

Morante v Studin

2010 NY Slip Op 34074(U)

May 24, 2010

Supreme Court, Nassau County

Docket Number: 19885/06

Judge: Antonio I. Brandveen

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ORIGINAL

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

JOAN K. MORANTE and ALEX MORANTE,

Plaintiffs,

- against -

JOEL R. STUDIN, M.D. and PREMIER
MEDICAL, PC,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 19885/06

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3, 4</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiffs move pursuant to CPLR 3126 to sanction the wilful and contumacious behavior of the defendants for their refusal to provide disclosure, to obey a July 23, 2009 disclosure order of the Court, and for spoliation of evidence. The plaintiffs request the answer be stricken, or prohibit the defendants from supporting their claims and opposing the plaintiffs' claims, and granting costs, disbursements against the defendants. This motion is supported by a March 6, 2010 affirmation by plaintiffs' counsel, a March 6, 2010 memorandum of law, and other supporting papers.

The defendants oppose this motion. The defense attorney states, in a March 15,

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2010 affirmation, the defendants fully complied with the July 23, 2009 court order, and points to a September 8, 2009 and November 20, 2009 correspondence attached to the plaintiffs moving papers, and an October 6, 2009 affidavit by Chris Kossifos, the managing director at CK Technology, LLC attached to the opposition papers. The defense attorney notes Kossifos' explanation that all old data from the time period at issue to this lawsuit has been lost and all recovery efforts failed. The defense attorney asserts the office notes exist, but there is no legal requirement a physician maintain office notes on a hard drive, and preserve that hard for a designated period of time. The defense attorney argues the plaintiffs fail to demonstrate any bad faith, lack of appropriate means to prove their claims nor substantial prejudice by reason of the missing evidence. The defense attorney avers striking the answer or imposing sanctions are drastic and unnecessary here.

The plaintiffs' counsel replies, in an April 1, 2010 affirmation, the defendants fail to address the plaintiffs' main contention, namely the defendant Joel R. Studin, M.D. refused to supply crucial evidence which the doctor sworn exists, and this action necessitated this motion. The plaintiffs' counsel points out Kossifos' October 6, 2009 affidavit has no bearing on the issues raised in this motion, rather the sole issue are the names and addresses of the transcriptionists which Dr. Studin used. The plaintiffs' counsel argues the defense legal citations are in apposite to the issues.

The defense attorney replies, in an April 5, 2010 affirmation, with confusion by the

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plaintiffs' position. The defense attorney argues Dr. Studin produced his office records, and supplied a sworn statement regarding the hard drive. The defense attorney points to the plaintiffs' submission of two pages of typed progress notes, and states the notes do not contain any initials to enable Dr. Studin to identify any typists, the doctor and defense counsel have fully complied with the disclosure.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. CPLR 3126 provides:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, 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, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or (3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

This Court again directs the defendants or their attorney to supply to the plaintiffs' counsel the contact information regarding the defendants' transcriptionists of the voice-recorded notes of the defendant Dr. Studin. The defendants are directed to supply that information or provide an affidavit by Dr. Studin for a reason why that information has not been supplied. The Court finds, at this juncture, the defense actions have not been

shown to be a refusal to obey the July 23, 2009 court order for disclosure or wilfully failing to disclose information. The Court notes the motion Court retains the authority to impose CPLR 3126 relief should it determined, in the future, the defense actions with respect to disclosure emanate from a refusal to obey the court orders for disclosure or wilfully failing to disclose information. Moreover, the trial Court has the discretion to instruct the Jury with respect to the failure to produce documents or evidence, or some other corrective action (*see* PJI 1:75, 1:77).

Accordingly, the motion is granted solely in accord with this decision. The defendants are directed to comply with this order within 20 days after service of a copy of this order with notice of entry upon defense counsel, and if there is noncompliance with this order the defendants' answer will be stricken.

So ordered.

Dated: **May 24, 2010**

ENTER:



J. S. C.

ENTERED

MAY 28 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

FINAL DISPOSITION XXX

NON FINAL DISPOSITION