

**South Shore Neurologic Assoc., P.C. v Mobile
Health Mgt. Servs., Inc.**

2014 NY Slip Op 30454(U)

February 19, 2014

Supreme Court, Suffolk County

Docket Number: 32347-2008

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:

HON. EMILY PINES
J. S. C.

Original Motion Date: 09-17-2013
Motion Submit Date: 11-19-2013
Motion Sequence No.: 014 RRH

Final
 Non Final

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SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.,

Plaintiff,

-against-

MOBILE HEALTH MANAGEMENT SERVICES, INC., LEE
MANAGEMENT, INC., BROOKHAVEN MAGNETIC RESONANCE
IMAGING, INC., NORMAN CHERNIK, M.D. and BERT BRODSKY,

Defendants.

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Plaintiff, South Shore Neurologic Associates, PC (Plaintiff) moves, by Order to Show Cause (motion sequence # 014) for an Order, pursuant to CPLR § 3126, awarding Plaintiff penalties against Defendants, Mobile Health Management Services, Inc. (“Mobile Health”), Lee Management, Inc. (“Lee Management”), and Bert Brodsky (collectively, Defendants), awarding Plaintiff :1) reimbursement of payment of fees paid to the Court appointed Special Referee, Ronald Rosenberg, Esq., in the amount of \$57,442.09; 2) reimbursement of fees paid the Court appointed Receiver, Mark Goldsmith, Esq., in the amount of \$20,442.09; 3) reimbursement of attorneys’ fees and disbursements in connection with this and related actions for the period August 1, 2009 through the present in the amount of \$1,414,520.50; and 4) punitive damages in an amount to be determined by the Court. The Plaintiff’s counsel sets forth that the above

expenditures would have been rendered unnecessary had the Defendants complied with discovery requests in the form of document demands served by Plaintiff on the Defendants in July 2009 and finally responded to in July 2013. It is Plaintiff's contention that these long awaited responses demonstrate beyond question that for all of the years between 1994 and 2008, distributions to Plaintiff amounted to 66% of the total disbursements received, while distributions to Lee Management and Mobile Health amounted to 34% of the total (exhs 5-7 to Burger affidavit). In addition, Plaintiff avers that the e-mails finally produced in July 2013 by the Defendants state specifically that all distributions for BMRI, a related party in a connected litigation, must result in a "1/3 2/3 distribution". It is, therefore, Plaintiff's contention that had the subject documents been made available in a timely manner, there would have been no dispute that the subject entities were engaged in an unlawful fee splitting scheme and there would have been no need for appointment of a Special Referee to hear and report on such issue; nor for the Court to appoint a Receiver for BMRI (an entity recently dissolved in the joined litigation). Based on the assertion that all these documents were available during this four year hiatus, Plaintiff also asserts that it expended attorneys' fees that would have been unnecessary, including those in connection with an appeal of the Referee's recommendation that was adopted and confirmed by order of this Court.

Defendants oppose the motion on several grounds. First, Defendants' counsel sets forth that before this matter ever came to this Court, the Plaintiff had its own auditors inspect the books and records of BMRI and accessed emails and memos from the entity's databases, all of which were placed before the Special Referee. In addition, the Defendants assert that although they requested further discovery before the Referee, SSNA vehemently objected to the same and based its legal argument on the documents already in the Plaintiff's possession. Defendants' counsel also avers that the instant motion was made in bad faith and contrary to Uniform Rule 202.02 (a) by not engaging in a good faith effort to resolve a discovery dispute and that Plaintiff's counsel never requested a conference nor set forth any intent to make this current motion without first

conferring with the Court. Finally, Defendants' counsel sets forth that the type of relief requested does not come within the ambit of permissible relief as contained within CPLR § 3126 for failure to respond to discovery demands.

In reply, Plaintiff's counsel argues that case law supports broad discretion in court awarded monetary sanctions, including attorneys' fees, for wasted time and expense in connection with failure to respond to proper discovery demands. Plaintiff also points out that there is certainly no excuse set forth by the Defendants for failing to respond to the 2009 document demands for the seventeen month period between the date of the requests and the court's appointment of a Special Referee on the issue of the alleged unlawful fee splitting arrangement in November 2010. Finally, Plaintiff's counsel sets forth that had such documents as those provided in July 2013 been made available in 2009 or 2010, the entire appointment of the Referee as well as the appointment of counsel for BMRI in the related dissolution action could have been avoided.

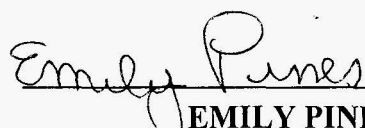
The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 for failure to comply with discovery demands rests in the sound discretion of the Court. **Friedman, Harfenst, Langer & Kraut v Rosenthal**, 79 AD 3d 798, 914 NYS 2d 196 (2d Dep't 2010). In this regard, willful and contumacious behavior can be inferred as a result of a party's failure to comply with court ordered discovery over an extended period of time. **Id; Rville v Elnmany**, 76 AD 3d 520, 906 NYS 2d 586 (2d Dep't 2010). Thus, although CPLR § 3126 does not specifically set forth the sanctions requested by the Plaintiff herein, the courts have consistently held that in addition to those sanctions specified in the statute, the court may, under appropriate conditions, impose monetary sanctions, such as discovery costs and attorneys fees, upon the party from whom disclosure is sought who fails or refuses to comply. **Knoch v City of New York**, 95 AD 3d 459, 970 NYS 2d 270 (2d Dep't 2013).

On the other hand, 22 NYCRR § 202 does provide that no motion shall be filed with the court concerning disclosure unless counsel provides an affirmation setting forth that counsel has conferred with the opposing counsel in good faith in an effort to resolve the issues raised by the motion.

Under the circumstances set forth above, while the Court believes it has the authority to impose sanctions for a lengthy failure to comply with a valid discovery demand, the Defendants' counsel has raised issues with regard to a failure to meet and confer as well an allegation that Plaintiff's counsel participated in a delay of the discovery process. Accordingly, the Court refers the issue of sanctions to the next conference of this case, which is set for May 6, 2014, at 2 o'clock p.m.. At such conference, the Court will take the opportunity to discuss the issue further with counsel, and, if unable to reach a resolution, is inclined to set this matter down for an evidentiary hearing.

This constitutes the Decision of the Court.

Dated: February 19, 2014
Riverhead, New York



EMILY PINES
J. S. C.

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