

Eisner v Gunn

2015 NY Slip Op 31222(U)

July 14, 2015

Supreme Court, New York County

Docket Number: 805052/13

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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TERI EISNER,

Plaintiff,

-against-

Index No. 805052/13

Motion seq. no. 002

DECISION AND ORDER

JACQUELINE SIMON GUNN, Psy. D., THE KAREN
HORNEY CLINIC, and HENRY A. PAUL, M.D.,

Defendants.

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BARBARA JAFFE, J.:

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By notice of motion, defendant Jacqueline Simon Gunn, Psy. D. moves pursuant to CPLR 3126 and CPLR 3124 for an order dismissing the complaint against her with prejudice. Plaintiff opposes.

I. BACKGROUND

On February 7, 2013, plaintiff commenced this action asserting claims against defendant Gunn for negligence, medical malpractice, and defamation, and alleging medical and psychological injuries. In her complaint, plaintiff alleges, in pertinent part, that but for defendant's negligence and medical and psychological malpractice, her various enumerated mental ailments, including depression, anxiety, and suicidal ideation, would have been cured or stabilized. (NYSCEF 1).

On October 22, 2013, defendant served on plaintiff a demand for a bill of particulars,

along with other discovery demands, including, among other things, medical authorizations and records. (NYSCEF 10). Thereafter, the parties engaged in settlement negotiations but were unable to reach an agreement. (NYSCEF 16, 28).

Between March and May 2014, defendant sent three emails to plaintiff requesting the discovery responses to the October 2013 demand. (NYSCEF 20-22).

On June 27, 2014, defendant filed a motion for an order precluding plaintiff from offering at trial evidence given her failure to provide discovery responses, or in the alternative, to compel plaintiff to produce a bill of particulars and outstanding discovery responses. (NYSCEF 5).

By preliminary conference order dated July 28, 2014, plaintiff was directed to provide defendants a bill of particulars on or before September 8, 2014, and to hold depositions on or before October 14, 2014. (NYSCEF 11).

By decision and order dated August 11, 2014, plaintiff was ordered to provide defendants with the requested bill of particulars before September 22, 2014 and appear for deposition before October 11, 2014. (NYSCEF 16).

In September 2014, defense counsel sent two emails to plaintiff detailing her availability over the following month to take plaintiff's deposition, and plaintiff's counsel responded that the requested authorizations and bill of particulars were forthcoming. (NYSCEF 24-25).

On October 27, 2014, plaintiff sent defendant 10 HIPAA-compliant medical authorizations. By letter to plaintiff dated November 5, 2014, defendant rejected the authorizations, claiming that they failed to authorize the release of mental health information or authorize defendant to discuss same with plaintiff's health care providers. (NYSCEF 33).

By supplemental affirmation dated March 23, 2015, defense counsel stated that plaintiff

had still not complied with court-ordered discovery. (NYSCEF 38).

II. DEFENDANT'S MOTION TO STRIKE

A. Contentions

Defendant alleges that plaintiff has repeatedly failed to comply with discovery demands and defied a court order compelling her to provide discovery and appear for deposition. She claims that, to date, plaintiff has failed to provide a bill of particulars, medical authorizations, or appear for deposition, and that striking her complaint is the appropriate remedy. (NYSCEF 16).

In opposition, plaintiff claims that defendant mischaracterizes why the litigation has not progressed, claiming that the parties have been actively engaged in settlement negotiations. She contends that defendant's effort to depose her on video and with defendant presumably present constitutes an attempt to intimidate her, and that the delays in producing the other requested discovery are due to her fragile emotional state. Plaintiff observes that medical authorizations forwarded to defendant were rejected, and she seeks a 60-day extension to comply with the outstanding discovery requests. (NYSCEF 34).

In reply, defendant reiterates her contentions and notes that plaintiff has still failed to provide discovery during the pendency of the instant motion. She argues that plaintiff's medical excuses for her delays have no merit, absent a supporting affidavit from someone with medical expertise to evaluate her mental condition, and maintains that she has an absolute right to be present at and to videotape plaintiff's deposition. Defendant also claims that plaintiff's authorizations were properly rejected as the authorizations do not not release mental health-related records. (NYSCEF 32).

B. Analysis

Pursuant to CPLR 3126(3), the court may issue an order striking a party's pleading if the party refuses to obey a discovery order or willfully fails to disclose information. The party moving to strike a pleading must establish that the other party's failure to comply with a discovery order was willful, contumacious, or in bad faith. (*Rodriguez v United Bronx Parents, Inc.*, 70 AD3d 492, 492 [1st Dept 2010]). "The wilful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse." (*Commisso v Orshan*, 85 AD3d 845, 845 [2d Dept 2011]).

Here, plaintiff concedes her repeated failure to comply with defendant's discovery demands since October 2013. As of March 2015, beyond furnishing the rejected authorizations, plaintiff has provided none of the requested court-ordered discovery or appeared for deposition. Counsel's proffered excuse fails as it is based solely on her attorney's affirmation and not on any expert medical evidence. (*Compare Elghanayan v Elghanayan*, 128 AD2d 465, 466 [1st Dept 1987] [striking defenses where witness-party failed to provide competent medical evidence explaining nonappearance at deposition], *with Shure v New York Cruise Lines, Inc.*, 59 AD3d 292, 293-294 [1st Dept 2009] [plaintiff, who had otherwise complied with discovery, established that a stroke interfered with his ability to complete discovery]).

Moreover, by placing in issue her mental condition, thereby waiving her physician-patient privilege (*see Guitierrez v Trillium USA, LLC*, 111 AD3d 669, 672 [2d Dept 2013] ["party has waived the physician-patient privilege by affirmatively putting his or her physical or mental condition in issue"]), plaintiff's failure to submit authorizations for pertinent health-related information appears to be an attempt to frustrate the discovery process. (*Rossi v Budget Rent A*

Car/Budget Car and Truck Rental, 49 AD3d 1088, 1088-1098 [3d Dept 2008], *lv denied* [having placed medical condition in issue, plaintiff's failure to provide authorizations and medical records warranted dismissal of complaint]).

Although settlement negotiations were conducted during the period in question, plaintiff does not explain why they prevented her from complying with outstanding discovery demands. (See *Berna v Monroe Community Coll.*, 91 AD2d 1199, 1199 [4th Dept 1983] [settlement negotiations not reasonable excuse for delay in filing note of issue]).

In light of the foregoing, plaintiff's failures to comply with the various discovery orders and demands appear wilful and contumacious. (See *Commisso*, 85 AD3d at 845 [inferring wilful and contumacious conduct from plaintiff's pattern of ignoring court-ordered discovery]).

Thus, in order to avoid a dismissal, plaintiff must, within 30 days of this decision and order, comply with all of defendant's outstanding discovery demands herein referenced. (See *Figuroa v City of New York*, AD3d , 2015 Slip Op 05418 *1 [1st Dept 2015] [proper exercise of discretion where court denied motion to strike pleadings and gave defendants one final chance to comply with discovery]; see generally Siegel, NY Prac § 367 at 608 [4th ed 2005] [conditional sanctions appropriate]). Should plaintiff fail to do so, the complaint will be dismissed on affirmation of defense counsel and without further motion practice.

IV. 22 NYCRR 216.1

In her reply papers, defendant asks that I "strike those portions of plaintiff's opposition that prejudiciously [sic] recite confidential settlement negotiations." (NYSCEF 32). To the extent that defendant seeks an order pursuant to 22 NYCRR 216.1 sealing confidential portions of plaintiff's opposition papers, she fails to demonstrate "compelling circumstances to justify

restricting public access.” (*Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010] [movant’s burden to establish “good cause” to seal public documents]).

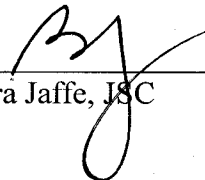
V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Jacqueline Simon Gunn, Psy. D.’s motion to strike plaintiff’s pleadings and dismiss this case as against said defendant is granted unless plaintiff, within 30 days of the date of service on her of a copy of this order with notice of entry by regular mail at her last known address: 1) appears for deposition; and 2) responds to defendant Jacqueline Simon Gunn, Psy. D.’s October 2013 demand for a bill of particulars and combined discovery demands, including but not limited to medical authorizations; and it is further

ORDERED, that if plaintiff fails to comply timely with this order, defense counsel may e-file an affidavit of noncompliance, and the case will be dismissed.

ENTER:



Barbara Jaffe, JSC

DATED: July 14, 2015
New York, New York