

Ahern v St. Catherine of Siena Med. Ctr.

2013 NY Slip Op 30934(U)

April 29, 2013

Supreme Court, Suffolk County

Docket Number: 08-23423

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 6-18-12
ADJ. DATE 1-16-13
Mot. Seq. # 001 - MotD

-----X
DONNA AHERN,

Plaintiff,

- against -

ST. CATHERINE OF SIENA MEDICAL
CENTER, MOSES WILLIAMS, M.D., JILL
THOMPSON, M.D. and HUNTINGTON
MEDICAL GROUP, P.C.,

Defendants.
-----X

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Upon the following papers numbered 1 to 16 read on this motion to strike defendant's answer, etc.; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 15 - 16; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by plaintiff for, inter alia, an order striking the answer of defendant St. Catherine of Siena Medical Center is granted to the extent set forth herein, and is otherwise denied.

In 2008, plaintiff Catherine Ahern commenced this medical malpractice seeking damages for injuries allegedly resulting from defendants' failure to timely diagnose and treat her breast cancer. According to the Court's computerized records, a preliminary conference was conducted in this action

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on January 27, 2010. Thereafter, plaintiff served a notice of discovery and inspection dated January 20, 2011. As relevant to the instant motion, items 3, 4 and 5 of the January 2011 discovery notice demand copies of the “layperson letter” allegedly sent by defendant St. Catherine of Siena Medical Center to plaintiff after a mammography study performed in January 2006, item 10 seeks the “tape(s) containing the transcription of the sonography and mammography reports relevant to the plaintiff’s breast studies,” and item 11 seeks “any type of log . . . documenting when and how the plaintiff’s sonogram and mammogram report[s] were forwarded to her ordering physician,” defendant Jill Thompson, M.D. The response to the January 2011 discovery notice served on behalf of St. Catherine of Siena Medical Center and defendant Moses Williams, M.D., states, in part, that such defendants were not in possession of a copy of the “layperson letter” sent to plaintiff, that they did not maintain tapes used for dictating mammography reports, and that they did not have in their possession a log indicating how the sonogram and mammogram reports at issue were forwarded to Dr. Thompson.

A second notice of discovery and inspection, dated April 29, 2011, was served by plaintiff on St. Catherine of Siena Medical Center and Dr. Williams. The April 2011 notice demands at item 2 that St. Catherine of Siena Medical College and Dr. Williams produce a copy of the “transmission logs documenting the successful transmission, attempted transmission, and/or failed transmission” of the reports related to the ultrasound and mammogram procedures performed on January 13, 2006. Items 3, 4 and 5 of the April 2011 notice demand a copy of the “requisition forms” for the ultrasound and mammograms performed on January 13, 2006, a copy of “the list documenting the request for [plaintiff’s] prior mammography films,” and a copy of any documentation of the request for plaintiff’s prior mammography films. Defendants’ response to the April 2011 notice states as to item 2 that “[a] search has been made for these documents, however, they have not been located. If they are located, copies will be sent to your attention.” As to item 3, it states the request is unclear; as to items 4 and 5, it states such documents are not maintained by the hospital.

A third disclosure notice, dated November 10, 2011, demands, in part, that St. Catherine of Siena Medical Center and Dr. Williams produce a copy of “any log or documentation recording the successful, attempted or failed transmission, by facsimile, of any communication regarding Donna Ahern had between St. Catherine of Siena and/or Dr. Williams and Dr. Thompson.” The response of St. Catherine of Siena Medical Center and Dr. Williams to this third discovery notice states that log or other document responsive to such demand has been located, and that “[i]f and when any such material is identified, it will be exchanged under separate cover.”

Plaintiff now moves for an order striking the answer of St. Catherine of Siena Medical Center, arguing it has willfully failed to provide comply with the above-mentioned demands for discovery. Alternatively, plaintiff seeks an order compelling the hospital to provide such disclosure or to provide an affidavit detailing why such documents are not available. St. Catherine of Siena Medical Center opposes the motion, arguing that it has complied with plaintiff’s disclosure demands by producing the material in its possession. More specifically, an affirmation by defense counsel alleges that St. Catherine of Siena Medical Center has repeatedly advised plaintiff it “does not have in [its] possession a log indicating the successful or failed transmissions” of the facsimile transmission of the subject ultrasound and mammography reports. The affirmation also asserts the medical center does not have the tapes used for dictation of mammography reports; a digital file containing a copy of the layperson letter to plaintiff, or

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the requisition forms used by staff when requesting to view documents. It further states that Dr. Williams testified at an examination before trial that dictation tapes were not used in the preparation of the ultrasound and mammography reports at issue.

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 [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]).

Furthermore, while actions should be resolved on the merits whenever possible (see *Ingoglia v Barnes & Noble Coll. Booksellers, Inc.*, 48 AD3d 636, 852 NYS2d 337 [2d Dept 2008]; *Pascarelli v City of New York*, 16 AD3d 472, 791 NYS2d 617 [2d Dept 2005]; *Cruzatti v St. Mary’s Hosp.*, 193 AD2d 579, 597 NYS2d 457 [2d Dept 1993]), 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 *Almonte v Pichardo*, __ AD3d __, 2013 NY Slip Op 02209 [2d Dept 2012]; *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 *Zakhidov v Boulevard Tenants Corp.*, 96 AD3d 737, 945 NYS2d 756 [2d Dept 2012]; *Chong v Chaparro*, 94 AD3d 800, 941 NYS2d 709 [2d Dept 2012]; *Hoi Wah Lai v Mack*, 89 AD3d 990, 933 NYS2d 712 [2d Dept 2011]). 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]; *Devito v J & J Towing*, 17 AD3d 624, 794 NYS2d 74 [2d Dept 2005]).

Plaintiff’s application for an order striking St. Catherine of Siena Medical Center’s answer is denied, as plaintiff’s submissions fail to demonstrate that such defendant willfully failed to comply with

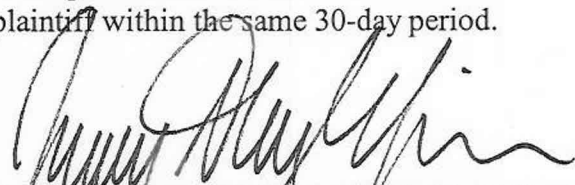
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the January, April and November 2011 notices for discovery and inspection (*cf. Mangru v Schering Corp.*, 90 AD3d 621, 933 NYS2d 897 [2d Dept 2011], *lv denied* 19 NY3d 806, 949 NYS2d 343 [2012]; *Romeo v Barrella*, 82 AD3d 1071, 921 NYS2d 83 [2d Dept], *lv dismissed* 17 NY3d 935, 935 NYS2d 576 [2011]; *Brown v Astoria Fed. Sav.*, 51 AD3d 961, 858 NYS2d 793 [2d Dept], *lv denied* 11 NY3d 703, 864 NYS2d 807 [2008]). Rather, the evidence indicates St. Catherine of Siena Medical Center has complied with many of the demands made in the disclosure notices. A party cannot be sanctioned for failing to produce documents or other tangible items that do not exist or are not in its possession or control (*Forman v Jamesway Corp.*, 175 AD2d 514, 572 NYS2d 782 [3d Dept 1991]; *see Argo v Queens Surface Corp.*, 58 AD3d 656, 871 NYS2d 657 [2d Dept 2009]; *Tolz v Valente*, 39 AD3d 737, 835 NYS2d 604 [2d Dept 2007]; *Bivona v Trump Mar. Casino Hotel Resort*, 11 AD3d 574, 782 NYS2d 667 [2d Dept 2004]; *Byrne v City of New York*, 301 AD2d 489, 753 NYS2d 132 [2d Dept 2003]). However, a party's failure to timely produce documents within its possession or control precludes that party from later using such documents at trial (*see Vaz v New York City Tr. Auth.*, 85 AD3d 902, 925 NYS2d 587 [2d Dept 2011]; *Sagiv v Gamache*, 26 AD3d 368, 810 NYS2d 481 [2d Dept 2006]; *Lauro v Top of Class Caterers*, 169 AD2d 708, 565 NYS2d 714 [2d Dept 1991]; *Corriel v Volkswagen of Am.*, 127 AD2d 729, 512 NYS2d 126 [2d Dept 1987]).

As mentioned above, counsel for the hospital alleges in his affirmation in opposition to the motion that his client is not in possession of a copy of the layperson letter sent to plaintiff, does not use tapes for transcription of mammography reports, and does not maintain the requisition forms used to request films from past mammograms. He does not dispute that such records are relevant to the prosecution of plaintiff's malpractice action for failure to diagnose and treat her breast cancer. Further, plaintiff does not dispute St. Catherine of Siena Medical Center's assertions that its employee, Carol Lindoe, testified at an examination before trial that the hospital does not have a copy of the layperson letter allegedly sent to plaintiff after the ultrasound and mammogram procedures performed in January 2006, and that Dr. Williams testified at an examination before trial that a dictation tape was not used to transcribe mammography reports. However, absent from the record is evidence that Ms. Lindoe or a different employee has provided evidence relating to the hospital's maintenance of facsimile transmission logs and requisitions to view films from prior mammograms.

Accordingly, plaintiff's application to compel disclosure is granted to the extent that St. Catherine of Siena Medical Center shall, within 30 days after service of a copy of this order with notice of entry, produce the logs related to the facsimile transmission of plaintiff's ultrasound and mammogram reports to her treating physician, as well as the requisitions for plaintiff's prior mammogram films. If the hospital is unable to produce the transmission logs or the requisition forms requested in the disclosure notices at issue, a detailed affidavit explaining why it is not in possession of such documents and where such documents may be found shall be provided by it to plaintiff within the same 30-day period.

Dated: April 29, 2013



 JEFFREY ALLEN SPINNER

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION