

Kersul v Shih

2009 NY Slip Op 31152(U)

May 22, 2009

Supreme Court, New York County

Docket Number: 109892/08

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 109892/2008

KERSUL, EYDOKIA

vs
SHIH, JULIE

Sequence Number : 001

DISMISS

INDEX NO. _____
MOTION DATE 4-29-09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 23 were read on this motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits X MOT: 18-21
Replying Affidavits _____

PAPERS NUMBERED
<u>1-15</u>
<u>16-17, 22</u>
<u>in 23</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER

FILED
MAY 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/22/09

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

FILED
MAY 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
EYDOKIA KERSUL,

Plaintiff,

- against -

Index No.: 109892/08

JULIE SHIH, M.D., DOWNTOWN WOMEN OBGYN
ASSOCIATES, and NEW YORK UNIVERSITY
MEDICAL CENTER,

Decision and Order

Defendants.

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

Defendants Julie Shih, M.D. (“Dr. Shih”), and Downtown Women OBGYN Associates (“Downtown”) move, pursuant to C.P.L.R. § 3126, for an order dismissing plaintiff Eydokia Kersul’s complaint for failure to comply with court-ordered discovery or, alternatively, compelling disclosure and providing for a conditional order of preclusion. Defendant New York University Langone Medical Center, s/h/a New York University Medical Center (“NYU”) cross-moves for the same relief.

Briefly, this is an action sounding in medical malpractice in which plaintiff alleges that Dr. Shih failed to diagnose and treat an abdominal cyst. Plaintiff alleges that in November 2007, Dr. Shih diagnosed plaintiff with uterine fibroids, and, from that time until March 2008, treated plaintiff with Lupron, which was intended to decrease estrogen production in an attempt to reduce the size of the uterine fibroids. Plaintiff alleges that the treatment for the fibroids “masked an abdominal cyst” that was growing inside her. and that the cyst grew from approximately seven (7) pounds in January 2008 to twenty (20) pounds in February 2008, necessitating an emergency

admission to Hackensack University Medical Center (“HUMC”) in New Jersey on March 18, 2008, and surgical removal of the abdominal cyst by Daniel Smith, M.D., on March 20, 2008.

Plaintiff commenced this action by the filing of a summons and complaint on July 18, 2008. Issue was joined by Dr. Shih and Downtown (the “moving defendants”) by the service of their respective answers on or about August 11, 2008, and by NYU by its service of an answer on or about August 14, 2008. Dr. Shih’s answer was served together with a demand for a verified bill of particulars and numerous discovery demands, including, but not limited to, demands for medical authorizations; collateral source information pursuant to C.P.L.R. § 4545; and, expert witness information pursuant to C.P.L.R. Rule 3101(d) (the “Combined Demands”). Downtown served a separate demand for a verified bill of particulars. On or about September 22, 2008, plaintiff served one verified bill of particulars in response to the separate demands of both moving defendants.

On October 28, 2008, the parties appeared for a preliminary conference. On that date, I signed a preliminary conference order (the “PC Order”) directing plaintiff to, *inter alia*, provide a further verified bill of particulars as to certain enumerated items from the bill of particulars within twenty (20) days; furnish HIPAA¹-compliant medical authorizations as to certain health care providers within twenty (20) days; furnish authorizations for plaintiff’s health insurance providers from January 2002 to present within thirty (30) days; respond to defendants’ respective demands for authorizations, notices to produce, and demands for discovery and inspection within thirty (30) days;

¹ Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), Pub. L. No. 104-191, 110 Stat. 1936 (1996).

and, respond to the moving defendants' demands for ex parte interviews with plaintiff's subsequent treating physicians within thirty (30) days.

On February 10, 2009, the parties appeared before me for a compliance conference. On that date, I signed a compliance conference order (the "CC Order") directing plaintiff to provide certain Arons-compliant authorizations² previously demanded; respond to moving defendants' previous demands for authorizations dated December 11, 2008, December 16, 2008, November 18, 2008, November 21, 2008; and, furnish a supplemental bill of particulars pursuant to and in accordance with the PC Order.

Counsel for the moving defendants complains that plaintiff has failed to respond to their various discovery demands, the PC Order, and the CC Order. On February 9, 2009, the moving defendants received certain authorizations from plaintiff. Although defense counsel realized that these authorizations were not HIPAA-compliant,³ he sets forth that he attempted to process these authorizations anyway; as of April 27, 2009, he had received no responsive records. Counsel for plaintiff sets forth that plaintiff has provided defendants with "a plethora" of authorizations already, that he furnished defendants with a copy of Dr. Smith's records, and that he furnished defendants with authorizations for both Dr. Smith and HUMC. Additionally, plaintiff's counsel annexes to his

² Arons v. Jutkowitz, 9 N.Y.3d 393 (2007).

³ Annexed to plaintiff's papers are copies of the authorizations that were sent in February 2009. The authorizations are not HIPAA-compliant because they do not contain any of the language regarding privacy and revocation as required by HIPAA and New York State Law and as promulgated by the Office of Court Administration's Official Form No. 960.

motion two Arons-compliant authorizations for Dr. Smith and HUMC. Plaintiff's counsel further avers that certain authorizations requested by defendants were for practitioners that plaintiff never saw, and that some practitioners were affiliated with Downtown, for which authorizations were already provided. Plaintiff does not address the moving defendants' claims that plaintiff has failed to provide supplemental bills of particulars or any response to the Combined Demands served along with defendants' answers.

“The law strongly prefers that matters be decided on their merits. . . . Accordingly, the drastic sanction of striking a pleading is inappropriate without a clear showing that the failure to comply with disclosure obligations was willful, contumacious, or the result of bad faith.” Gibbs v. St. Barnabas Hosp., ___ A.D.3d ___, 2009 N.Y. Slip Op. 03441 (1st Dep't Apr. 30, 2009) (internal citations omitted). Plaintiff's partial compliance with the previous demands and court orders does not evidence behavior that rises to the level of willful, contumacious, or bad faith; albeit, plaintiff's responses to proper discovery demands and orders have been woefully delinquent and incomplete. Those branches of defendants' motion and cross-motion seeking to strike plaintiff's complaint are denied, but a conditional order of preclusion is warranted. Plaintiff is ordered to fully respond to any outstanding discovery demands from the Combined Demands, the PC Order, and the CC Order—including any references to other outstanding demands for discovery contained in those court orders—within forty-five (45) days of the date of this order; this includes providing HIPAA-compliant authorizations where previous HIPAA-noncompliant authorizations had been provided, together with Arons-compliant authorizations if duly demanded. Regarding the medical providers that plaintiff's counsel states that plaintiff did not see, if indeed this statement is true, within forty-

five (45) days plaintiff shall provide an affidavit from plaintiff herself attesting to this; otherwise, within forty-five (45) days plaintiff shall provide HIPAA-complaint and Arons-compliant authorizations for these practitioners. Should plaintiff fail to comply with the foregoing, she will be precluded from offering into evidence the documents and materials that were duly requested by defendants or ordered by this court, but not produced. This conditional order of preclusion shall become a final order of preclusion, upon application to the court, should plaintiff fail to provide the discovery within forty-five (45) days of the date of this order.

This constitutes the decision and order of the court.

Dated: May 22, 2009



JOAN B. LOBIS, J.S.C.

FILED
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NEW YORK