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

PRESENT: MARTIN SHULMAN J.S.C. PART 1
*Justice*

Index Number : 115490/2007
EMERSON, GORDON P.
VS.
PFIZER, INC.,
SEQUENCE NUMBER : # 001
DISMISS

INDEX NO. 115490-07
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

were read on this motion to/for

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-D | 1 |
| Answering Affidavits — Exhibits [illegible] | 2 |
| Replying Affidavits | 3 |

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
SEP 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: SEP 3 2009

MARTIN SHULMAN J.S.C.

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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GORDON P. EMERSON,

Plaintiff,

Index No.: 115490/07

-against-

DECISION/ORDER

PFIZER INC.,

Defendant.

----------X



Defendant Pfizer Inc. ("Pfizer" or "defendant") moves to dismiss this action pursuant to CPLR 3126 based upon plaintiff Gordon P. Emerson's ("Emerson" or "plaintiff") failure to comply with Pfizer's demand for authorizations for plaintiff's medical, insurance, employment and educational records. Alternatively, defendant requests that Emerson be compelled to immediately respond to its discovery requests[1] and provide proof that he has taken steps to preserve the records Pfizer seeks. Defendant also requests the imposition of costs and fees attendant to this motion.

In this action, Emerson alleges various causes of action based upon injuries he allegedly suffered as a result of ingesting Lipitor, a cholesterol lowering medication manufactured by Pfizer. The case is one of several similar actions coordinated under the caption *In re: New York Lipitor Products Liability Litigation*, Case Management Index No. 767000/07.

To say that discovery has not proceeded in an orderly and expeditious fashion in these actions is an understatement. Court conferences in these matters are typically

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[1] Pfizer's supporting affidavit and memorandum of law also detail Emerson's alleged defaults in responding to demands concerning lost earnings and collateral source information.

contentious, counsel for the parties routinely call or write the court in an effort to resolve discovery conflicts and the court finally was constrained to appoint a referee to supervise depositions. A recurring complaint in this coordinated litigation is plaintiffs' counsel's claim that he, a solo practitioner, is being "papered" to death by the corporate giant defendant and its counsel, a large, internationally renowned law firm with far superior resources. For example, this case was filed on the same date as four other Lipitor cases and during the relevant time period, plaintiffs' counsel was in the process of responding to Pfizer's demands in all five cases.

Here, Pfizer claims that it first served a demand for authorizations and other discovery demands on November 21, 2007 and ultimately granted plaintiff's counsel a two week extension to respond. Thereafter, pursuant to a conference call with the court, plaintiff obtained a further extension to January 9, 2008 for its responses. Defendant claims that plaintiff first responded in part on January 11, 2008 (two days late) and characterizes plaintiff's subsequent responses as being incomplete.[2] Correspondence between counsel for the parties from January 11, 2008 through December 10, 2008 documents counsel's disagreements in this regard. See Motion at Exhs. C through L. Pfizer notes that its primary concern with being unable to expeditiously obtain authorizations from Emerson is the risk of spoliation of evidence in light of routine, periodic document destruction by third parties.

On this round of motion practice, plaintiff's counsel candidly acknowledges that he has not strictly adhered to discovery deadlines, but urges that the defaults have now

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[2] Pfizer notes that plaintiff often responded that information requested would be forthcoming at a later date.

been cured, were due to mere oversight and were not wilful or contumacious.[3] Plaintiff's counsel further contends that Pfizer has suffered no prejudice by any inadvertent delays. As to defendant's demands for documentation concerning Emerson's damages and collateral source information, plaintiff claims the demands are unduly burdensome, premature and can be obtained via the provided authorizations and/or at plaintiff's deposition. Finally, plaintiff argues that defendant failed to make a good faith effort to resolve the outstanding discovery issues prior to filing this motion, as required by Uniform Rule 202.7, since defendant waited six months from advising plaintiff that authorizations were still outstanding in this case to bring this motion.

In reply, Pfizer contends that authorizations for educational and employment records have still not been provided. Further, defendant makes the important distinction that plaintiff did not merely default by failing to provide 15 authorizations which defendant's counsel prepared and forwarded to plaintiff's counsel.[4] Rather, plaintiff has not identified and supplied authorizations for any other providers which defendant would be unable to identify.

CPLR §3126 provides in pertinent part as follows with respect to penalties for failure to comply with orders to disclose:

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[3] Plaintiff's counsel states that he provided more than 600 authorizations to defense counsel in connection with other Lipitor actions, overlooking a mere 15 authorizations in this case. Further, upon receipt of the instant motion, plaintiff's counsel provided the outstanding authorizations before a single business day had passed.

[4] Apparently, Pfizer's counsel has prepared authorizations and forwarded same to plaintiffs' counsel for execution where Pfizer has been able to identify a provider from documentation obtained from plaintiffs. It is necessary for plaintiff to identify other providers as defendant would have no knowledge of whether other providers existed.

> If 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 this article, the court may make such orders with regard to the failure or refusal as are just, among them:
>
> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . ; or
>
> 3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad discretion of the trial court. *Zletz v. Wetanson*, 67 N.Y.2d 711, 499 N.Y.S.2d 933 (1986); *Berman v. Szpilzinger*, 180 A.D.2d 612, 580 N.Y.S.2d 324 (1st Dept., 1992). In *Stanfill Plumbing & Heating Corp. v. Dravo Constructors, Inc.*, 216 A.D.2d 101, 627 N.Y.S.2d 689 (1st Dept., 1995), the First Department held that the lower court "did not improvidently exercise its discretion in dismissing the underlying action for the failure of plaintiff to comply with prior court-ordered discovery." The court specifically found that it was proper to dismiss the plaintiff's complaint since the record revealed that the lower court had given the plaintiff ample opportunity to comply with discovery and the plaintiff repeatedly failed to comply. *Id.*

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or

contumacious." *Henry Rosenfeld, Inc. v. Bower & Gardner*, 161 A.D.2d 374, 555 N.Y.S.2d 320 (1st Dept., 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 A.D.2d 488, 489, 637 N.Y.S.2d 15 (1st Dept., 1996), *lv. to app. den.*, 88 N.Y.2d 802, 644 N.Y.S.2d 689 (1996)(disobedience of a series of court orders directing discovery warranted striking of pleading); *Berman v. Szpilzinger*, *supra*.

Here, the court must balance two competing interests, *viz*, the interest in having the case decided on the merits and the interest of ensuring that discovery is completed expeditiously and without prejudicing any party's rights. On these facts, the court cannot conclude that plaintiff's conduct warrants the harsh penalty of striking the complaint. Nonetheless, it is within the court's discretion to make such orders as may be just in the event of a party's failure to comply with court ordered discovery. CPLR §3126; *Riley v. Iss Int'l Serv. Sys. Inc.*, 304 A.D.2d 637, 757 N.Y.S.2d 593 (2nd Dept. 2003)("It is within the Supreme Court's broad discretion to determine whether- and to what degree -to impose sanctions against a party for discovery violations [citations omitted].").

It is undisputed that defendant is entitled to the authorizations it seeks from plaintiff. Moreover, despite plaintiff's argument that defendant cannot establish that spoliation has occurred, nonetheless, there is a very real possibility that it may. It simply should not take over a year to obtain authorizations defendant is clearly entitled to, nor can plaintiff place the onus on defendant to repeatedly remind plaintiff that discovery has not been provided. At this time, the court declines to impose the harsh

penalty of dismissing the complaint. However, some form of sanction is warranted under the circumstances.

Accordingly, Pfizer's request for alternative relief is granted as follows: 1) within 30 days of service of a copy of this decision and order with notice of entry, plaintiff is directed to provide authorizations for employment and educational records, as well as authorizations for any medical and insurance providers, if any, not previously identified by defendant; 2) plaintiff is further directed to respond to defendant's demands for documentation concerning Emerson's damages and collateral source information within 30 days of service of a copy of this decision and order with notice of entry; and 3) plaintiff shall pay to defendant $1,000.00 within 30 days of service of a copy of this decision and order with notice of entry. In the event that plaintiff fails to comply with the foregoing, defendant shall submit an affirmation detailing the default and shall settle an order on notice precluding plaintiff from offering any evidence or testimony on these issues at the time of trial.

Counsel for the parties are directed to appear for a preliminary conference on September 29, 2009 at 9:30 a.m., at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's decision and order. Copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
September 3, 2009



Hon. Martin Shulman, J.S.C.