

Browne v Nassau Health Care Corp.

2012 NY Slip Op 33255(U)

February 3, 2012

Sup Ct, Nassau County

Docket Number: 2762/11

Judge: Denise L. Sher

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LYNDORA V. BROWNE and CARLTON R. GALLOWAY,

TRIAL/IAS PART 31
NASSAU COUNTY

Plaintiffs,

- against -

Index No.: 2762/11
Motion Seq. No.: 02
Motion Date: 01/04/12

XXX

NASSAU HEALTH CARE CORPORATION,
NASSAU UNIVERSITY MEDICAL CENTER,
YASMEEN NAZLI, CLONES LANS, SCOTT
CONNAUGHTON and PAUL LIU,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
<i>Pro se</i> Affidavit in Opposition	2

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3126, for an order dismissing plaintiffs' Verified Complaint for their failure to provide discovery responses and/or a Bill of Particulars and for willfully failing to comply with the order of this Court. Plaintiffs, *pro se*, oppose the motion.

The above entitled action stems from personal injuries sustained by plaintiffs as a result of defendants' alleged medical malpractice. Plaintiffs commenced the present action with the filing and service of a Summons with Notice on or about February 18, 2011. On or about April 11, 2011, plaintiffs served a Verified Complaint. Issue was joined on or about April 27, 2011.

Defendants submit that, on or about the April 27, 2011 date when they served their Verified Answer, they also served upon plaintiffs a number of discovery demands and a Demand

for a Bill of Particulars. *See* Defendants' Affirmation in Support Exhibit D. On the same date, defendants also served plaintiffs with a Notice to Take Deposition Upon Oral Examination. *See id.*

Defendants now contend that, to date, the only discovery responses that have been provided to them by plaintiffs are some authorizations for medical records. *See* Defendants' Affirmation in Support Exhibit E. Defendants' counsel states "although plaintiff has mistakenly served a 'podiatric (*sic*) malpractice action' notice, that document mistakenly states that a bill of particulars had been served. However, to date, a bill of particulars has never been served. No employment or third-party payment authorizations have been served. Additionally, the other demands as outlined above have not been responded to. On October 3, 2011, Karen Halpern of this office corresponded with plaintiff and requested a bill of particulars and responses to discovery demands, which had been served five months previously (Exhibit 'F'). Neither plaintiff nor her former counsel ever objected to any of these demands, requested an extension of time to respond thereto, or moved for a protective order. The failure to provide the requested documents is therefore clearly willful."

On October 31, 2011, this Court granted plaintiffs' former counsel's motion to be relieved. The Court also granted a thirty day stay in the matter for plaintiffs to acquire new counsel. On November 29, 2011, the matter was scheduled for a conference before this Court. On that date, counsel for defendants made an oral application for dismissal of the action based upon plaintiffs' failure to obtain new counsel. The Court granted plaintiffs a two week adjournment in order for them to find new counsel. The matter was scheduled for another conference on December 13, 2011. On this date, plaintiffs advised the Court that they had not yet found counsel to represent them in the instant matter. Once again, defendants' counsel made an oral application for the case to be dismissed. The Court advised defense counsel to make the motion in papers.

In the instant motion, defendants' counsel also argues that "[o]f particular note, this action sounds in medical malpractice. Plaintiff's (*sic*) complaint alleges that each of the defendants herein was negligent in its diagnosis, medical care and treatment of the plaintiff and that as a result, she suffered personal injuries. This medical malpractice action no doubt requires the skill and expertise of not only 'any attorney', but a medical malpractice attorney. Further, in

order to prove plaintiff's (*sic*) claims, it is axiomatic that medical expertise/testimony will be required. To date, plaintiff has not even provided, as noted above, a bill of particulars. It is clear that it will be impossible for a lay person to properly prosecute this action, which is rife with sophisticated issues and procedural requirements, as well as highly specialized medical knowledge. It is telling that the bill of particulars has not yet been served. To date, in sum, plaintiff has not served the vast majority of discovery materials which were requested more than five months ago. Plaintiff further has not drafted documents which would particularize the claims with regard to both liability and damages. It is virtually impossible to believe that plaintiff can prosecute this action *pro se*."

Defendants' counsel argues that "[d]efendants are subject to tremendous prejudice due to the delays which have already afflicted this case. Absent counsel, there is no question but that this action cannot and will not be effectively or expeditiously prosecuted by plaintiff."

In opposition to the motion, plaintiffs submitted a *pro se* Affidavit in Opposition which stated that "I am asking the Court to oppose the defendants' motion to have my case thrown out. I believe that I should have the opportunity to continue to represent myself regardless of how difficult this case appears to be, until I have an Attorney to represent me. I'm asking the Court to please accept me (*sic*) plea and proceed with my case and give me the chance to represent my (*sic*) myself until I can find an attorney. I believe that I can prove my case."


Pursuant to CPLR §3126 (3), when a 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:...an order...dismissing the action or any part thereof..."

Defendants made their demands for discovery upon plaintiffs on or about April 27, 2011. Plaintiffs were represented by counsel on that date and were represented by counsel until said counsel was relieved by order of this Court on October 31, 2011. During that approximately six months time, plaintiffs failed to provide any of the requested discovery, despite additional requests to do so from defendants' counsel. Plaintiffs have been given approximately three months to retain new counsel in this matter, but have failed to do so. While every litigant is afforded the opportunity to represent him or herself, one does so at their own peril, especially in a

complex medical malpractice litigation like the instant action. In the three months time that the Court gave plaintiffs to retain new counsel, none of the requested discovery was provided to defendants, making it now approximately nine months that the subject discovery demands have gone unanswered. In their *pro se* opposition to defendants' motion, plaintiffs failed to even acknowledge the outstanding discovery which is the basis of defendants' motion. In said opposition, plaintiffs merely state that they want to continue to represent themselves regardless of how difficult the case. Plaintiffs fail to provide any of the demanded discovery as part of their motion papers and fail to indicate that they will be, or are even capable of, so doing. Plaintiffs have not drafted documents which would particularize the claims with regard to both liability and damages, specifically a Bill of Particulars, and their failure to do so has indeed prejudiced defendants in their defense of this matter.

As plaintiffs have, for nine months, failed to obey orders for disclosure and have willfully failed to disclose information which this Court finds ought to have been disclosed, the Court holds that defendants' motion, pursuant to CPLR § 3126, for an order dismissing plaintiffs' Verified Complaint for their failure to provide discovery responses and/or a Bill of Particulars and for willfully failing to comply with the order of this Court is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER: 

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
 February 3, 2012

ENTERED
FEB 06 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE