

Barnett v Leipziger

2016 NY Slip Op 32696(U)

April 12, 2016

Supreme Court, Nassau County

Docket Number: 601857/13

Judge: James P. McCormack

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

LUANNE BARNETT,

TRIAL/IAS, PART 29
NASSAU COUNTY

Plaintiff(s),

-against-

Index No.: 601857/13

LYLE S. LEIPZIGER, M.D. and LYLE S.
LEIPZIGER, M.D., P.C.,

Motion Seq. 002
Motion Submitted: 4/7/16

Defendant(s).
_____x

The following papers read on this motion:

- Notice of Motion/Supporting Exhibits.....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X

Defendant, Lyle S. Leipziger, M.D.¹, (Leipziger) moves this court for an order, pursuant to CPLR §3126, to dismiss Plaintiff's complaint for failure to comply with discovery and appear for a deposition. Plaintiff, Luanne Barnett (Barnett), opposes the motion.

Plaintiff commenced this medical malpractice action by service of a summons and

¹The parties have stipulated to discontinue the action against Defendant Lyle S. Leipziger MD, PC

complaint dated July 17, 2013. Issue was joined by service of an answer dated September 6, 2013. A preliminary conference was held, and a preliminary conference order was issued, on October 7, 2014.

Before a motion relating to discovery or a bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating “that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion...or shall indicate good cause why no such” conferral was held. 22 NYCRR 202.7(a). This court, having conferenced this case multiple times in an attempt to move discovery forward, accepts that conferral would have been futile. While Defendant’s affirmation of good faith does not strictly comply with 22 NYCRR 202.7, this court finds it sufficient under the facts of this case.

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party’s failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. “Although actions should be resolved on the merits where possible, a court may strike the answer of a defendant for failure to comply with court-ordered discovery where there is a clear showing that the noncompliance is willful and contumacious” (*Rawlings v. Gillert*, 78 AD3d 806 [2d Dept 2010]; see also CPLR 3126[3]; *Moray v. City of Yonkers*, 76 AD3d 618 [2d Dept 2010]; *Palomba v. Schindler El. Corp.*, 74 AD3d 1037 [2d Dept 2010]; *Rini v. Blanck*, 74 AD3d 941 [2d Dept 2010]).

The determination of whether to strike a pleading is addressed to the sound discretion of the trial court (see *Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2d Dept 2010]; *Workman v. Town of Southampton*, 69 AD3d 619, 620 [2d Dept 2010]).

It is well settled that “the penalty of preclusion is extreme and should only be imposed when the failure to disclose has been willful or contumacious” (*Kingsley v. Kantor*, 265 AD2d 529, 530 [2d Dept 1999]; *Nicoletti v. Ozram Transportation, Inc.*, 286 AD2d 719 [2d Dept 2001]). Striking a pleading is appropriate when there is “a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith” (*Mendez v. City of New York*, 7 AD3d 766, 767 [2d Dept 2004]; *Simpson v. City of New York*, 10 AD3d 601, 602 [2d Dept 2004]).

The circumstances surrounding the current dispute between these parties contain the very minutiae that frustrate courts and clog discovery and trial calendars. While there is always blame to ascribe to both sides, in this matter the vast majority belongs to Plaintiff. A review of the court’s file, and the history of this case, demonstrates Plaintiff’s dilatory conduct.

The preliminary conference order in this matter directed, *inter alia*, Plaintiff to provide authorizations for medical treatment by November 7, 2014 and to appear for a deposition on December 23, 2014. A compliance conference with the court was scheduled for February 18, 2015. On February 18, 2015, the court was advised that

Plaintiff had provided none of the authorizations and the deposition did not occur. The case was adjourned until April 1, 2015, on which date the court was informed (and Plaintiff did not deny) that the authorizations were still not served and the deposition still did not occur. The case was adjourned until May 5, 2015, on which date Plaintiff had still not provided the authorizations. On May 18, 2015, the parties appeared and Defendant complained that Plaintiff's responses to discovery demands were largely just objections to the demands, and that authorizations for gym membership, ob-gyn and pharmacy, among others, were still outstanding. Plaintiff's deposition had still not occurred. The parties next appeared on June 2, 2015, on which date the court was informed Plaintiff had served authorizations the previous week. The court directed Plaintiff's deposition to occur on or before July 23, 2015. On July 30, 2015, the court was informed that Plaintiff's deposition did not go forward, despite the court's direction. It was rescheduled for September 8, 2015. On September 16, 2015, the court was informed the deposition did not occur because of a flight cancellation. The case was adjourned until November 12, 2015, on which date the court was informed the deposition was scheduled for December 1, 2015. The next conference was February 11, 2016, on which date Plaintiff's counsel informed the court that Plaintiff did not appear for the December 1, 2015 deposition, but had no explanation why. Plaintiff's counsel further informed the court that he was not, at that time, prepared to choose a date for the deposition. The court then set a briefing schedule for the within motion, directing Defendant's motion to be served by February 18, 2016,

Plaintiff's opposition to be served by March 3, 2016 and Defendant's reply due March 10, 2016, which was also the submission date. On March 10, 2016, despite the fact that the papers were on submission only, the parties appeared. Plaintiff had not submitted opposition, instead claiming that at the February 11, 2016 court appearance, the court indicated that Plaintiff could produce Plaintiff for a deposition in lieu of the motion. Such a statement was a complete fabrication. On February 11, 2016, Plaintiff's counsel asked the court to direct Defendant to appear for Plaintiff's deposition, but as Plaintiff had failed to appear on multiple previous depositions, and as counsel was not even prepared to pick a date at that time, the court denied that request. At no time was Plaintiff told that producing Plaintiff at a date of her choosing would obviate the need for the motion. The court then reset the briefing schedule to allow Plaintiff to serve opposition.

Apparently, after leaving court on February 11, 2016, Plaintiff's counsel then contacted Defendant's calendar clerk and set a deposition for Plaintiff on February 22, 2016. The parties differ greatly on the details of who confirmed what and who contacted who for what reason. However, Defendant's counsel did not appear for the deposition. Plaintiff's counsel made a record on February 22, 2016, which might imply the court acquiesced to the deposition on February 11, 2016. To be clear, the court was not a part of any such discussion, and as already indicated, refused to order Defendant to appear at some future, unknown date.

The court does not understand how the tone of Plaintiff's papers can be accusatory

and aggrieved, without being apologetic. Plaintiff still has not offered an explanation as to why Ms. Barnett did not appear at any of her scheduled deposition dates, except for the September 8, 2015 date. While Plaintiff claims that date had to be changed due to a flight cancellation, there is no explanation why they waited to inform Defendant's counsel of the cancellation until an hour before the deposition. Plaintiff appears to think that appearing for a deposition on February 22, 2016 gives her grounds to attack Defendant's behavior. It is disappointing that the court must remind Plaintiff that she alone does not get to decide how and when the discovery process will go forward. The court, and defendants, are not subject to her convenience. Plaintiff is further reminded that three of the dates missed were set by this court.

The court is aware of at least four specific dates set for the deposition, all of which were missed and only one with an explanation. Plaintiff not only fails to address the reasons why they deposition dates were missed, but instead points fingers at Defendants and the court to justify her behavior. Under these circumstances, this court finds Plaintiff's refusal to appear for multiple deposition dates willful and contumacious.

The court believes sanctions are a necessity in this matter to underscore that Plaintiff's behavior and recalcitrance will no longer be tolerated. However, dismissing the complaint would be unduly harsh, and precluding Plaintiff from testifying, which might be justifiable in this matter, would have the same effect.

The court therefore finds a monetary sanction with a conditional order would be

appropriate.

Accordingly, it is hereby

ORDERED, that Plaintiff Luanne Barnett has 30 days from the date of this order to pay \$1,000.00 to the The Lawyer's Fund for Client Protection; and it is further

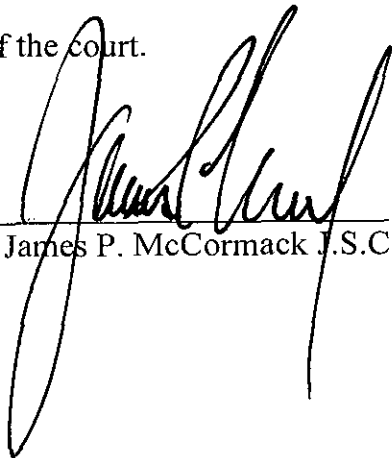
ORDERED, that Plaintiff has 60 days from the date of this order to submit proof of said payment to this court, and it is further

ORDERED, that the deposition of Plaintiff Luanne Barnett shall take place on or before May 9, 2016 at a time and place agreed upon between the parties. If the parties cannot agree upon a time and a place, the deposition will take place in the Nassau County Supreme Court courthouse on May 3, 2016 at 10:00 a.m; and it is further

ORDERED, that Plaintiff's failure to appear for the deposition, or failure to be prepared to testify at the deposition, will result in the complaint being dismissed.

This constitutes the decision and order of the court.

Dated: April 12, 2016
Mineola, New York



Hon. James P. McCormack J.S.C.

ENTERED

APR 15 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE