

Teguegne v Levine

2014 NY Slip Op 31254(U)

May 14, 2014

Supreme Court, New York County

Docket Number: 800061/12

Judge: Martin Shulman

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARTIN SHULMAN, J S C
Justice

PART 1

Index Number : 800061/2012
TEGUEGNE, ADDIS-ALEM BEKELE
vs.
LEVINE, WILLIAM NOAH
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 800061/12
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits A-E | No(s) 1

Answering Affidavits -- Exhibits _____ | No(s) 20

Replying Affidavits _____ | No(s) 63

Supp. Aff. in Opp. - exhibit | No. 4

Upon the foregoing papers, it is ordered that this motion is
*decided in accordance with the
attached decision and order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
MAY 15 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: May 14, 2014

HON. MARTIN SHULMAN, J S C

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
ADDIS-ALEM BEKELE TEGUEGNE,

Plaintiff,

Index No. 800061/12

Decision/Order

-against-

WILLIAM NOAH LEVINE, et al,

Defendants.
-----X

FILED

MAY 15 2014

Martin Shulman, J.:

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff, Addis-Alem Bekele Teguegne (hereinafter "plaintiff"), commenced

this action *pro se* by filing a summons and verified complaint sounding in negligence and medical malpractice against defendants, William Noah Levine, M.D. (s/h/a William Noah Levine) and The New York and Presbyterian Hospital (s/h/a "the Orthopedic, Radiology, Emergency, Physical therapy departments of New York Presbyterian Hospital, New York and Presbyterian Hospital") (collectively "defendants"). Plaintiff's complaint is based upon treatment defendants rendered to plaintiff in connection with a dislocated left shoulder from approximately October 5, 2009 through December 10, 2009.

Plaintiff and defense counsel have appeared before this court at numerous scheduled court conferences as part of the Medical Malpractice Settlement Program ("MMSP").¹ Sensitive to the difficulties faced by *pro se* litigants, especially in medical malpractice cases, this court at each conference

¹ This action first appeared on the MMSP calendar on January 16, 2013. No preliminary conference order was ever entered notwithstanding subsequent appearances on March 13, 2013, June 19, 2013, November 20, 2013 (adjourned without appearance from September 18, 2013) and January 15, 2014.

[* 3]
repeatedly encouraged plaintiff to obtain counsel. To date he has been unable to do so.

Two concerns have been raised consistently at these conferences. First, as a practical matter, this court sought to ascertain the case's merits sooner rather than later. To this end, this court advised plaintiff of CPLR §3012-a's requirement that a certificate of merit be obtained in medical malpractice actions after consulting with a physician, as well as of his ultimate obligation to retain an expert in order to prove his case. The second matter discussed was plaintiff's default in responding to defendants' discovery demands, including but not limited to demands for a bill of particulars and medical authorizations. These demands were served together with defendants' answers on or about June 1, 2012 (collectively, the "demands"). See Motion at Exh. B.

As this court predicted to plaintiff at the various court conferences, defendants now move to dismiss pursuant to CPLR §3012-a based upon plaintiff's failure to provide a certificate of merit, or pursuant to CPLR §3126(3) based upon plaintiff's default in responding to defendants' demands. Alternatively, defendants seek an order of preclusion pursuant to CPLR §3126(2) or an order pursuant to CPLR 3124 compelling plaintiff to comply with their demands. Plaintiff opposes the motion.

At the outset, the portion of defendants' motion to dismiss this action based upon plaintiff's failure to provide a certificate of merit pursuant to CPLR §3012-a must be denied. This court's further research reveals that this statutory provision was expressly made inapplicable to *pro se* plaintiffs. See CPLR §3012-

a(f); *Harmon v Huntington Hosp.*, 163 Misc2d 150, 619 NYS2d 492 (Sup Ct, NY County, 1994). As such, dismissal on this ground would be inappropriate.

Turning to the remaining portion of defendants' motion seeking dismissal based on plaintiff's failure to comply with discovery, CPLR §3126 provides in pertinent part as follows with respect to penalties for refusal to comply with orders to disclose:

If any party . . . refuses to obey an order for disclosure or wilfully 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:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses . . . ; or
3. an order striking out pleadings or parts thereof, . . . or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

As stated in *Birch Hill Farm, Inc. v Reed*, 272 AD2d 282 (2d Dept 2000):

Although actions should be resolved on the merits wherever possible, a court may, *inter alia*, strike the "pleadings or parts thereof" as a sanction against a party who "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . ." While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of the Supreme Court's discretion, striking a pleading is appropriate where there is a clear showing that the failure to comply with discovery demands is willful, contumacious or in bad faith. (Citations omitted).

Further, "[t]he sanction of dismissal may be warranted even where . . . the plaintiff committed no violation of a prior court order (citations omitted)." *Wolfson*

v Nassau County Med. Ctr., 141 AD2d 815 (2d Dept 1988). Similar to *Wolfson*, in this case there is no prior written discovery order. Nonetheless, this court has made clear at multiple prior conferences that it was mandatory for plaintiff to comply with discovery and obtain confirmation of this case's merits.

Defendants' demands have gone unanswered for almost two (2) years and this court repeatedly warned plaintiff at five (5) different conferences spanning a one (1) year period that the case could ultimately be dismissed. Given the length of plaintiff's delay, willfulness can be readily inferred. See *Wolfson, supra* (dismissal sanction warranted for two and a half year delay in responding to interrogatories); *Goldstein v CIBC World Mkts. Corp.*, 30 AD3d 217 (1st Dept 2006) (year-long pattern of non-compliance after court's repeated warnings at numerous compliance conferences warranted inference of willful conduct and justified dismissal sanction).

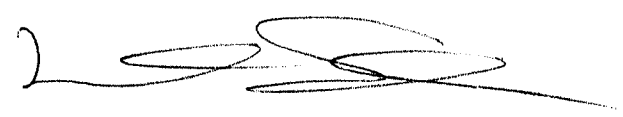
Under the circumstances, dismissal is warranted in the case at bar. Plaintiff was afforded ample opportunity to comply with discovery yet has failed to take any steps to move this case forward. This court has considered imposing a lesser sanction. However, notwithstanding that plaintiff was not obligated to provide a certificate of merit, this court "may nevertheless consider the absence of any showing of merit as a factor affecting [its] decision whether a sanction less drastic than dismissal might be warranted." *Wolfson, supra*, at 815-816; *Commissioners of State Ins. Fund v Valenzano*, 175 AD2d 687, 688 (1st Dept 1991). Here, given the complete lack of showing of merit, the extensive

disregard for discovery deadlines and the potential prejudice to defendants, dismissal is justified. For all the foregoing reasons it is hereby

ORDERED that defendants' motion is granted to the extent that the complaint is hereby dismissed pursuant to CPLR §3126(3), together with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs, and the motion is otherwise denied. The Clerk is directed to enter judgment accordingly.

The foregoing constitutes this court's decision and order. Courtesy copies of this decision and order have been provided to plaintiff and defendant's counsel.

Dated: New York, New York
May 14, 2014



HON. MARTIN SHULMAN, J.S.C.

FILED

MAY 15 2014

COUNTY CLERK'S OFFICE
NEW YORK