

Tammaro v Pfizer Inc.
2011 NY Slip Op 31374(U)
May 23, 2011
Sup Ct, NY County
Docket Number: 109850/06
Judge: Martin Shulman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

PRESENT: MARTIN SHULMAN
J.S.C.

PART 1

Judge

Index Number : 109850/2006
TAMMARO, PAUL A., SR.
vs.
PFIZER INC
SEQUENCE NUMBER : 001
COMPEL DISCLOSURE

INDEX NO. 109850/06
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion is for _____

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits A-L
Answering Affidavits - Exhibits A-Y
Replying Affidavits - Exhibits A-C

PAPERS NUMBERED	
1	1
2	2
3	3

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

MAY 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 23, 2011

MARTIN SHULMAN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
PAUL A. TAMMARO, SR.

Index No. 109850/08

Plaintiffs,

Decision & Order

-against-

PFIZER INC.,

FILED

Defendant.

MAY 25 2011

-----X
Hon. Martin Shulman

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Pfizer Inc. ("Pfizer" or "defendant") moves to strike plaintiff Paul A.

Tammaro, Sr.'s complaint based upon alleged discovery defaults. Alternatively, defendant asks the court to preclude Tammaro from introducing into evidence information or documents he unjustifiably failed to produce, including evidence pertaining to his damages or, alternatively, to compel Tammaro to immediately respond to defendant's outstanding demands. Plaintiff opposes the motion.

Pfizer served its Second Set of Interrogatories on November 1, 2010 (Exh. D to motion). In opposition, plaintiff's counsel describes the multiple simultaneous deadlines and obligations he faced in other Lipitor litigations at the time Tammaro's responses were due.¹ Plaintiff's counsel also documents his efforts to obtain an extension of time to respond from opposing counsel, to no avail. Prior to this motion, Tammaro provided 27 authorizations and responded to Pfizer's demands for discovery and inspection, witnesses, the First Set of Interrogatories, requests for admission and demand for

¹ Both parties' submissions refer extensively to alleged discovery defaults and proceedings in other Lipitor actions pending before this court (coordinated with this case under the caption *In re: New York Lipitor Products Liability Litigation, Case Management Index No. 767000/07*) and in other courts across the country.

collateral source information (Krum Opp. Aff. at ¶35). Ultimately, Tamaro responded to the outstanding interrogatories on January 30, 2011 (Exh. X to Krum Opp. Aff.), after Pfizer served this motion.

In reply, defendant's counsel contends many of the responses are deficient or not responsive. Defendant's counsel's reply affirmation does not expressly delineate which of Tamaro's interrogatory responses are alleged to be deficient. However, it appears from attached correspondence (Exh. B to Cheffo Aff. in Response) that items 1, 2, 4, 6, 9 and 13-16 are allegedly at issue. Pfizer's reply also refers to its arguments raised in connection with a previously pending motion in *Fine v Pfizer Inc.*, N.Y. County Index No. 109839/06).²

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

² As the motion in *Fine* was submitted almost seven (7) weeks after this motion, the court was unable to determine this motion earlier. Subsequently, the motion in *Fine* was withdrawn and the action discontinued.

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 AD2d 374 (1st Dept 1990); *Kutner v. Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1st Dept), *lv. to app. den.*, 88 NY2d 802 (1996)(disobedience of a series of court orders directing discovery warranted striking of pleading).

At the outset, and although not raised by Pfizer, Tammaro's interrogatories do not comply with CPLR 3133(b), which provides that "[i]nterrogatories shall be answered in writing under oath by the party served, if an individual . . ." Here, the interrogatories are signed by plaintiff's counsel, but they are neither signed under oath nor are they signed by the plaintiff as CPLR 3133(b) requires. This defect should be remedied forthwith.

Turning to the sufficiency of Tammaro's responses, interrogatory number 1 asks plaintiff to identify and provide addresses for all healthcare providers for whom no authorizations were provided. Plaintiff responds with various objections, but ultimately refers defendant to the medical records obtained to date and states that he "believes he has provided all required authorizations." Similarly, interrogatory 2 asks plaintiff to identify healthcare providers seen within the last four (4) years and the reasons for such visits. Again, Tammaro refers defendant to his medical records and identifies two new healthcare providers for whom he also supplied authorizations. Interrogatory 13 asks

plaintiff to identify all injuries he attributes to Lipitor that still cause him impairment.

Tammaro responds by simply referring to his amended complaint, which was filed four (4) years ago. In response to interrogatories 14 through 16 which request information about plaintiff's medical treatment, Tammaro once again refers defendant to the medical records produced to date.

The court agrees that the above responses require supplementation. However, of the 22 interrogatories contained in Pfizer's demand, plaintiff has sufficiently responded to all but the above six (6). Despite Tammaro's tardiness in serving the interrogatories, under all of the circumstances, the court cannot conclude that plaintiff's default was so wilful and/or contumacious to warrant striking the complaint. Accordingly, the branch of the motion to strike the complaint is denied.

Pfizer's motion is granted to the extent that plaintiff is directed to fully respond to interrogatories 1, 2, 13, 14, 15 and 16 and to properly sign the interrogatories under oath. In the event Tammaro fails to comply with the foregoing within 30 days of service of a copy of this decision and order with notice of entry, he shall be precluded from introducing evidence pertaining to his healthcare providers at trial.

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 Tammaro is directed to fully respond to interrogatories 1, 2, 13, 14, 15 and 16 and to properly sign the interrogatories under oath; and it is further

ORDERED that in the event plaintiff fails to comply with the foregoing, defendant shall submit an affirmation detailing the default and shall submit an order of preclusion on notice; and it is further

ORDERED that the remaining branches of the motion are denied.

Counsel for the parties are directed to appear for a preliminary conference on June 7, 2011 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
May 23, 2011



Hon. Martin Shulman, J.S.C.

FILED

MAY 25 2011

NEW YORK
COUNTY CLERK'S OFFICE