

Vaughn v Mount Sinai Med. Ctr.

2014 NY Slip Op 32988(U)

June 9, 2014

Supreme Court, Westchester County

Docket Number: 51411/13

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513(a)), you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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ROBERT VAUGHN,

Plaintiff,

DECISION & ORDER

-against-

Index No. 51411/13
Motion Date: June 9, 2014

MOUNT SINAI MEDICAL CENTER,

Seq. Nos. 2

Defendant.

-----X
LEFKOWITZ, J.

The following papers were read on these motions by defendant for an order pursuant to CPLR 3126, dismissing plaintiff's complaint for his failure to provide outstanding discovery, or, in the alternative, precluding plaintiff from introducing evidence at the time of trial as to discovery demanded but not provided.

Order to Show Cause - Affirmation in Support - Exhibits A-H
Affidavit of Service

Upon the foregoing papers and upon the proceedings held on June 9, 2014, the motion is determined as follows:

Plaintiff commenced the present action pro se. In the complaint, plaintiff alleges that he was falsely imprisoned and assaulted in defendant's psychiatric clinic after a dispute with employees at defendant's walk-in clinic and was forcibly given medication. Plaintiff alleges that he was at the walk-in clinic for pre-surgical blood testing and to see a doctor about the surgery which was scheduled for the next day. Plaintiff alleges that the lab technician who was drawing his blood asked him if he would participate in medical research which required the drawing of extra blood, testing of the blood for certain illnesses, and plaintiff answering certain questions. Plaintiff further alleges that he initially agreed, but was not presented with an "authorization document", and the extra blood was drawn. Plaintiff also alleges that, thereafter, while he was being asked questions by a different employee, there was a dispute regarding the questions and the lab technician threw his blood sample into the "biohazard material disposal." Plaintiff further alleges that, after speaking with supervisors and being told that the extra blood could not be taken out of the "biohazard material disposal," he was forcibly taken to the emergency room, administered drugs, and eventually taken to defendant's psychiatric clinic. Plaintiff alleges that he was taken to the psychiatric clinic in violation of New York State law since he was neither a harm

to himself or others. Plaintiff also alleges that while at defendant's psychiatric clinic he was assaulted by security guards and staff and forced to remain inside his room. Additionally, plaintiff alleges that his request, as well as the request of his doctor, that he have the scheduled surgery were ignored. Plaintiff demands \$20,600.00.

On or about March 18, 2013, defendant served and filed an answer, as well as various demands, including demands for a verified bill of particulars and authorizations for medical, hospital and employment records. By letter dated September 16, 2013, defendant's counsel advised plaintiff that the demanded discovery was outstanding and requested plaintiff execute an enclosed authorization for his records from Mount Sinai Medical Center. Therein, defendant's counsel also enclosed a self addressed stamped envelope. No response was received from plaintiff.

By letter dated September 16, 2013, defendant's counsel advised plaintiff that the preliminary conference was adjourned to November 12, 2013, insofar as plaintiff refused to enter into a discovery order. Defendant's counsel also demanded a bill of particulars and discovery as previously demanded by defendant, and included copies of the discovery demands and an authorization for Mount Sinai Medical Center for plaintiff to execute.

On November 12, 2013, the parties attended a preliminary conference. At that time, plaintiff had not provided any discovery. By Preliminary Conference Order dated November 25, 2013, this court directed, among other things, plaintiff to send defendant's counsel a list of his medical providers within 30 days of the order. Defense counsel agreed to provide blank HIPAA authorizations to plaintiff. The order also directed plaintiff to, inter alia: provide all authorizations, including employment, physician, hospital and psychiatric records, and a bill of particulars on or before January 15, 2014; appear for a deposition on or before February 28, 2014; submit to an examination by a physician designated by defendant on or before March 27, 2014; provide defendant with the names and addresses of all witnesses, statements and photographs on or before March 7, 2014; serve discovery demands on or before February 3, 2014; and respond to all discovery demands within 30 days. The order also directed the parties to appear for a conference in the Compliance Part on January 31, 2014.

By letter dated November 26, 2013, defendant's counsel forwarded plaintiff a copy of the Preliminary Conference Order and authorizations to complete for Mount Sinai Medical Center, Dr. Aaron McDaniel and New York Metropolitan Psychiatry LLC, as well as a self-addressed stamped envelope. Defendant's counsel, therein, also asked plaintiff to provide the names and addresses of his medical providers and his employers from January, 2009 to the present, so that counsel could prepare authorizations for those providers. Counsel also reminded plaintiff as to discovery deadlines directed by the court, including that he was to provide a bill of particulars and the authorizations by January 15, 2014 and appear for a deposition on or before February 28, 2014.

On January 31, 2014, only counsel for defendant appeared at the scheduled conference. As of that date, plaintiff had not provided any discovery. By Compliance Conference Order dated January 31, 2014 and entered on February 5, 2014, this court directed plaintiff to appear for a

conference on February 27, 2014, and directed defendant's counsel to serve a copy of the order upon plaintiff.

By letter dated February 5, 2014, defendant's counsel advised plaintiff that the court conference was adjourned to February 27, 2014 due to his failure to appear. Defendant's counsel again demanded that plaintiff provide authorizations for Mount Sinai Medical Center, Dr. McDaniel and New York Metropolitan Psychiatry LLC, as well as lists of the names and addresses of all his physicians, hospitals and employers. Counsel also reminded plaintiff of the discovery deadlines, including that he was to have provided a bill of particulars by January 15, 2014.

The parties appeared for a compliance conference on February 27, 2014. Defendant's counsel asserted that plaintiff had not provided outstanding discovery prior to the conference. At the conference, plaintiff signed authorizations for Mount Sinai Medical Center, Dr. McDaniel and New York Metropolitan Psychiatry LLC. By Compliance Conference Referee Report & Order dated February 28, 2014, this court directed plaintiff to serve a bill of particulars within 45 days of the order and directed defendant to serve plaintiff with a copy of the order with notice of entry within ten days.

By letter dated February 28, 2014, defendant's counsel enclosed a copy of the demand for a bill of particulars and reminded plaintiff he was to respond within 45 days of the last court appearance. Defendant's counsel also advised plaintiff that she could not locate "Dr. Shanker" for whom plaintiff had provided an authorization at the conference, and asked for a first name and address of the physician, as well as the names and addresses of any other medical/psychiatric providers.

On March 10, 2014, defendant's counsel served this court's February 28, 2014 order with notice of entry.

On April 16, 2014, the parties appeared for a conference. Plaintiff had not provided any further discovery and had not provided defendant with a bill of particulars. A briefing schedule for the present motion was then issued.

Defendant now seeks an order dismissing the complaint due to plaintiff's failure to provide outstanding discovery, or in the alternate, precluding plaintiff from introducing evidence at trial as to discovery demanded but not provided. Defendant contends that plaintiff's failure to provide demanded discovery is willful insofar as defendant has sent plaintiff multiple reminders of the outstanding discovery and multiple copies of the demand for a bill of particulars. Defendant contends that the demanded authorizations and discovery is necessary to review, analyze and defend the claims asserted by plaintiff. Defendant notes that the court has specifically ordered plaintiff to provide authorizations for medical/mental health providers and employment records. Moreover, defendant contends that it still has not received a bill of particulars and the specific claims of medical malpractice are still unknown. Defendant also asserts that plaintiff only recently signed three authorizations provided by defendant, including an authorization for defendant

hospital's records. Defendant contends that it is significantly prejudiced by plaintiff's failure to comply with the court orders and defendant's demands. Finally, defendant contends that the action should be dismissed due to plaintiff's willful failure to comply with court ordered discovery on at least four occasions, and since the action has been pending for over a year and defendant still has not been apprised of the specific acts of negligence claimed.

Plaintiff failed to file any written opposition to the motion despite being served with the motion papers. At oral argument, plaintiff appeared after the motion was called. The court, however, allowed plaintiff to present argument insofar as counsel for defendant was still present. Upon questioning from the court, plaintiff admitted that he had been served with the motion papers. Plaintiff further alleged that, prior to appearing for oral argument, he had filed a bill of particulars with the facts of his claims on the "third floor". At the time of oral argument, however, the document which plaintiff alleged that he had filed had not yet been uploaded to the NYSCEF website by the County Clerk. Counsel for defendant, however, asserted that she had not received a verified bill of particulars, sworn to by plaintiff before a notary public. Plaintiff further asserted that he had signed authorizations during a court conference. The court advised plaintiff that he had to execute authorizations for his employment records and all of his medical and mental health providers during the period of 2009 to the present.

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may, inter alia, issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading, or preclusion, a court must determine that the party's failure to disclose is willful and contumacious (*Arpino*, 102 AD3d at 210; *Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]). "Willful and contumacious conduct can be inferred from repeated noncompliance with court orders ... coupled with no excuses or inadequate excuses" (*Russo v Tolchin*, 35 AD3d 431, 434 [2d Dept 2006]; see also *Commisso v Orshan*, 85 AD3d 845, 845 [2d Dept 2011]; *Prappas v Papadatos*, 38 AD3d 871, 872 [2d Dept 2007]).

Although plaintiff has executed three authorizations for defendant hospital, Dr. McDaniel and New York Metropolitan Psychiatry LLC, he has not provided defendant with a verified bill of particulars or the other discovery demanded by defendant, including authorizations for employment records and his other medical and mental health providers. The verified bill of particulars and discovery demanded by defendant is material and necessary to the issues in this action, and defendant's ability to defend the action will be severely prejudiced if plaintiff fails to serve a verified bill of particulars and produce the demanded discovery. Accordingly, this court will give plaintiff one last opportunity to serve defendant with a verified bill of particulars and the outstanding discovery. Plaintiff, therefore, shall, on or before June 23, 2014, serve on defendant's counsel a verified bill of particulars and outstanding discovery, including (1) authorizations for the period of 2009 to the present for his employers for employment records, and (2) authorizations for the period of 2009 to the present for all of his medical and mental health providers for his medical records which have not yet been provided to defendant. If plaintiff has not been employed or has

not seen any other medical or mental health providers other than defendant hospital, Dr. McDaniel and New York Metropolitan Psychiatry LLC during the period of 2009 to the present, plaintiff shall serve an affidavit to that effect. In the event that defendant fails to serve defendant on or before June 23, 2014 with a bill of particulars and the foregoing authorizations or an affidavit to the effect that he was not employed and did not have health providers other than defendant hospital, Dr. Mc Daniel or New York Metropolitan Psychiatry LLC, for whom he has already provided authorizations, defendant shall file an affidavit of noncompliance and proposed order dismissing plaintiff's complaint, with notice to plaintiff. In the absence of a bill of particulars which details and particularizes plaintiff's claims, defendant is unable to prepare a defense to the claims and is entitled to dismissal of the complaint.

Accordingly, it is

ORDERED that the motion is granted to the extent that plaintiff shall, on or before June 23, 2014, serve defendant's counsel with (1) a verified bill of particulars, sworn to by plaintiff before a notary public; (2) authorizations for his employers for his employment records for the period of January, 2009 to the present, or an affidavit to the effect that he was not employed during that period, and (3) authorizations for all his medical and mental health providers, other than those already provided, for the period of January, 2009 to the present, or an affidavit to the effect that he did not have any other medical or mental health providers; and it is further

ORDERED that defendant's counsel is directed to serve plaintiff with 6 blank authorizations within 5 days of entry of this order; and it is further

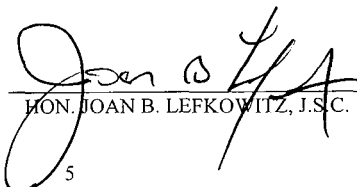
ORDERED that, in the event that plaintiff fails to serve a verified bill of particulars and the outstanding authorizations, or the required affidavits, on or before June 23, 2014, defendant shall file, on or before June 26, 2014, with notice to plaintiff, an affidavit of non-compliance with a proposed order dismissing the complaint based plaintiff's failure to serve a verified bill of particulars and outstanding authorizations; and it is further

ORDERED that counsel shall appear for a conference in the Compliance Part, Courtroom 800, on June 30, 2014 at 9:30 A.M.

ORDERED that defendant shall serve a copy of this order with notice of entry on plaintiff within 5 days of entry.

This constitutes the decision and order of this court.

Dated: White Plains, New York
June 9, 2014



HON. JOAN B. LEFKOWITZ, J.S.C.