

Dziegielewski v Advanced Integrative Wellness, LLC
2010 NY Slip Op 30811(U)
March 9, 2010
Supreme Court, Nassau County
Docket Number: 18467/06
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

CAROLYN DZIEGIELEWSKI,

Index No. 18467/06

Plaintiff(s),

-against-

Motion Submitted: 2/4/10

Motion Sequence: 005, 006

**ADVANCED INTEGRATIVE WELLNESS, LLC,
d/b/a HEALTHBRIDGE MEDICAL ASSOCIATE,
P.C., HEALTHBRIDGE MEDICAL ASSOCIATE,
P.C., ELYSIUM DAY SPA, and DYNATRONICS,
INC.,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....XX
- Reply.....XXXX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

This motion by the defendants Advanced Integrative Wellness, LLC d/b/a Healthbridge Medical Associates, P.C., and Healthbridge Medical Associates, P.C., for an order pursuant to CPLR §§ 3124, 3126 striking the plaintiff Carolyn Dziegielewski's complaint or, in the alternative, an order pursuant to CPLR §§ 3124, 3126 striking the first cause of action and precluding the plaintiff from offering evidence at trial regarding her medical treatment and alleged physical injuries and an order awarding them costs and attorneys fees is determined as provided herein.

This motion by the defendant Dynatronics, Inc. for an order pursuant to CPLR §§ 3124, 3126 striking the plaintiff Carolyn Dziegielewski's complaint is determined as provided herein.

In this action, the plaintiff seeks to recover for negligence/*res ipsa loquitur*, statutory fraud and false advertising pursuant to General Business Law §§ 349, 350 and common law fraud for injuries she allegedly sustained, specifically, chronic myofascial pain syndrome, numbness and tingling in her lower extremities, insomnia, depression, anxiety and Synergie cellulite reduction as a result of her treatment at Elysium Day Spa with Dynatronics' product, a Synergie AMS device.

In this court's July 22, 2008 order, the plaintiff was directed to: (1) provide a verification for her response to Dynatronic's Demand for a Bill of Particulars within 20 days; (2) to respond to or supplement her responses to Items No. 12, 23, 24, 27, 28 and 29 of Dynatronics' Demand for a Bill of Particulars; (3) to provide a verification for her responses to Advanced Integrative Wellness, LLC, d/b/a Healthbridge Medical Associates, P.C., and Healthbridge Medical Associates, P.C.'s demand for a Bill of Particulars within 20 days; (4) to respond to or supplement her responses to Items No. 4, 6, 11, 12, 17, 18, 22, 23, 24, 29, 30, 31, 32, 33, 34, 35, 36, 37 and 38 of Advanced Integrative Wellness, LLC, d/b/a Healthbridge Medical Associates, P.C., and Healthbridge Medical Associates, P.C.'s Demand for a Bill of Particulars; (5) "to identify each and every health care provider and drug store she has visited since her last treatment at Elysium Day Spa, identify the conditions she was being treated for and to provide HIPPA complaint authorizations for each one; (6) to provide authorizations for her records at other health or alternative medicine facilities that she has gone to since 2001; (7) to respond to or supplement her responses to Demands 20, 21, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48 and 55 of Advanced Integrative Wellness, LLC, d/b/a Healthbridge Medical Associates, P.C., and Healthbridge Medical Associates, P.C.'s Notice of Discovery and Inspection; and, (8) to produce or make available for inspection documents responsive to Demand 25 of Advanced Integrative Wellness, LLC, d/b/a Healthbridge Medical Associates, P.C., and Healthbridge Medical Associates, P.C.'s First Notice for Discovery and Inspection within 20 days. That order cautioned that "[i]f plaintiff fails to supplement the Bills of Particulars and to otherwise comply with court orders, she will be precluded from offering evidence at trial as to those matters."

By these applications the defendants seek to, *inter alia*, strike the plaintiff's complaint based upon the plaintiff's alleged failure to comply with those directives.

In *Kihl v. Pfeffer*, 94 N.Y.2d 118, 123, 722 N.E.2d 55, 700 N.Y.S.2d 87 (1999), the Court of Appeals cautioned "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." Furthermore, the court underscored "that compliance with a disclosure order requires both

a timely response and one that evinces a good-faith effort to address the requests meaningfully.” (*Kihl v. Pfeffer, supra*, at p. 123, quoting CPLR § 3126). Although striking a pleading is a drastic remedy, it is warranted when a party’s failure to comply with discovery demands was willful and/or contumacious. (*Northfield Ins. Co. v. Model Towing and Recovery*, 63 A.D.3d 808, 809, 881 N.Y.S.2d 135 (2d Dept., 2009); citing *Frias v. Fortini*, 240 A.D.2d 467, 658 N.Y.S.2d 435 (2d Dept., 1997); *Novis v. Benes*, 268 A.D.2d 464, 701 N.Y.S.2d 914 [2d Dept., 2000]).

When unable to produce documents, a party must set forth where the records were kept, what efforts, if any, were made to preserve them and the circumstances surrounding their disappearance or destruction. (*Jackson v. City of New York*, 185 A.D.2d 768, 770, 586 N.Y.S.2d 952 [1st Dept., 1992]). A basis for a finding of good faith should also be set forth. (*Jackson v. City of New York, supra*, at p. 770). “It can be inferred that a party’s conduct is willful and contumacious when it repeatedly fails to comply with discovery demands and court orders compelling disclosure without providing a reasonable excuse for noncompliance.” (*Northfield Ins. Co. v. Model Towing and Recovery, supra* at p. 809, citing *Mei Yan Zhang v. Santana*, 52 A.D.3d 484, 485, 860 N.Y.S.2d 129 (2d Dept., 2008); *Dinstber v. Geico Ins. Co.*, 32 A.D.3d 893, 820 N.Y.S.2d 804 (2d Dept., 2006), *lv den.*, 8 N.Y.3d 810 (2007), *cert den.*, 522 U.S. 956 (2007); *Kroll v. Parkway Plaza Joint Venture*, 10 A.D.3d 633, 781 N.Y.S.2d 613 (2d Dept., 2004); *Ordonez v. Guerra*, 295 A.D.2d 325, 743 N.Y.S.2d 156 (2d Dept., 2002), *lv den.*, 99 N.Y.2d 507 (2003); *Cuotolo v. Khalife*, 242 A.D.2d 661, 664 N.Y.S.2d 939 (2d Dept., 1997); *Frias v. Fortini, supra*; *Kubacka v. Town of North Hempstead*, 240 A.D.2d 374, 657 N.Y.S.2d 770 [2d Dept., 1997]). Substantially tardy responses do not warrant drastic relief absent underlying willful contumacious conduct. (See, *Mawson v. Historic Properties, LLC*, 30 A.D.3d 480, 817 N.Y.S.2d 364 (2d Dept., 2006), citing *Lombardo v. St. Francis Hosp. Rehabilitation Servs.*, 16 A.D.3d 385, 790 N.Y.S.2d 405 (2d Dept., 2005); *Centerport Ins. Agency, Inc. v. Atlantic Fabricators of Rhode Island, Inc.*, 277 A.D.2d 414, 715 N.Y.S.2d 908 (2d Dept., 2000); *Vancott v. Great Atlantic & Pacific Tea Co. Inc.*, 271 A.D.2d 438, 705 N.Y.S.2d 640 [2d Dept., 2000]). Indeed “[t]he drastic remedy of striking a pleading must be supported by a clear showing that there was a failure to comply with discovery demands and that such failure was willful and contumacious.” (*Step-Murphy, LLC v. B & B Bros. Real Estate Corp.*, 60 A.D.3d 841, 875 N.Y.S.2d 535 (2d Dept., 2009), citing *Nieves v. City of New York*, 35 A.D.3d 557, 558, 826 N.Y.S.2d 647 (2d Dept., 2006); *Brandes v. North Shore Univ. Hosp.*, 22 A.D.3d 778, 803 N.Y.S.2d 204 (2d Dept., 2005); *Jenkins v. City of New York*, 13 A.D.3d 342, 788 N.Y.S.2d 117 [2d Dept., 2004]). “Similarly, preclusion is also warranted only when ‘the offending party’s lack of cooperation with disclosure was willful, deliberate and contumacious.’” (*Assael v. Metropolitan Transit Authority*, 4 A.D.3d 443, 772 N.Y.S.2d 364 (2d Dept., 2004), quoting *Pryzant v. City of New York*, 300 A.D.2d 383, 750 N.Y.S.2d 779 (2d Dept., 2002), citing *Patterson v. New York City Health and Hospitals Corp.*, 284 A.D.2d 516, 726 N.Y.S.2d 715 (2d Dept., 2004); *Cianciolo v. Trism Specialized Carriers*, 274 A.D.2d 369,

370, 711 N.Y.S.2d 441 (2d Dept., 2000); *Kelleher v. Mt. Kisco Medical Group, P.C.*, 264 A.D.2d 760, 694 N.Y.S.2d 770 [2d Dept., 1999]). This state's policy strongly favors the resolution of matters on the merits. (*Byam v. City of New York*, 68 A.D.3d 798, 890 N.Y.S.2d 612 (2d Dept., 2009); *Maiorino v. City of New York*, 39 A.D.3d 601, 834 N.Y.S.2d 272 (2d Dept., 2007); *Cruzatti v. St. Mary's Hosp.*, 193 A.D.2d 579, 597 N.Y.S.2d 457 [2d Dept., 1993]).

Money sanctions in the form of costs and attorneys fees are appropriate where a party's conduct has caused financial prejudice. (*Riley v. ISS Intern. Service Systems, Inc.*, 304 A.D.2d 637, 757 N.Y.S.2d 593 [2d Dept., 2003]).

Despite repeated court orders dated August 30, 2007 and February 25, 2008 issued prior to the defendants' motions to compel, countless compliance conferences held on October 8, 2008, and January 9, 2009, January 16, 2009, January 22, 2009, February 20, 2009, March 11, 2009, April 29, 2009, June 26, 2009, July 13, 2009, and July 26, 2009 and this court's clear directives in its July 22, 2008 order, there was a prolonged failure by the plaintiff to provide a comprehensive list of health care providers she has seen as well as the conditions that she was treated for and to supplement her Bill of Particulars by setting forth the name of every hospital, clinic or institution where any treatment or examination was rendered and the dates of admission and discharge. The plaintiff's woefully belated second supplemental Bill of Particulars served at the July 26, 2009 conference listed 13 new health care providers without any dates. When this motion was made, all drug stores utilized by the plaintiff were yet to be identified and authorized to release her records, this, despite testimony by the plaintiff revealing their existence. When this motion was made, the plaintiff had also failed to supplement her Bill of Particulars by providing a detailed statement concerning how her injury occurred. She also failed to produce documents relating to her Social Security Disability application. Moreover, responses to many of her long overdue authorizations proved futile as the responsive documents had been destroyed. And, she also failed to set forth the manner in which the Synergie device was improperly operated and/or maintained, the substance of all written statements or advertisements she read with reference to Synergie and the dates read, and the misleading statements made by the defendants and the dates made.

The plaintiff's health history as well as possible history of accidents and injuries appears to be both complicated and complex. It appears that she has been in a number of accidents and has undergone numerous medical procedures. The movants were prejudiced by her failure to provide access to all of her medical records as well as details relating to her injuries prior to her two depositions. Only in response to this motion after this court's December 19, 2009 conference has the plaintiff provided some of the information and long sought after materials or an explanation for her failure to provide them.

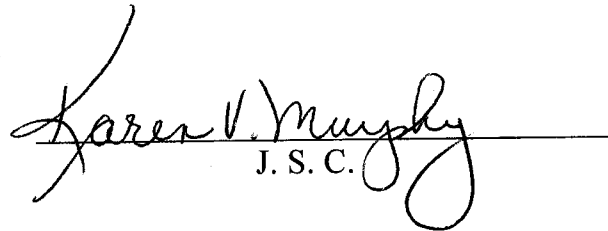
It is this court's view that the delay is attributable to the plaintiff and/or her attorney's conduct. This conduct simply cannot be countenanced. Accordingly, the plaintiff is precluded from offering any evidence of medical treatment received on account of her alleged injuries that have not been fully disclosed as well as evidence or testimony regarding defendants' statements or advertising that allegedly misled her that have not been heretofore identified.

The defendants Advanced Integrative Wellness, LLC, d/b/a Healthbridge Medical Associates, P.C. and Healthbridge Medical Associates, P.C.'s motion for award of costs and attorneys fees is granted. (See, *Kogan v. Royal Indem. Co.*, 179 A.D.2d 399, 577 N.Y.S.2d 849 (1st Dept., 1992); *Figdor v. City of New York*, 33 A.D.3d 560, 823 N.Y.S.2d 385 [1st Dept., 2006]). They are directed to serve and submit copies of legal bills redacted where warranted within ten (10) days of this court's orders.

Counsel for Dynatronics is also awarded costs and attorneys fees and is accordingly directed to submit copies of legal bills redacted where warranted within ten (10) days of this court's orders, as well.

The foregoing constitutes the Order of this Court.

Dated: March 9, 2010
Mineola, N.Y.


J. S. C.

ENTERED
APR 05 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE