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SHORT FORM ORDER

INDEX NO. 12162/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

COPY

ARLENE MORANTE and JOSEPH MORANTE,

Plaintiffs,

-against-

CHRISTINE J. DUNCAN, M.D., WOMEN FOR WOMEN OBSTETRICS & GYNECOLOGY, LLC., GLENN E. RABIN, M.D., STEVEN L. MENDELSOHN, M.D., ELLIOT KALKER, M.D., and ZWANGER & PESIRI RADIOLOGY GROUP, LLP,

Defendants.

ORIG. RETURN DATE: JULY 28, 2011
FINAL SUBMISSION DATE: SEPTEMBER 22, 2011
MTN. SEQ. #: 001
MOTION: MOT D

ORIG. RETURN DATE: JULY 28, 2011
FINAL SUBMISSION DATE: SEPTEMBER 22, 2011
MTN. SEQ. #: 002
CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 10 read on this motion TO STRIKE ANSWER AND CROSS-MOTION FOR A PROTECTIVE ORDER. Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Affirmation in Opposition and supporting papers 7, 8; Replying Affidavit and supporting papers 9, 10; it is,

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ORDERED that this motion by plaintiffs, ARLENE MORANTE and JOSEPH MORANTE (collectively "plaintiffs"), for an Order:

(1) pursuant to CPLR 3126, striking the answer of defendants, GLENN E. RABIN, M.D., ELLIOT KALKER, M.D., and ZWANGER & PESIRI RADIOLOGY GROUP, LLP, and granting a judgment of default in favor of plaintiffs and against defendants, GLENN E. RABIN, M.D., ELLIOT KALKER, M.D. and ZWANGER & PESIRI RADIOLOGY GROUP, LLP, on the grounds that these defendants have willfully failed to comply with plaintiffs' multiple discovery requests; or, alternatively, if denied, then

(2) pursuant to CPLR 3126, compelling defendants, GLENN E. RABIN, M.D., ELLIOT KALKER, M.D., and ZWANGER & PESIRI RADIOLOGY GROUP, LLP, to provide outstanding discovery due plaintiffs within twenty (20) days of service upon them of a copy of this Order with notice of entry, and if defendants, GLENN E. RABIN, M.D., ELLIOT KALKER, M.D., and ZWANGER & PESIRI RADIOLOGY GROUP, LLP, fail to do so, then deeming their answer stricken and granting a judgment of default in favor of plaintiffs and against defendants, GLENN E. RABIN, M.D., ELLIOT KALKER, M.D., and ZWANGER & PESIRI RADIOLOGY GROUP, LLP; or, alternatively, if denied, then

(3) pursuant to CPLR 3126, compelling defendants, GLENN E. RABIN, M.D., ELLIOT KALKER, M.D., and ZWANGER & PESIRI RADIOLOGY GROUP, LLP, to provide outstanding discovery due plaintiffs within twenty (20) days of service upon them of a copy of this Order with notice of entry; and

(4) setting a thirty-day on or before date certain, which cannot be adjourned without Court Order, for the depositions of the 2007 mammogram technician with the initials "ML" and the 2007 sonographer with the initials "GS," if they are still presently employed at defendant ZWANGER & PESIRI RADIOLOGY GROUP, LLP,

is hereby **GRANTED** solely to the extent provided hereinafter; and it is further

ORDERED that this cross-motion by defendants, GLENN E. RABIN, M.D., STEVEN L. MENDELSOHN, M.D., ELLIOT KALKER, M.D., and ZWANGER & PESIRI RADIOLOGY GROUP, LLP (the "moving defendants"), for an Order:

(1) pursuant to CPLR 3103, and the Court's inherent authority, granting the moving defendants a protective Order precluding further discovery

by plaintiffs with regard to all diagnostic studies performed by the moving defendants because the moving defendants have provided copies of all studies performed and because the moving defendants have already appeared for depositions;

(2) denying plaintiffs' instant motion;

(3) pursuant to CPLR 3126, precluding plaintiffs from introducing testimony and evidence at trial concerning plaintiff ARLENE MORANTE's medical condition for failure to provide medical authorizations;

(4) pursuant to CPLR 3101, 3120 and 3124, compelling plaintiffs to provide outstanding discovery; and

(5) pursuant to CPLR 3126, precluding plaintiffs from deposing further defendant employees and former employees,

is hereby **GRANTED** solely to the extent provided hereinafter.

This medical malpractice action was commenced on or about March 27, 2009, to recover damages as a result of defendants' alleged failure to timely and properly diagnose plaintiff ARLENE MORANTE's breast cancer. Plaintiff JOSEPH MORANTE asserts a claim for loss of services and consortium.

Plaintiffs have now filed the instant discovery motion seeking the relief described hereinabove, and in response, the moving defendants have filed the instant cross-motion for, among other things, a protective Order precluding further discovery by plaintiffs with regard to all diagnostic studies performed by the moving defendants.

Initially, the Court notes that CPLR 3101 (a) provides for disclosure of "all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). Although CPLR 3101 favors liberal disclosure, such disclosure must be material and necessary to the prosecution or defense of the action (CPLR 3101; *Gill v Mancino*, 8 AD3d 340 [2004]; *DeStrange v Lind*, 277 AD2d 344 [2000]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered evidence material in the prosecution or defense" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 407 [1968]). Moreover, "New York has long favored open and far-reaching pretrial discovery" (*DiMichel v South Buffalo Ry. Co.*, 80 NY2d 184 [1992], *cert*

denied sub nom Poole v Consolidated Rail Corp., 510 US 816 [1993]), and "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]; *Northway Eng'g v Felix Indus.*, 77 NY2d 332 [1991]).

By commencing the instant action to recover damages for medical malpractice, the physician/patient privilege held by plaintiff ARLENE MORANTE was waived with respect to her relevant past medical history (*see Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452 [1983]; *Gill v Mancino*, 8 AD3d 340, *supra*; *McLane v Damiano*, 307 AD2d 338 [2003]; *DeStrange v Lind*, 277 AD2d 344, *supra*). However, a party does not waive the privilege with respect to unrelated illnesses or treatments (*see McLane v Damiano*, *supra*; *see also Sadicario v Stylebuilt Accessories*, 250 AD2d 830 [1998]).

Moreover, CPLR 3126 provides that a court may, in its discretion, impose a wide range of penalties upon a party which either: (a) refuses to obey an order for disclosure; or (b) willfully fails to disclose information which the court finds ought to have been disclosed (CPLR 3126). The penalties proposed by the statute include: (1) deciding the disputed issue in favor of the prejudiced party; (2) precluding the disobedient party from producing evidence at trial on the disputed issue; or (3) either striking the pleadings of the disobedient party, or staying the proceedings until the ordered discovery is produced, or rendering a default judgment against the disobedient party (CPLR 3126). It is appropriate to strike a party's pleading where there is a clear showing that its failure to comply with discovery demands is wilful, contumacious, or in bad faith (*see Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Fellin v Sahgal*, 268 AD2d 456 [2000]; *Harris v City of New York*, 211 AD2d 663 [1995]). Generally, "willfulness" is inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (*see Siegman v Rosen*, 270 AD2d 14 [2000]; *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41 [1998]; *Frias v Fortini*, 240 AD2d 467 [1997]).

At this juncture, the Court finds that striking the answer of the moving defendants is not warranted. The moving defendants indicate that they have provided plaintiff's medical records and billing records; that the radiology jackets sought are not in the moving defendants' possession; and that there are no additional technologist notes. Therefore, the moving defendants cannot be compelled to produce such documents and records (*see e.g. Euro-Central Corp. v Dalsimer, Inc.*, 22 AD3d 793 [2005]). Further, the moving defendants indicate that it is impossible to reproduce print copies or CD-ROM copies with the computer aided detection (CAD) software enabled of mammograms or

sonograms performed in 2006, 2007, and 2008, as the CAD software is significantly different at the present time. Even assuming it were possible to create such documents, the Court cannot compel the moving defendants to create new documents that do not exist in order to comply with plaintiffs' demands (*see Argo v Queens Surface Corp.*, 58 AD3d 656 [2009]; *Rosado v Mercedes-Benz of North America, Inc.*, 103 AD2d 395 [1984]). In addition, the moving defendants indicate that they have produced the registration information sheet from August 14, 2007; the films marked "11A" and "11B"; the exaggerated cranial caudal view film; and Dr. Mendelsohn's *curriculum vitae*. Finally, the moving defendants have represented that Dr. Kalker does not possess the power point presentations referred to during his deposition testimony, and have provided an affirmation from Dr. Kalker to that effect.

With respect to the technologists, "ML" and "GS," the moving defendants indicate that their full names are Maria Lopez and Gail Schneider, respectively. Ms. Lopez is no longer employed by ZWANGER & PESIRI RADIOLOGY GROUP, LLP, and is therefore no longer in the moving defendants' control. However, the Court shall direct that the moving defendants provide plaintiffs with her last known address, so that plaintiffs may serve a non-party subpoena upon her, if so advised. Furthermore, plaintiffs have indicated that Ms. Schneider was the 2007 sonographer, and as such, the Court finds that she may have personal knowledge of the relevant events, and her testimony may be material and necessary to the prosecution of this action. Thus, plaintiffs are entitled to take her deposition.

Regarding the moving defendants' cross-motion, CPLR 3103 (a) provides in pertinent part, "[t]he court may at any time . . . on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). Here, plaintiffs allege that the moving defendants failed to timely respond to their discovery demands. The failure of the moving defendants to respond or move for a protective Order, pursuant to CPLR 3122, within twenty (20) days after service of the demands forecloses all inquiry concerning the propriety of the demands and the information sought to be discovered thereunder, except as to demands seeking privileged matter under CPLR 3101, or demands that are palpably improper (*see* CPLR 3122, 3101; *Anonymous v High School for Envtl. Studies*, 32 AD3d 353 [2006]; *Holness v. Chrysler Corp.*, 220 AD2d 721 [1995]; *Alaten Co. Inc. v Solil Management Corp.*, 181 AD2d 466 [1992]). A disclosure request is palpably improper if it seeks information of a confidential and private nature that does not appear to be

relevant to the issues on the case (*see Saratoga Harness Racing, Inc. v Roemer*, 274 AD2d 887 [2000]; *Titleserv, Inc. v Zenobio*, 210 AD2d 314 [1994]).

While the Court finds that the moving defendants are not entitled to a protective Order based upon the circumstances presented, the Court herein has limited and defined the moving defendants' obligations regarding the discovery due plaintiffs. However, with respect to that branch of the moving defendants' cross-motion to compel plaintiffs to provide an authorization for plaintiff's medical records from Dr. Robert Waldbaum, the Court finds that the moving defendants have made the requisite good faith showing that the authorization may lead to records that are material and necessary to the defense of this action (*see* CPLR 3101; *Gill v Mancino*, 8 AD3d 340, *supra*; *DeStrange v Lind*, 277 AD2d 344, *supra*).

Based upon the foregoing, plaintiffs' motion is **GRANTED** to the extent that the moving defendants shall provide plaintiffs with the last known address of Maria Lopez, and shall produce Gail Schneider for a deposition, both within thirty (30) days of service of the instant Order upon the moving defendants with notice of entry. The deposition of Ms. Schneider shall be adjourned only upon a stipulation of the parties which is to be So-Ordered by the Court.

The moving defendants' cross-motion is **GRANTED** to the extent that plaintiffs shall provide the moving defendants with an authorization for plaintiff ARLENE MORANTE's medical records from Dr. Robert Waldbaum within thirty (30) days of service of the instant Order upon plaintiffs with notice of entry.

The foregoing constitutes the decision and Order of the Court.

Dated: April 13, 2012

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION