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SHORT FORM ORDER

INDEX No. 09-1296

PUBLISH

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 11-16-11
ADJ. DATE 5-3-11
Mot. Seq. # 003 - MotD
004 - XMotD

---X

EVELYN MARTINEZ,

Plaintiff,

- against -

ANDREA QUINTANA, D.O., ANTHONY CAPPELLINO, M.D., SENGHAO FONG, M.D., and NASSAU-SUFFOLK RADIOLOGICAL ASSOCIATES,

Defendants.

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Upon the following papers numbered 1 to 139 read on this motion and cross motion for sanctions; Notice of Motion/ Order to Show Cause and supporting papers 1 - 42; Notice of Cross Motion and supporting papers 72 - 117; Answering Affidavits and supporting papers 43 - 62; 118 - 134; Replying Affidavits and supporting papers 63 - 64; 135 - 136; Other 65 - 71; 137 - 139; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Andrea Quintana, D.O., pursuant to CPLR 3126, for an order dismissing the complaint or precluding plaintiff from presenting evidence at trial is granted to the extent set forth herein and is otherwise denied; and it is

ORDERED that the cross motion by defendants Senghao Fong, M.D., and Nassau-Suffolk Radiological Associates, pursuant to CPLR 3126, for an order dismissing the complaint or precluding plaintiff from presenting evidence at trial is granted to the extent set forth herein and is otherwise denied.

In January 2009, plaintiff Evelyn Martinez commenced this action to recover damages for medical malpractice allegedly committed by defendants when she sought medical care for an injury to her right hand that occurred in October 2006. By her complaint, plaintiff alleges that defendants were negligent, among other things, in failing to diagnose a fracture in her right hand, failing to properly interpret diagnostic tests and films, failing to refer her to a specialist, and failing to hire qualified medical staff. Further, by her response to a demand for a bill of particulars served by defendant Andrea Quintana, D.O., plaintiff alleges that she suffered arthritis, restricted movement, "diminution in quality of life," and "loss of life's pleasures and pursuits" due to such defendant's malpractice.

Defendant Quintana now moves for an order dismissing the complaint, arguing that plaintiff has repeatedly failed to comply with various demands for disclosure, including numerous demands for authorizations served between February 2010 and April 2011. Alternatively, defendant Quintana seeks an order precluding plaintiff from presenting evidence at trial as to those matters related to the documents, records and information demanded but not disclosed. Defendant Quintana's submissions in support of the motion include copies of the pleadings, the bill of particulars, the demands for disclosure served on plaintiff, and the correspondence sent to plaintiff's counsel requesting responses to outstanding discovery demands. Similarly, defendants Senghao Fong, M.D., and Nassau-Suffolk Radiological Associates cross-move for an order imposing sanctions on plaintiff based on her failure to comply with various demands for disclosure.

Plaintiff opposes defendant Quintana's motion, asserting that she has substantially complied with her demands for disclosure, and annexes copies of numerous authorizations, dated November 18, 2011, for medical providers, Oxford Insurance Company and other businesses. As to the disclosure demand by defendant Quintana dated December 21, 2010, which seeks authorizations for "any and all medical providers concerning treatment for the 10/15/10 auto accident in which plaintiff claims injury to her neck, back and shoulder," as well as authorizations for the GEICO insurance file and for the non-privileged portion of the legal file maintained by Cellino & Barnes for a personal injury action arising from such accident, plaintiff's counsel argues such records are privileged and not related to the claims made in this medical malpractice action. Plaintiff's counsel also asserts that responses have been given to demands made in a notice dated April 18, 2011 for, among other things, physical therapy records, psychological records, and the records of plaintiff's treating gastroenterologist. In reply, defendant Quintana asserts that certain medical authorizations still are outstanding. She further argues that plaintiff, having failed to move for a protective order, may not object to the demands contained in the December 21, 2010 discovery notice or to the demand for the legal file of Goldsmith & Tortora contained in a March 9, 2010 notice. The Court notes that plaintiff does not dispute moving defendants' allegations that Goldsmith & Tortora represents plaintiff on a Workers' Compensation claim filed in connection with the injury to her right hand at issue in this action.

Plaintiff also opposes the cross motion made by defendants Fong and Nassau-Suffolk Radiological Associates (hereinafter collectively referred to as the Fong defendants), alleging that she

has complied with their demands for authorizations, and that the records of Cellino & Barnes and Goldsmith & Tortora are privileged and unrelated to the claim asserted in this action. By their reply, the Fong defendants withdraw that portion of their motion related to their demands for medical authorizations, except their demand for an ***Arons*** authorization for Dr. Jacqueline Ammirata. They assert that they are entitled to authorizations for the GEICO insurance file and the legal files, because such documents are necessary to determine if the motor vehicle accident was a proximate cause of the alleged injury to plaintiff's hand.

