu, M.D., Island Medical Associates, Michelle Johnson, M.D., "Lee, M.D.," Robert Mendelson, M.D., Thambirajah Nandakumar, M.D., Pinnacle Acupuncture Center, Arunima Sarkar, M.D., Bhupinder Singh, M.D., Elizabeth Weinman, M.D., and Sam Yee, M.D.

The Court is authorized under CPLR §§ 3126 and 3042, to strike a plaintiff's pleadings and dismiss the action where plaintiff "refuses to obey an Order for disclosure or willfully fails to disclose information which the Court finds ought to be disclosed." When a party fails to comply with an order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint" (Kihl v Pfeffer, 94 NY2d 118 [1999] [citations omitted]). Although a drastic remedy, striking a complaint is warranted "where a party's conduct is shown to be willful, contumacious or in bad faith" (Frost Line Refrigeration, Inc. v Frunzi, 18 AD3d 701 [2005]; see also Schwartz v Suebsanguan, 15 AD3d 565 [2005]; Sowerby v Camarda, 20 AD3d 411 [2005]). It is well established in New York that willful and contumacious conduct may be inferred by a party's "repeated failures to comply with the court's orders [along with] the absence of any explanation offered to excuse his failures to comply" (Sowerby v Camarda, supra at 412). This includes a party's failure "to comply with court orders to supply medical authorizations ..." (Frost Line Refrigeration, Inc. v Frunzi, supra at 742). Further, a party's "repeated failure to adequately respond to discovery demands ... also infers willful and contumacious behavior warranting dismissal" (Schwartz v Suebsanguan, supra at 570).

As indicated above, plaintiff has essentially ignored the discovery process and several discovery orders issued by the court. It has been nearly two years since defendants served their initial discovery demands, to which plaintiff provided either insufficient or incomplete responses; and eighteen months since the court issued its first discovery Order addressing the very same issues and the fact that plaintiff has virtually served no discovery since the Preliminary Conference Order.

The CPLR provides for full disclosure of all evidence material and necessary in the prosecution and defense of an action (CPLR 3101[a]). "New York has long favored open and far-reaching pretrial discovery" (Kavanagh v Ogden Allied Maintenance Corp.,

92 NY2d 952, 954 [1998]), and the Courts of this State give this language a liberal interpretation to permit discovery of any facts and documents bearing on the controversy in issue which will assist in a party's preparation for trial as long as the documents sought are not protected from discovery (see Anonymous v High School for Environmental Studies, 32 AD3d 353 [2006]). Protection against disclosure is the exception, not the rule (see O'Neill v Oakgrove Constr., 71 NY2d 521 [1988]). "Discovery determinations are discretionary" and "each request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure" (Andon v 302-304 Mott St. Assoc., 94 NY2d 740 [2000]). Therefore, the party who seeks a protective order bears the burden of showing that a privilege applies or that discovery is otherwise improper (see Koump v Smith, 25 NY2d 287 [1969]; Bombard v Amica Mut. Ins. Co., 11 AD3d 647 [2004]; Sage Realty Corp. v Proskauer Rose, 251 AD2d 35 [1998]).

Here, plaintiff failed to carry that burden. Indeed, plaintiff made no showing as to what information he is seeking to protect from disclosure and did not specify a reason for the same. Since defendants established that the sought medical records relating to plaintiff's medical treatment are material and necessary to the defense of this action (see CPLR 3101[a]), the Court denies the cross motion which is for a protective order with respect to those records, and grants the motion and cross motion which seek, inter alia, to compel the production of authorizations for the release of those records as well as all outstanding discovery (see Lamy v Pierre, 31 AD3d 613 [2006]; Andon v 302-304 Mott St. Assocs., 94 NY2d 740 [2000]). Further, since plaintiff placed his mental and physical condition in controversy, the records sought which materially bear on the issues of liability and damages, are subject to discovery (see CPLR 3121[a]; Koump v Smith, 25 NY2d 287 [1969]; Cannistra v County of Putnam, 139 AD2d 479 [1988]).

Accordingly, the motion and cross motion to dismiss are granted to the extent that the complaint shall be dismissed unless plaintiff complies with all outstanding discovery demands as previously directed in the preliminary conference and compliance conference orders, within thirty (30) days of the service of a copy of this order with proof of notice of entry.

Dated: January 26, 2009

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J.S.C.