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

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BLANCA VIRUET,

Plaintiff,

-against-

THE MOUNT SINAI MEDICAL CENTER INC., THE MOUNT SINAI HOSPITAL, RON PALMON, MD., BLAIR LEWIS, M.D., DANIEL LABOW, M.D. and "JOHN DOE" 1-3 (the fictitious names of persons yet to be identified),

Defendants.

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Index No. 104158/09

Amended Decision & Order

Martin Shulman, J.:

Defendants The Mount Sinai Hospital, Ron Palmon, M.D. and Daniel Labow, M.D. (collectively "defendants") move pursuant to CPLR 3042 and §3126 to dismiss plaintiff's complaint in this medical malpractice action based upon alleged discovery defaults. Plaintiff Blanca Viruet's ("plaintiff" or "Viruet") claim against defendants arose on April 20, 2006 when she underwent a colonoscopy and allegedly suffered a perforated colon. Plaintiff opposes the motion.

Defendants served their initial demands for written discovery and bills of particulars (the "demands") simultaneously with their answers in or about May 2009. Motion at Exhs. B and C. Viruet initially responded to the demands in or about April and September 2010 by serving bills of particulars and providing certain medical records and authorizations. Adam Aff. in Opp. at Exhs. B, C & D.

Counsel for the parties entered into a preliminary conference order on July 11, 2012 ("PCO") wherein plaintiff agreed *inter alia* to provide supplemental bills of particulars, various authorizations and responses to defendants' 2009

discovery demands within 30 days. Motion at Exh. D. Upon Viruet's failure to comply with the PCO a further compliance conference order was entered into on December 12, 2012 ("12/12/12 CCO"), granting plaintiff an additional 30 days to provide the discovery outlined in the PCO. *Id.* at Exh. G. Viruet still had not complied with the PCO and the 12/12/12 CCO as of the next compliance conference held on April 17, 2013. As a result, a further CCO ("4/17/13 CCO") was entered into granting plaintiff 30 more days to provide the previously ordered discovery. *Id.* at Exh. K.

The next compliance conference was scheduled for October 16, 2013. However, counsel for the parties stipulated to adjourn the conference to November 20, 2013 due to a family illness and subsequent death which required plaintiffs' counsel, Richard Adam, Esq., to be absent from his practice for an extended time. As memorialized in defense counsel's letter dated October 17, 2013 (*id.* at Exh. P), plaintiff also agreed to provide all outstanding discovery on or before November 15, 2013. In the event of a further default, defendants' counsel advised that she would make an application at the next conference for dismissal.

On the November 20, 2013 adjourn date, defense counsel advised that discovery was still outstanding and in response to defendants' request for dismissal, this court orally directed plaintiff to provide outstanding discovery on or before November 27, 2013.[1] On the next conference date of December 10, 2013

[1] Plaintiff's counsel of record did not attend the November 20, 2013 conference. However, during the conference he e-mailed his discovery response

this court found that Viruet still had not complied with the prior conference orders and issued a further order (the "12/10/13 CCO") granting plaintiff 20 days to provide new authorizations which included her initials at item 9a of the HIPAA authorization forms and 30 days to serve supplemental bills of particulars. *Id.* at Exh. V. At a follow-up conference held on February 19, 2014 this court once again granted plaintiff additional time to provide outstanding discovery (the "2/19/14 CCO"). *Id.* at Exh. Z.

Contending that Viruet is still in default of this court's numerous written conference orders, defendants brought the instant motion to strike the complaint. As of the date of this motion, defendants' counsel has written 14 good faith letters to plaintiff's counsel and this court has issued five (5) written conference orders and one oral directive. It has been eight (8) years since Viruet's claim arose, five (5) years since this action was commenced and defendants' initial demands served, and a year and a half since the PCO was issued.

In opposition, Viruet claims that she has responded to the best of her ability to defendants' voluminous and unreasonable demands and defense counsel merely seeks to stall and derail this case by "manufacturing a discovery crisis" where none actually exists. Plaintiff also claims she provided certain items, such as authorizations, on more than one occasion. More troubling, plaintiff's counsel, Richard Adam, Esq., questions the legitimacy of certain

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to the per diem attorney who covered the case for him. Upon the court's review of plaintiff's November 18, 2013 response (*id.* at Exh. R) it was determined to be inadequate.

compliance conference orders,[2] claiming that defense counsel tricked per diem counsel who covered the conference appearances for him[3] by including in the orders certain demanded items which Mr. Adam contested.[4]

In reply, defense counsel vehemently denies plaintiff's counsel's allegations of improper conduct with regard to the compliance conference orders. She further requests that his opposition be disregarded because it was not served timely.

Analysis

CPLR 3126, which details penalties for failing to comply with discovery, states:

> If any party, or a person who at the time of a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or willfully 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:
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> 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

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[2] Throughout his opposing affirmation plaintiff's counsel refers to the conference orders herein in quotation marks, as if they are not legitimate court orders.

[3] Plaintiff's counsel of record, Richard Adam, Esq., signed only the PCO. The subsequent four (4) CCOs were signed by per diem counsel who appeared at the conferences in Mr. Adam's stead.

[4] For example, by letter dated November 26, 2013, plaintiff advised defendants of Viruet's refusal to initial item 9a of the HIPAA authorization forms, yet defense counsel nonetheless prepared written orders directing that plaintiff initial them and advised the court that such terms had been consented to.

> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
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> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

In issuing penalties under CPLR 3126 the court "can take any other reasonable course consistent with the demands of the case and the purpose of CPLR 3126." Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3126:11. Sanctions are warranted if there is "[d]isobedience of a court order and frustration of the disclosure scheme provided by the CPLR . . ." *Pimental v City of New York,* 246 AD2d 467, 468 (1st Dept 1998). Whether or not a party is willfully ignoring discovery demands "can be inferred from a party's repeated failure to respond to demands and/or to comply with disclosure orders, coupled with inadequate excuses for its defaults (citations omitted)." *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 52 (2d Dept 1998).

While sympathetic to plaintiff's counsel's personal circumstances, nonetheless, his general inattentiveness to this case has caused significant delay. It simply should not take five (5) written court orders over a period of a year and a half for basic written discovery to be completed. The foregoing time period does not even take into account the three (3) year time period from May

2009, when defendants first served their demands, to the July 2012 issuance of the PCO.

Of the items listed as outstanding in the last conference order dated February 19, 2014, plaintiff ultimately provided non-party contact information to defendants and advised that she could not locate her birth certificate or recall any other medical providers not already identified. However, she is in default of this court's various orders requiring her bills of particulars to be supplemented. Plaintiff agreed to the supplementation in the July 2012 PCO, then ultimately served a response over a year later in November 2013 objecting, for the first time, to the particulars demanded and stating that it would not be possible to supplement same until plaintiff received certain billing records and deposed defendants. Counsel continues to insist that these non-responses satisfy the numerous court orders, despite the fact that this court reviewed same at the November 20, 2013 conference and concluded otherwise.

Plaintiff has also failed to comply with this court's orders by providing defendants with incomplete authorizations. Specifically, defendants objected to the authorizations plaintiff provided in November 2013 because plaintiff had not initialed item 9a of the HIPAA authorization form.[5] By letter dated November 26, 2013, plaintiff's counsel disputed the necessity of initialing this item.[6] At the

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[5] Initialing item 9a of the HIPAA form permits the disclosure of information relating to alcohol and drug abuse, mental health treatment and confidential HIV related information.

[6] Defendants contend that the uninitialed authorizations were likely to be rejected. Plaintiff contends that defendants nonetheless agreed to process them

subsequent December 10, 2013 conference attended on plaintiff's behalf by per diem counsel, this court ordered that initialed authorizations be provided. While plaintiff's counsel is quick to accuse defense counsel of improper conduct in surreptitiously inserting this term in the December 10, 2013 court order, at no time did he promptly raise this issue to the court, instead waiting until defendants made the within motion. It is further worth noting that court rules require attorneys appearing at conferences to be "thoroughly familiar with the action and authorized to act". See 22 NYCRR §202.12(b).

As stated in *Abouzeid v Cadogan*, 291 AD2d 423, 424 (2d Dept 2002): "Where a party disobeys a court order, and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of a pleading is within the broad discretion of the trial court (citations omitted)." Given the number of court orders issued and plaintiff's repeated failure to comply with their directives, this court can only infer that her default is wilful, notwithstanding her production of partial discovery over time. For the foregoing reasons, it is

ORDERED that defendants' motion to strike the complaint is granted and the action is dismissed; and it is further

ORDERED that this court's prior decision and order dated August 6, 2014 (motion sequence 002) is hereby amended and modified solely to the extent that the Clerk is directed to enter judgment accordingly; and it is further

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and have not advised that any have been rejected.

ORDERED that this amended decision and order shall supercede and replace the decision and order dated August 6, 2014.

The foregoing constitutes this court's amended decision and order.

Dated: New York, New York
August 22, 2014

Martin Shulman, J.S.C.