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998, 922 NYS2d 470 [2d Dept 2011]; ***Foster v Herbert Slepoy Corp.***, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]; ***Vyas v Campbell***, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]), and a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g.* ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998, 922 NYS2d 470; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 845 NYS2d 124; ***Astudillo v St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469, 784 NYS2d 645 [2d Dept 2004]; ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420, 541 NYS2d 30 [2d Dept 1989]).

However, the failure of a party to challenge a notice for discovery and inspection within the time specified by CPLR 3122 forecloses inquiry into the propriety of the information sought except as material which is privileged under CPLR 3101 or demands which are palpably improper (*see* ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; ***Giano v Ioannou***, 78 AD3d 768, 911 NYS2d 398 [2d Dept 2010]; ***Otto v Triangle Aviation Servs.***, 258 AD2d 448, 684 NYS2d 612 [2d Dept 1999]; ***Titleserv, Inc. v Zenobio***, 210 AD2d 314, 619 NYS2d 769 [2d Dept 1994]). A disclosure request will be considered palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case, is vague, or is overly broad and burdensome (*see* ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545; ***Velez v South Nine Realty Corp.***, 32 AD3d 1017, 822 NYS2d 86 [2d Dept 2006]; ***Holness v Chrysler Corp.***, 220 AD2d 721, 633 NYS2d 986 [2d Dept 1995]; ***Zambelis v Nicholas***, 92 AD2d 936, 460 NYS2d 360 [2d Dept 1983]).

Furthermore, a court may strike a pleading or impose other sanctions against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds should have been disclosed" (CPLR 3126; *see* ***Tos v Jackson Hgts. Care Ctr., LLC***, 91 AD3d 943, 937 NYS2d 629 [2d Dept 2012]; ***Nicolia Ready Mix v Fernandes***, 37 AD3d 568, 829 NYS2d 704 [2d Dept 2007]). The penalties authorized by CPLR 3126 are designed "to prevent a party who has refused to disclose evidence from affirmatively exploiting or benefitting from the unavailability of the proof" during a civil action (***Oak Beach Inn Corp. v Babylon Beacon***, 62 NY2d 158, 166, 476 NYS2d 269 [1984]). A party

seeking the drastic sanction of preclusion has the initial burden of coming forward with evidence clearly showing that the failure to comply with disclosure orders or discovery demands was willful, contumacious or in bad faith (*see* ***Chong v Chaparro***, 94 AD3d 800, 941 NYS2d 709 [2d Dept 2012]; ***Euro-Central Corp. v Dalsimer, Inc.***, 22 AD3d 793, 803 NYS2d 171 [2d Dept 2005]; ***181 S. Franklin Assocs. v Y & R Assoc.***, 6 AD3d 594, 774 NYS2d 811 [2d Dept 2004]). Willful and contumacious conduct may be inferred from a party's repeated failure to respond to discovery demands or to comply with disclosure orders, coupled with inadequate excuses for such default (*see* ***Tos v Jackson Hgts. Care Ctr., LLC***, 91 AD3d 943, 937 NYS2d 629; ***Quinones v Long Is. Jewish Med. Ctr.***, 90 AD3d 632, 933 NYS2d 907 [2d Dept 2011]; ***Workman v Town of Southampton***, 69 AD3d 619, 892 NYS2d 481 [2d Dept 2010]; ***Powell v Cipollaro***, 34 AD3d 551, 824 NYS2d 409 [2d Dept 2006]; ***Devito v J & J Towing***, 17 AD3d 624, 794 NYS2d 74 [2d Dept 2005]).

Moving defendants' applications for orders dismissing the complaint or precluding plaintiff from presenting evidence at trial regarding her alleged injury are denied, as it appears from a review of the submissions in opposition to the motions that plaintiff has complied, albeit belatedly, to moving defendants' demands for authorizations for the production of medical records and for ***Arons*** authorizations. As to the outstanding demands for authorizations for the production of the GEICO file and the files maintained by the law firms of Cellino & Barnes and Goldsmith & Tortora, it is undisputed that plaintiff failed to timely challenge the notices seeking such disclosure. The Court, therefore, must consider whether such demands, in fact, seek privileged material or are palpably improper (*see* ***Giano v Ioannou***, 78 AD3d 768, 911 NYS2d 398; ***Otto v Triangle Aviation Servs.***, 258 AD2d 448, 684 NYS2d 612). Here, moving defendants seek only the non-privileged portions of the legal files at issue, and plaintiff's conclusory assertion that such files and the GEICO file for the October 2010 motor vehicle accident are "privileged and/or not related in any way to the claims herein" is insufficient to establish that such demands are palpably improper.

Therefore, plaintiff, within 20 days after service of a copy of this order with notice of its entry, shall deliver to moving defendants' attorneys executed authorizations for the release of copies of the GEICO file maintained in connection with plaintiff's October 2010 motor vehicle accident, as well as executed authorizations for the release of copies of the non-privileged portions of the legal files maintained by Cellino & Barnes regarding plaintiff's personal injury action and by Goldsmith & Tortora regarding her pending Workers' Compensation claim.

Dated: 9/17/12

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**