

<b>D'Angiolella v Brown</b>
2010 NY Slip Op 32340(U)
August 27, 2010
Supreme Court, New York County
Docket Number: 150467/07
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

D'ANGIOLELLA, VINCENTO  
Plaintiff(s),  
- v -  
BROWN, WILLIAM, M.D.  
Defendant(s).

INDEX NO. 150467/07  
MOTION DATE 8/24/10  
MOTION SEQ. NO. 003  
MOTION CAL. NO.

The following papers, numbered 1 to 15, were read on this motion to vacate default.

Notice of Motion / ~~Order to Show Cause~~ - Affidavits - Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-3  
4-10, 11-15

Cross-Motion: [ ] Yes [ ] No

THIS MATTER IS FILED FOR THE COURT'S REVIEW AND DECISION  
WITH THE ACCOMPANYING MEMORANDUM DECISION

*and Order*  
**FILED**  
AUG 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 8/27/10

JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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

-----X  
VINCENZO D'ANGIOLELLA,

Plaintiff,

Index No. 150467/07

- against -

Decision and Order

WILLIAM BROWN, M.D., CONCORDE MEDICAL  
GROUP, PLLC, NICOLE WHITE, M.D., TISCH  
HOSPITAL - NEW YORK UNIVERSITY MEDICAL  
CENTER, and NEW YORK UNIVERSITY MEDICAL  
CENTER,

Defendants.

**FILED**  
AUG 3 0 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Motion Sequence Numbers 002, 003, and 004 are consolidated for disposition. In Motion Sequence Number 002, defendants Nicole White, M.D., and NYU Hospitals Center move for an order dismissing plaintiff's complaint for failure to comply with this court's orders, or in the alternative, prohibiting plaintiff from proffering evidence or testimony at the time of trial regarding the outstanding discovery or deeming all issues related to the outstanding discovery resolved in favor of the moving defendants. Motion Sequence Number 002 was fully submitted on July 27, 2010, on plaintiff's default on the motion.<sup>1</sup> The parties appeared for a court conference on August 3, 2010, at which Motion Sequence Number 002 was discussed. Subsequently, plaintiff brought an order to show cause (Motion Sequence Number 003), seeking an order vacating his default on Motion Sequence Number 002, and defendant William Brown, M.D., brought an order to show cause (Motion Sequence Number 004) seeking similar relief to to the relief sought in Motion Sequence

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<sup>1</sup> The court declines to consider defendant William Brown, M.D.'s request for affirmative relief within his affirmation in support on Motion Sequence Number 002, as Dr. Brown failed to formally cross-move or move for this relief.

Number 002. Motion Sequence Numbers 003 and 004 were fully submitted on August 24, 2010. Plaintiff also failed to oppose Motion Sequence Number 004, and that has been submitted on default.

As an initial matter, plaintiff's motion (Motion Sequence Number 003) to vacate his default on Motion Sequence Number 002 is denied. Plaintiff fails to adequately explain his default in timely filing opposition papers to Motion Sequence Number 002 and fails to provide a meritorious defense to his failure to honor prior court orders. Motion Sequence Number 002 shall be considered on default.

Plaintiff's medical malpractice claim relates to alleged departures during a laparoscopic cholecystectomy on June 30, 2006. After the care rendered by defendants in June and July 2006, plaintiff, himself a physician and an Italian citizen, returned to Europe and apparently received medical treatment there related to the injuries that are the subject of this suit. Plaintiff's counsel provided defendants' counsel with authorizations to obtain the European medical records, but defendants were unable to obtain the records with United States-issued HIPAA-compliant authorizations. Thereafter, on or about February 2, 2009, defendants served plaintiff with a Notice to Produce any European records in his possession, including records from Monaldi Hospital in Naples, Italy; an entity called Europe Assistance; Salvatore Pezone, M.D., in Italy; Mario Pasternosto, M.D., in Italy; Paulbrousse Hospital, in Paris, France; the "diagnostic center in Italy where a contrast study was performed in 2007"; Dr. Corcione, in Italy; and Henry Bismuth, in France.

Plaintiff's failure to respond meaningfully to the Notice to Produce was the subject of a number of court orders. On March 3, 2009, this court ordered plaintiff to respond to the Notice to Produce within thirty (30) days. On May 5, 2009, plaintiff was ordered to provide defendants with the records in plaintiff's possession from the eight aforementioned European providers. Similar orders were signed on June 23, 2009; October 6, 2009; and December 1, 2009. Plaintiff was also repeatedly directed to provide defendants with the names and addresses of any European providers and to supplement his bills of particulars regarding his lost earnings claim within sixty (60) days of the last defendant's deposition. At the parties' conference on February 23, 2010, the records from the aforementioned European providers were still outstanding. Accordingly, the court signed the following order (the "February 2010 Order"): (1) plaintiff was to provide all records from the aforementioned providers that were currently within his custody or control within thirty days; (2) plaintiff was to write to said providers and seek to obtain the aforementioned records within twenty days; (3) plaintiff was to telephone the providers and attempt to expedite the process if said records had not been received by plaintiff within thirty days; (4) plaintiff was to turn over to defendants copies of any records he received within seven days of receipt; (5) if plaintiff's efforts to obtain copies of the medical records were unsuccessful, he was to provide an affidavit detailing the efforts he made to obtain the records prior to the next conference date of April 27, 2010; and (6) plaintiff was to attempt to obtain the aforementioned records in person if he returned to Europe in the interim. By the date of the next conference, April 27, 2010, plaintiff had failed to comply with the February 2010 Order and had failed to provide a supplemental bill of particulars as to the lost earnings claim. Instead, plaintiff had filed his note of issue on March 31, 2010, which the court struck at a

subsequent conference on May 25, 2010, and again ordered plaintiff to produce the aforementioned outstanding discovery. This motion followed.<sup>2</sup>

C.P.L.R. § 3126 sets forth that “[i]f any party . . . refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed . . . the court may . . . [make] an order striking out pleadings . . . [.]” A court may strike a pleading where plaintiff’s failure to comply with orders is “willful, contumacious or in bad faith.” Fish & Richardson, P.C. v Schindler, 2010 N.Y. Slip Op. 04465, \*2, 75 A.D.3d 219, \_\_\_ (1st Dep’t May 25, 2010) (internal quotation marks and citation omitted). Plaintiff’s “pattern of disobeying court orders and failing to provide discovery” is certainly grounds for striking his complaint. Id. Further, at oral argument on Motion Sequence Numbers 003 and 004, plaintiff’s attorney acknowledged that he had knowingly ignored the court’s orders because he did not want to ask his client to make a good faith attempt to obtain the records in question. These actions are disingenuous and exceedingly troubling. The moving defendants have established that plaintiff has willfully failed to provide discovery as directed in a number of court orders. The court, in its discretion, will conditionally grant defendants’ motions for an order striking the complaint, and allow plaintiff one final chance to comply with this court’s orders. In light of this decision, the court will also extend plaintiff’s note of issue due date. Accordingly, it is hereby

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<sup>2</sup> The court notes that on August 24, 2010, during oral argument on Motion Sequence Numbers 003 and 004, it came to light that plaintiff’s attorney had improperly and prematurely filed a second note of issue on August 18, 2010, during the pendency of this recent motion practice dealing with outstanding discovery and with the attorney’s full knowledge of the existence of outstanding discovery. The court again struck plaintiff’s note of issue by so-ordered stipulation dated August 24, 2010.

ORDERED that defendants Nicole White, M.D.'s and NYU Hospitals Center's motion (Motion Sequence Number 002), and defendant William Brown, M.D.'s motion (Motion Sequence Number 004) are conditionally granted, and plaintiff's complaint is stricken as to these defendants, unless, within twenty (20) days from service of a copy of this order with notice of entry, plaintiff shall, if he has not already, serve upon all parties and the Clerk of this Part:

(1) copies of all records from the aforementioned providers that are currently within his custody or control or, if the records are unavailable, a detailed affidavit from plaintiff explaining the efforts he made to comply with the court's February 23, 2010, including his efforts to request the records in writing (together with the address he mailed the request to), by telephone (together with the telephone number that he used to contact the provider), and if applicable, in person; and

(2) a supplemental bill of particulars as to lost earnings; and it is further

ORDERED that Motion Sequence Number 003 is denied; and it is further

ORDERED that the time to file note of issue is extended to October 29, 2010; and it is further

ORDERED that the parties shall appear for a conference on October 19, 2010, at 10:00 a.m., in Part 6, Courtroom 345, at 60 Centre Street.

Dated: *Aug 27*, 2010

**FILED**  
AUG 30 2010  
NEW YORK COUNTY CLERK'S OFFICE  
\_\_\_\_\_  
JOAN B. LOUIS, J.S.C.