

Kersul v Shih

2009 NY Slip Op 32115(U)

September 14, 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: Jean B. Lohis

PART 6

Index Number : 109892/2008
KERSUL, EYDOKIA
 vs.
SHIH, JULIE
 SEQUENCE NUMBER : 002
 PRECLUDE

INDEX NO. _____
 MOTION DATE 9/11/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED
1-22
23
24-26

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
 SEP 16 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 9/14/09 _____ JBL J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
EYDOKIA KERSUL,

Plaintiff,

- against -

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

Defendants.
-----X

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

Motion Sequence Numbers 002 and 003 are consolidated for disposition. In Motion Sequence Number 002, defendants Julie Shih, M.D. ("Dr. Shih"), and Downtown Women OBGYN Associates ("Downtown") move, pursuant to C.P.L.R. §§ 3013 and 3126, for an order staying the deposition of all parties for plaintiff's alleged willful and repeated failure to comply with various prior court orders and for a final order of preclusion. In Motion Sequence Number 003, plaintiff moves for an order compelling the depositions of all parties.

The facts of this case are set forth in this court's decision and order dated May 22, 2009 (the "May 2009 Order"), and will only briefly be repeated here. This is an action for medical malpractice in which plaintiff alleges that Dr. Shih failed to diagnose and treat an abdominal cyst. Plaintiff alleges that the erroneous diagnosis of uterine fibroids and treatment with Lupron, which was intended to decrease estrogen production in an attempt to reduce the size of the uterine fibroids, "masked an abdominal cyst" that was growing inside her. As a result, she claims that the cyst grew from approximately seven (7) pounds in January 2008 to twenty (20) pounds in February 2008, necessitating emergency surgery in March 2008.

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Decision and Order

In Motion Sequence Number 001, defendants Dr. Shih and Downtown moved for an order dismissing the 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-moved for the same relief. The May 2009 Order reflects that “plaintiff’s responses to proper discovery demands and orders have been woefully delinquent and incomplete,” but that the responses did not evince bad faith or contumacious behavior. Accordingly, this court denied the request to strike plaintiff’s complaint, but issued a conditional order of preclusion. Plaintiff was 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,” including providing HIPAA-compliant authorizations and Arons-compliant authorizations if duly demanded.¹ The May Order continues that

[s]hould 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.

Plaintiff asserts that in June 2009, plaintiff provided counsel for defendants Dr. Shih and Downtown with approximately twenty-four (24) HIPAA-compliant and Arons-compliant

¹ As set forth in the May 2009 Order, the Combined Demands consist of a demand for a verified bill of particulars and, inter alia, 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).

authorizations. Plaintiff also produced medical records from Daniel Smith, M.D., plaintiff's treating physician. But, plaintiff did not produce a Supplemental Bill of Particulars and Response to Combined Demands until after defendants brought Motion Sequence Number 002; the Notice of Motion was served on or about July 28, 2009, which no doubt compelled plaintiff to finally respond to the Combined Demands on August 3. Plaintiff alleges that defendants refused to proceed with plaintiff's August 9 deposition, claiming prejudice and surprise.

Plaintiff's untimely service of the Supplemental Verified Bill of Particulars on August 3 did not comply with this court's May 2009 Order. But, the order does not address the issue of preclusion with respect to the failure to serve a timely or proper bill of particulars. Rather, the May 2009 Order refers only to preclusion for failure to provide authorizations or documents. Therefore, an order of preclusion is not warranted at this time.

Although plaintiff did eventually serve a Supplemental Verified Bill of Particulars, defendants assert that the response is inadequate, since there is a single response for both defendants Dr. Shih and Downtown. As defendants assert, a bill of particulars "must clearly detail the specific acts of negligence attributed to each defendant." Miccarelli v. Fleiss, 219 A.D.2d 469, 470 (1st Dep't 1995) (citations omitted). While this may be accomplished by service of a bill of particulars with separate paragraphs for each defendant (see, Marshall v. Leppard, 17 Misc. 3d 1103[A] [Table], 2007 WL 2790383 [Sup. Ct. Nassau Co. 2007]), plaintiff did not do this. Rather, plaintiff combined the alleged acts of negligence in the same sentences and paragraphs. Where, as here, each defendant serves a separate demand for a bill of particulars, each defendant "is entitled to a [separate] bill of

particulars specifying the acts or omissions upon which plaintiff's claim of negligence against him is based, as distinguished from those claimed against the other defendants." Laukaitis v. Ski Stop, Inc., 202 A.D.2d 554, 556 (2d Dep't 1994) (bracket in original), quoting Lamb v. Rochester Gen. Hosp., 130 A.D.2d 963 (4th Dep't 1987).

Plaintiff is directed to serve separate supplemental verified bills of particulars as to Dr. Shih and Downtown by October 8, 2009. The parties are directed to proceed with plaintiff's deposition, which shall be held on or before October 22, 2009. Thereafter, Dr. Shih shall be deposed on or before November 12; Downtown shall be deposed on or before November 30; and, NYU, shall be deposed on or before December 21. If plaintiff has not yet done so, plaintiff shall identify a witness from Downtown and NYU within thirty (30) days prior to the respective depositions.

This constitutes the decision and order of the court.

Dated: September 14, 2009


JOAN B. ROBIS, J.S.C.

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