

| |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Angielczvk v New York Cent. Mut. Ins. Co. |
| 2013 NY Slip Op 34194(U) |
| June 4, 2013 |
| Supreme Court, Erie County |
| Docket Number: 2009/5874 |
| Judge: Patrick H. NeMoyer |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York on the ~~4th~~ day of JUNE, 2013

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

THOMAS D. ANGIELCZYK and
DEBORA ANGIELCZYK,
Plaintiffs,

v.

NEW YORK CENTRAL MUTUAL
INSURANCE COMPANY,
Defendants.

DECISION and ORDER

INDEX NO. 2009/5874

FILED
2013 JUN -5 PM 1:13
CLERK'S OFFICE

APPEARANCES: STEVEN M. COHEN, ESQ., for Plaintiffs
JOSHUA P. RUBIN, ESQ., for Defendant

PAPERS CONSIDERED:¹ The April 24, 2013 NOTICE OF MOTION of Defendants and the AFFIRMATION of Joshua P. Rubin, Esq., with annexed exhibits; and
the May 8, 2013 opposing AFFIRMATION of Steven M. Cohen, Esq., with annexed exhibits.

Plaintiffs Thomas D. and Debora Angielczyk commenced this action in May 2009 against defendant New York Central Mutual Insurance Company, plaintiffs' own automobile insurer, seeking to recover supplementary uninsured motorist [SUM] benefits for injuries sustained by Mr. Angielczyk (hereinafter plaintiff, in the singular) as a result of an automobile accident of December 8, 2006. The current dispute originates with defendant's May 21, 2012 motion to compel plaintiffs to disclose numerous categories of records, pleadings, documents, authorizations, and information. Defendant's motion was divided into thirteen separate requests. Defendant's motion was granted by order of September 13, 2012, with the Court

¹Not currently considered is the April 29, 2013 opposing AFFIRMATION of Steven M. Cohen, Esq. In response to the concerns raised in those papers, the Court adjourned the motion for about a week.

12

explicitly ruling on each numbered request.

Subsequently, on October 10, 2012, prior to plaintiffs' compliance with that disclosure order, plaintiffs' counsel moved to withdraw from his representation of plaintiffs. By order dated November 16, 2012, the Court permitted counsel to withdraw while giving plaintiffs some time to either retain new counsel or resume their prosecution of the action *pro se*.

On December 11, 2012, plaintiff appeared without legal counsel, advising the Court that plaintiffs wished to proceed *pro se*. By order dated December 21, 2012, the Court directed that plaintiffs fully and completely respond to each and every part of the Court's September 2012 order and that, if plaintiffs failed to do so, defendant would be permitted to seek dismissal of plaintiffs' complaint.

On January 23, 2012, defendant moved to dismiss plaintiff's complaint with prejudice for their failure to adhere to the Court's prior conditional, but non-self-executing, orders. Pending the return of that motion, plaintiffs retained new counsel, who cross-moved for an adjournment of the motion in order to give plaintiffs time to respond to the outstanding disclosure requests. On the February 4, 2013 return date, the Court adjourned the motion until March 7, 2013 in order to give plaintiffs' new counsel an opportunity to respond to the outstanding disclosure requests by that date, the first and only hard-and-fast deadline imposed upon plaintiffs by the Court in this matter.

On March 7, 2013, defendant received an abundance of materials from plaintiffs. The Court granted defendant an opportunity to review the responses for their completeness before being heard on its motion to dismiss. On March 26, 2013, counsel for defendant received an e-mail from counsel for plaintiffs inquiring into the sufficiency of the March 7, 2013 disclosures. In response, counsel for defendant expressed his dissatisfaction with the disclosures. In updated papers, defendant now presses its motion to dismiss the complaint with prejudice, arguing that plaintiffs failed to timely and completely heed each and every part of the Court's September

2012 order, despite their capacity to do so, and pointing out twelve separate instances within seven numbered disclosure requests concerning which defendant finds plaintiffs' responses to be lacking in content and/or specificity. In opposition, plaintiffs respond to each claim of deficiency. Upon reviewing the materials submitted, including each numbered request for disclosure and the corresponding disclosures, the Court makes the following determinations:

With respect to Request #1, under which plaintiffs were required to provide an unrestricted authorization for the disclosure of plaintiff's employment records (hereinafter employment authorization) with SUNY Buffalo, defendant argues that plaintiffs insufficiently provided an authorization limited to wage verification, dates of absenteeism, and use of sick days. The Court notes that defendant's initial request demanded an unrestricted employment authorization for SUNY Buffalo to enable defendant to determine whether plaintiff had missed any time from work as a result of a prior work-related injury. Given the somewhat ambiguous nature of the request itself, the Court feels that plaintiffs disclosed that which would reasonably comply with that request, i.e., information pertaining to missed time. The Court thus deems plaintiffs' limited initial disclosure to have been sufficient. In any event, plaintiffs have since provided a new authorization for release of any and all SUNY Buffalo employment records relative to plaintiff. Thus, any claimed insufficiency in the initial response has been rectified.

With respect to Request #2, under which plaintiffs were required to provide an employment authorization for Odds & Ends, defendant argues that plaintiffs instead insufficiently provided an authorization limited to wage verification, dates of absenteeism, and use of sick days. As defendant initially failed to specify the purpose of that request (unlike in the case of the SUNY Buffalo-related request, discussed *supra*), plaintiffs initially provided an authorization similar to the one provided for SUNY Buffalo. Under the circumstances, the Court deems plaintiffs' limited initial disclosure to have been sufficient. In any event, plaintiffs have since provided a new authorization for release of any and all Odds & Ends employment records

relative to plaintiff. Thus, any claim that the initial response was insufficient has been satisfied.

With respect to Request #4, under which plaintiffs were required to provide an employment authorization for whatever entity employed plaintiff at the time of a work-related accident in 1994, defendant argues that plaintiffs deficiently provided an authorization for Durham Staffing limited to wage verification, dates of absenteeism, and use of sick days. Defendant argues that the authorization did not provide for disclosure of workers' compensation records, accident reports, medical records, or other items relevant to the work-related accident. As defendant initially failed to specify the purpose of the request, plaintiffs initially provided an authorization similar to those provided for SUNY Buffalo and Odds & Ends. Moreover, plaintiffs have explained that they do not know the pertinent worker's compensation claim number. The Court thus deems plaintiffs' limited initial disclosure to have been sufficient. In any event, plaintiffs have since provided a new authorization for release of any and all Durham Staffing employment records relative to plaintiff. Thus, any claim of insufficiency of the initial response has been answered.

Also with respect to Request #4, under which plaintiffs were required to identify and provide authorizations for any and all health care providers who treated, evaluated, or imaged any injury sustained by plaintiff in a work-related accident in 1994, defendant argues that plaintiffs listed but failed to provide authorizations for Drs. Bell, Dale, Gantner, or Sachdev, or for Buffalo Columbus Hospital. Plaintiffs respond that they were unable to recall the first names – and hence unable to uncover the addresses – of those treating physicians, information necessary for the proper execution of each authorization. The Court cannot require plaintiffs to disclose that which plaintiffs cannot recall. The Court further notes that Buffalo Columbus Hospital is now defunct. As such, the Court deems plaintiffs' limited initial disclosure to have been sufficient. In any event, plaintiffs have since provided authorizations for those providers in question. Thus, any insufficiency of the initial response has been rectified.

With further respect to Request #4, defendant notes that plaintiffs were required, at the least, to submit plaintiff's health insurance records to the Court for its *in camera* review, specifying which records they believe are protected from discovery and why. Defendant notes that plaintiffs have neither provided defendant with an authorization for those records, nor submitted such records for *in camera* review. Plaintiffs respond that, upon their receipt of opposing counsel's most recent affirmation, they promptly asked Independent Health to send all of plaintiff's medical records to the Court for its *in camera* review. Plaintiffs have provided the Court with a copy of that authorization. Thus, any insufficiency of the initial response has been rectified.

With respect to Request #5, defendant argues that plaintiffs were required to disclose all pleadings from an action arising out of a motor vehicle accident of June 23, 2001 that ultimately settled for \$100,000, but that plaintiffs provided only a copy of a verified bill of particulars and a supplemental verified bill of particulars and denied possessing any reports, photographs, damage estimates, statements, deposition transcripts, questionnaires, or applications concerning that accident. Plaintiffs argue in response that they provided all documents in their possession as of March 7, 2013. The Court cannot penalize plaintiffs for not providing records that plaintiffs assertedly do not possess, and thus the Court deems plaintiffs' limited initial disclosure to have been sufficient. Plaintiffs' new counsel has since been in contact with predecessor counsel, and has requested a complete copy of the prior litigation file, which plaintiffs promise to turn over to defendant once they receive it. Thus, any insufficiency of the initial response is being rectified.

Also with respect to Request #5, under which plaintiffs were required to provide unrestricted employment authorizations for Nick's Coverall Cleaning and Buffalo City Mission, defendant argues that plaintiffs instead insufficiently provided authorizations limited to wage verification, dates of absenteeism, and use of sick days. For the reasons stated *supra*, the

Court deems plaintiffs' limited initial disclosure to have been sufficient. In any event, plaintiffs have since provided unlimited authorizations for such employment records. Thus, any insufficiency of the initial response has been rectified.

With further respect to Request #5, defendant argues that plaintiffs were required to provide an unrestricted authorization for the disclosure of plaintiff's SUNY Buffalo educational records, but provided an authorization limited to individual attendance and academic records. The request itself demanded "an unrestricted education authorization for SUNY Buffalo, where plaintiff claims he previously went to school, but was unable to attend further classes, because of the neck injury sustained on 6/23/01." Because the authorization initially executed by plaintiffs would have given defendant access to the requested information pertaining to missed time from classes as a result of the alleged neck injury, the Court deems plaintiffs' limited initial disclosure to have been sufficient. In any event, plaintiffs have since provided a new authorization. Thus, any insufficiency of the initial response has been rectified.

With respect to Request #6, defendant argues that plaintiffs should have provided nine categories of documents and statements relating to a motor vehicle accident of November 30, 2002, but instead provided only three photographs and an IME report. Plaintiffs respond that Mr. Angielczyk was merely a passenger in his wife's car and himself suffered no injury as a result of that accident, which injured only his wife. As such, plaintiffs did not initially believe that the related litigation file, which they did not then possess, contained any documents responsive to the demands of defendant. In this instance, plaintiffs' lack of understanding of the request does not render their limited initial disclosure insufficient. Plaintiffs' new counsel has since contacted predecessor counsel to request the related litigation file. Plaintiffs are thus in the process of rectifying any claimed insufficiency of their initial response.

Also with respect to Request #6 and the November 30, 2002 accident, defendant argues that plaintiffs were required to provide certain information that should have included a statement

specifying whether any claim arising from the accident resolved and what the resolution was. As plaintiffs were not then in possession of the related litigation file, plaintiffs' response indicating that plaintiff pursued a claim that settled for an unknown amount was reasonably compliant with the request. Again, the Court cannot require plaintiffs to disclose that which plaintiffs cannot recall. And again, plaintiffs' new counsel has since contacted predecessor counsel to request the litigation file. Plaintiffs are thus in the process of retrieving information responsive to defendant's demand.

With respect to Request #11, defendant argues that plaintiffs were required to provide information, documents, and authorizations related to a motor vehicle accident of December 31, 2010, including a statement specifying plaintiff's injuries and complaints stemming from that accident. Defendant further argues that plaintiffs were noncompliant and evasive in stating that plaintiffs were not presently in possession of any documents responsive to the demand. In their response, plaintiffs indicated that no attorney was retained, nor any lawsuit commenced, in relation to that accident. Nonetheless, plaintiffs provided the names and addresses of all medical professionals who treated, examined, or imaged plaintiff after that accident, along with authorizations for the medical records of the same. The Court thus deems plaintiffs' disclosure to have been adequate.

With respect to Request #13, defendant argues that plaintiffs were required to provide some fifteen categories of documents and information concerning a 1999 accident, but in response merely specified the location of the incident, the nature of the occurrence and of plaintiff's resultant injuries, and whether and how any claim arising from the accident was resolved, additionally providing four authorizations for medical records. Defendant further argues that related records indicate that the accident took place at the apartment of a friend of plaintiff, but that no relevant identification and contact information was provided. Plaintiffs have since provided the name of the friend, but explain that they are unable to provide updated

contact information inasmuch as plaintiffs are no longer in contact with that friend. Again, the Court cannot require plaintiffs to disclose that which plaintiffs do not know or cannot recall. Thus, the Court deems plaintiffs' disclosure to have been sufficient.

CPLR 3126 provides in pertinent part that if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed," "the court may make such orders with regard to the failure or refusal as are just, among them . . . an order . . . striking out pleadings or . . . dismissing the action."

" [T]he striking of a pleading is appropriate only where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith' (*Perry v Town of Geneva*, 64 AD3d 1225, 1226 [2009] [internal quotation marks omitted]). 'Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse' (*WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619 [2011])" (*Hann v Black*, 96 AD3d 1503, 1504-1505 [4th Dept 2012] [bracketed material in original]).

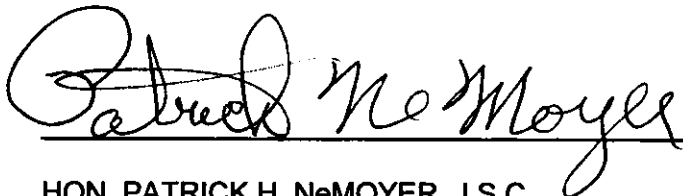
By and large, the Court concludes that plaintiffs made good faith efforts to comply with the discovery requests of defendant and to rectify any alleged deficiencies since highlighted by defendant. There has been no categorical refusal or failure to disclose any information or documents within plaintiffs' recollection or control, and thus it cannot be said that plaintiffs ignored or violated this Court's disclosure order. By the same token, defendant has made no showing that plaintiffs' limited non-disclosures were "willful, contumacious, or in bad faith" (see *Hann*, 96 AD3d at 1504, quoting *Perry v Town of Geneva*, 64 AD3d 1225, 1226 [2009] [internal quotation marks omitted]). The most that can be said is that, in the compressed time frame under which he was then operating, plaintiffs' new counsel was forced to grapple with some ambiguities in defendants' requests, and that some limited categories of documents and information were then wholly outside plaintiffs' control, resulting in an appearance of a refusal to respond. Plaintiffs have since offered a reasonable excuse for any and all alleged non-disclosures, coupled with a showing of their reasonable efforts to rectify any and all alleged

deficiencies (*see Hann*, 96 AD3d at 1505; *see also Roof v Bogdanski*, 174 AD2d 1046 [4th Dept 1991]). Although the court does “not condone the plaintiffs' delays in adhering to [the] court-ordered discovery schedule[]” (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]), given the public policy favoring resolution on the merits (*see Lampel v Sergel*, 287 AD2d 548 [2001]), under the circumstances,” the Court feels that dismissal of the complaint is not required or appropriate as a penalty for any refusal by plaintiffs to comply with an order to disclose (*Lopes v Metropolitan Tr. Auth.*, 66 AD3d 744 [2d Dept 2009]; *see CPLR 3126*).

Accordingly, defendant's motion to dismiss plaintiffs' complaint with prejudice is DENIED.

All counsel are to report for a status conference to be held on July 24, 2013, at 9:30 a.m., in Part 34 at 50 Delaware Avenue.

SO ORDERED:



HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

JUN 04 2013

BY 
KEVIN J. O'CONNOR
 COURT CLERK