

Fine v Pfizer Inc.

2010 NY Slip Op 31853(U)

July 7, 2010

Supreme Court, New York County

Docket Number: 109839/06

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 109839/2006

FINE, DR. IRWIN

INDEX NO. 109839/06

vs

PFIZER INC.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

STRIKE

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <u>A-2</u>	<u>1</u>
Answering Affidavits — Exhibits <u>A-5</u>	<u>2</u>
Replying Affidavits _____	_____

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
JUL 12 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 7, 2010

MARTIN SHULMAN J.S.C.
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
COUNTY OF NEW YORK: IAS PART 1

-----X
DR. IRWIN FINE,

Plaintiff,

-against-

PFIZER INC.,

Defendant.

Index No.: 109839/06

DECISION/ORDER

FILED

JUL 12 2010

NEW YORK
COUNTY CLERK'S OFFICE

-----X
Defendant Pfizer Inc. ("Pfizer" or "Defendant") moves to strike the complaint in this action pursuant to CPLR §3126 based upon plaintiff Dr. Irwin Fine's ("Fine" or "Plaintiff") failure to comply with Pfizer's discovery demands seeking: medical authorizations, including authorizations to interview plaintiff's non-party treating physicians pursuant to *Arons v. Jutkowitz*, 9 N.Y.3d 393 (2007) ("*Arons* authorizations"); collateral source and damages information; additional documents relevant in the discovery process;¹ and tax returns. Alternatively, Defendant requests that Plaintiff be precluded from introducing any evidence of damages, information, or documents that he failed to produce or be compelled to respond to Pfizer's outstanding requests. Plaintiff opposes the motion.

In this action, Fine alleges various causes of action based upon injuries he claims to have suffered as a result of ingesting Lipitor, a cholesterol lowering medication Pfizer manufactured. The case is one of several similar actions coordinated under the caption *In re: New York Lipitor Products Liability Litigation*, Case

¹ Central to Pfizer's motion is the undisputed contention that, in response to Pfizer's demands, Fine has produced only a one page document consisting of a medical provider's 2004 hand-written notes.

Management Index No. 767000/07. Pfizer's motion cites other Lipitor plaintiffs' alleged discovery defaults and this court's decision dated September 3, 2009 in *Emerson v. Pfizer, Inc.* (N.Y. County Index No. 115490/07), which addressed similar discovery issues.

Here, Pfizer claims that it first served a demand for authorizations and other discovery demands on October 13, 2006 and eventually gave Plaintiff's counsel an extension of time to respond. Thereafter, Plaintiff continuously and unilaterally extended the allotted time to respond. Infrequently throughout the course of the discovery process, Plaintiff has provided Defendant with certain requested documents, though in many instances Defendant claims the responses were incomplete.² Correspondence between counsel for the parties from November 3, 2006 through December 4, 2009 documents the conflict. See Motion at Exhs. B through E.

In opposition to this motion, Plaintiff's counsel does not deny that he has not strictly adhered to all discovery deadlines, but urges that the defaults have been remedied and were not willful or contumacious.³ Plaintiff's counsel further claims that he has offered to provide collateral source and damages information ten days before each plaintiff's deposition. Finally, Plaintiff claims that Defendant is not entitled to income tax returns as the information Defendant seeks is readily available from other sources he has provided.

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

³ Plaintiff's counsel states that he provided more than 900 authorizations to defense counsel in connection with all of the Lipitor actions.

Discussion

CPLR §3126 states the following relevant provisions with respect to penalties for failure to comply with discovery procedure:

If any party...refuses to obey an order for disclosure or willfully 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.

While the penalty of striking a pleading for failure to comply with disclosure is extreme, courts have nonetheless 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 (1st Dept. 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 A.D.2d 488, 489 (1st Dept.), *lv. to app. den.*, 88 N.Y.2d 802 (1996)(disobedience of a series of court orders directing discovery warranted striking of pleading).

A. Authorizations

There is no dispute that Defendant is entitled to the requested authorizations. Here, although the authorizations were not provided in a timely manner, 87 authorizations were provided from June 2007 to date. Also, Plaintiff's counsel explains

that 22 authorizations that were overdue were misfiled and that this error was cured immediately upon learning of the omission when Pfizer served the instant motion. Krum Aff. in Opp. at ¶19. Under these circumstances, the court cannot conclude that Plaintiff wilfully withheld authorizations and striking the complaint on this ground is not warranted.

However, Fine's opposition reveals that he and his counsel continue to improperly place an impossible onus on Pfizer to identify his medical providers. Plaintiff submits an affidavit averring that he has signed and returned all authorizations his attorneys forwarded to him and he believes these authorizations "represented all the doctors I had seen to that point." See Krum Aff. in Opp. at Exh. S, ¶14. As Fine's affidavit is not entirely unequivocal, the motion is granted to the extent that Plaintiff is directed to identify any medical providers for which no authorization was previously supplied and to provide those authorizations to Defendant, or to provide a further affidavit attesting that all providers have been identified. Furthermore, Plaintiff and his counsel are reminded that discovery is a continuing process, and as such, Fine must continue to update his responses to include any new providers he has seen since the case commenced.

B. Collateral Source Information and Damages

As with Pfizer's demands for authorizations, there is no dispute that Fine is obligated to produce discovery as to collateral sources and damages. As previously stated, Plaintiff's counsel has proposed that these materials be produced no later than ten days before each plaintiff's deposition. Defendant's counsel has refused to so stipulate.

Under CPLR 3120(2), discovery responses must be served within 20 days of a written demand. Here, Fine has had well more than the 20 day statutory time period to produce the requested documentation. Plaintiff's counsel has no right to unilaterally manipulate discovery procedure and therefore must provide Defendant with all requested collateral source and damages information, regardless of proximity to Plaintiff's deposition. Pfizer's motion is granted to the extent that Fine shall be precluded from introducing evidence of collateral sources and damages unless Plaintiff fully responds to Defendant's demands within 30 days of service of a copy of this decision and order with notice of entry.

C. Fine's Limited Document Production

As previously stated, in response to Pfizer's demands, Fine has produced only a one page document consisting of a medical provider's 2004 hand-written notes, which he produced three years ago. See Motion at Exh. C. Plaintiff maintains in his affidavit in opposition that it is not his practice to retain copies of his "medical, pharmaceutical, insurance or other records relating to [his] injuries." See Krum Aff. in Opp. at Exh. S, ¶7. Acknowledging his continuing obligation to preserve and maintain potentially relevant materials, Fine nonetheless states that to the best of his knowledge, he has no additional documents in his possession. *Id.* at ¶15.

Pfizer argues that Fine's meager production is "manifestly and objectively deficient" and "patently inadequate". Defendant concludes that Plaintiff must be remiss since, at the very least, he should have retained pertinent documentation since 2006 when this action was commenced.

Although Plaintiff has produced only one page of documentation related to this action, without any evidence otherwise, the court must accept his sworn affidavit claiming he possesses no other documents and has not destroyed any relevant documents as truthful. An affidavit made by one party claiming that he possesses no additional documents relevant to the matter will satisfy that party's discovery obligation and preclude sanctions. See *Greenberg v. Montalvo*, 290 A.D.2d 402 (1st Dept. 2002). While Plaintiff's assertion that he is not in the practice of keeping documents raises questions about his diligence in this action, at this juncture any potential conclusion that Fine has acted wilfully would be based solely upon speculation. The court notes, however, that plaintiff's limited production of documentation supporting his claims raises questions as to whether he will be able to prove a *prima facie* case. Accordingly, Pfizer's motion is denied to the extent that it is based upon Fine's production of only a single page document.

D. Income Tax Returns

Finally, Defendant is entitled to Plaintiff's income tax returns. Disclosure of income tax returns is disfavored due to their highly confidential and private nature. *Williams v New York City Hous. Auth.*, 22 A.D.3d 315, 316 (1st Dept. 2005). Generally, a party seeking disclosure of tax returns "must make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources". *Id.* However, the defendant is entitled to the plaintiff's income tax returns in the case of a negligence action, where the injured party is claiming a loss of earnings due to the accident and where, as here, that party was self-employed. *Lane v.*

D'Angelos, 108 A.D.2d 727, 728 (2nd Dept. 1985) ("in a negligence action where a self-employed plaintiff claims loss of earnings . . . a defendant is entitled to the discovery and inspection of the plaintiff's income tax returns"). Here, while Plaintiff did put together a chart detailing his earnings from his practice, he did not include all sources in the chart. See *Krum Aff. in Opp.* at Exh. N. The court agrees with Defendant that the information provided by Plaintiff is insufficient and that due to the circumstances of the case, including Plaintiff's single page document production discussed above, more information pertaining to Fine's earnings is required.

Accordingly, it is hereby

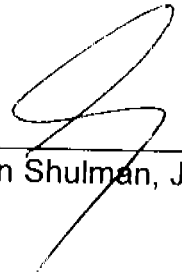
ORDERED that Pfizer's motion is granted to the extent that within 30 days of service of a copy of this decision and order with notice of entry, Plaintiff is directed to:

- 1) identify any medical providers for which no authorization was previously supplied and to provide those authorizations to Defendant, or to provide a further affidavit attesting that all providers have been identified;
- 2) respond to Defendant's demand for documentation concerning Fine's damages and collateral source information; and
- 3) provide copies of his income tax returns as requested by Defendant. In the event that Plaintiff fails to comply with the foregoing, Defendant shall submit an affirmation detailing the default and shall submit 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 July 20, 2010 at 9:30 a.m. at 60 Centre St., Room 325, 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
July 7, 2010



Hon. Martin Shulman, J.S.C.

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