

**Michael v Schlegel**

2015 NY Slip Op 30725(U)

May 5, 2015

Supreme Court, New York County

Docket Number: 805388/13

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

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

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MEDHAT MICHAEL and ANGELA MICHAEL,

Plaintiffs,

-against-

PETER SCHLEGEL, M.D. and NEW YORK  
PRESBYTERIAN HOSPITAL,

Defendants.

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Index No. 805388/13

**Decision & Order**

**Hon. Martin Shulman**

In this medical malpractice action, defendants move pursuant to *inter alia* CPLR §§ 3124 and 3126<sup>1</sup> to dismiss this action with prejudice based upon plaintiffs' alleged failure to comply with two (2) discovery orders or, alternatively, to compel plaintiffs' compliance with such orders. Plaintiffs oppose the motion.

Defendants first served their demands for a bill of particulars and omnibus demands on February 2, 2014 (motion at Exh. C). Plaintiffs initially served a bill of particulars on or about March 3, 2014 (*id.* at Exh. D) and responses to defendants' omnibus demands on or about March 8, 2014 (Bloomfield Aff. in Opp. at Exh. A). By letter dated March 17, 2014 (motion at Exh. E), defendants' counsel objected to plaintiffs' responses to items 1, 5, 7, 8, 10, 11, 15 and 17 of their bill of particulars as to defendant New York Presbyterian Hospital (NYPH) as deficient, and the corresponding demands served by co-defendant Schlegel. Thereafter, a preliminary conference order (PCO) was entered on July 16, 2014 (*id.* at Exh. F) *inter alia* directing plaintiffs to: supplement their bills of particulars as per defendants' March 17, 2014 letter (¶ II);

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<sup>1</sup> The notice of motion indicates that relief is being sought under CPLR 3216 (want of prosecution), which presumably is a typographical error.

provide authorizations for mental health records, in vitro fertilization (IVF) and fertility treatment providers and health insurance records (¶ III); and provide authorizations to obtain records from plaintiff Angela Michael's obstetrician-gynecologist and pharmacy records (¶ IX).

Upon plaintiffs' failure to comply with the PCO, defense counsel sent further letters to plaintiffs' counsel on July 25, 2014, August 25, 2014 and September 30, 2014 (*id.* at Exhs. G and H). By letter dated October 1, 2014, plaintiffs responded that their bills of particulars were sufficient and that authorizations were previously provided for all relevant health care providers (*id.* at Exh. I). Defendants objected to the foregoing by letter dated October 24, 2014 (*id.* at Exh. K) and on December 10, 2014, a compliance conference order (CCO, *id.* at Exh. J) was entered into directing plaintiffs to comply by providing the discovery outlined in defendants' letters dated July 25, 2014, August 25, 2014, September 30, 2014 and October 24, 2014. After a further good faith letter from defense counsel dated January 9, 2015 (*id.* at Exh. L), plaintiffs responded by letter dated February 24, 2015 (*id.* at Exh. M) as follows:

- plaintiff Medhat Michael has had no primary care physicians or mental health providers in the last 10 years;
- plaintiff Medhat Michael confirmed that authorizations had already been provided for all urologists and fertility specialists;
- plaintiff Medhat Michael paid for the surgery at issue out of pocket and did not use health insurance to pay for same;
- plaintiff Medhat Michael provided a pharmacy authorization and an updated authorization for Baylor University;
- plaintiff Medhat Michael withdrew his claim for lost earnings; and

- plaintiff Angela Michael was discontinuing the action against defendants.

In response, defendants by letter dated March 6, 2015 (id. at Exh. N) disputed that plaintiffs' February 24, 2015 response brought them into compliance with their discovery obligations. Defendants also refused to sign the stipulation permitting plaintiff Angela Michael to discontinue her claims against them. This motion ensued.

With respect to penalties for failure to comply with discovery procedures, CPLR §3126 provides in relevant part as follows:

If any party...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:

- 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
- an order prohibiting the disobedient party from supporting or opposing designated claims or defenses...; or
- 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.

While the penalty of striking a pleading for failure to comply with disclosure is extreme, courts have nonetheless held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 (1<sup>st</sup> Dept 1990); *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1<sup>st</sup> Dept), *lv denied*, 88 NY2d 802 (1996) (disobedience of a series of court orders directing discovery warranted striking of pleading).

Here, with respect to plaintiffs' bills of particulars, a review of the record underlying this round of motion practice reveals that plaintiffs have not adequately responded to the following items demanded in NYPH's demand for a bill of particulars, or the corresponding items demanded in defendant Schlegel's demand for a bill of particulars: 1 (plaintiffs' street address), 5 (each act of alleged negligence upon which plaintiffs base their malpractice claims), 7 (statement of accepted medical practices plaintiffs claim were violated), 8 (manner in which defendant departed from accepted medical practices, customs and standards), 10 (further specifics as to alleged negligent acts and/or omissions),<sup>2</sup> 11 (laws and/or health code provisions claimed to have been violated) and 15 (identification of all collateral sources).<sup>3</sup> Plaintiffs shall serve supplemental bills of particulars in accordance with the directives below.

As to plaintiff Angela Michael, plaintiffs attempt to avoid their obligation to provide various authorizations for her medical records by discontinuing this plaintiff's claims against defendants. However, defendants have refused to consent to the discontinuance and plaintiff cannot discontinue against defendants without a court order, which they have failed to request. See CPLR 3217. As a result, defendants'

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<sup>2</sup> As to items 5, 7, 8 and 10, plaintiffs, in violation of the PCO incorporating defendants' March 17, 2014 letter, provide the same particulars as to both defendants, wholly failing to identify the specific acts and/or omissions attributable to each and the standard of care from which each defendant is alleged to have deviated. Plaintiffs' self-serving claim that they have sufficiently provided detailed particulars is unavailing.

<sup>3</sup> Plaintiffs respond to item 15 by stating that health insurance was not used to pay for the subject surgery. However, the March 17, 2014 letter asked plaintiffs to clarify whether they had health insurance, regardless of whether or not it was used to pay for the treatment at issue in this action. This information has not been provided.

demands for various authorizations for this plaintiff remain outstanding and must be provided.

Accordingly, it is hereby

ORDERED that defendants' motion is granted and the complaint shall be stricken unless plaintiffs fully comply by providing the outstanding authorizations for plaintiff Angela Michael and supplemental bills of particulars as specified herein within 30 days of the date hereof; and it is further

ORDERED that in the event that plaintiffs fail to comply with the foregoing, defendants' counsel shall electronically file and submit a proposed order striking the complaint directly to chambers, together with an affirmation detailing the default and an affidavit of service of same upon plaintiffs' counsel.

Counsel for the parties shall appear for a compliance conference on July 15, 2015 at 9:30 a.m., at Part 1, 60 Centre Street, Room 325, New York, New York.

The foregoing constitutes this court's decision and order.

Dated: New York, New York  
May 5, 2015

  
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Hon. Martin Shulman, J.S.C.