

Rubbo v Plainview Oral & Maxillofacial Assoc. P.C.
2016 NY Slip Op 33182(U)
September 6, 2016
Supreme Court, Nassau County
Docket Number: Index No. 606513/15
Judge: Antonio I. Brandveen
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ORIGINAL

SHORT FORM ORDER

SUPREME COURT. - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MARIE RUBBO and DANIEL RUBBO,

TRIAL / IAS PART 35
NASSAU COUNTY

Plaintiff,

Index No. 606513/15

- against -

Motion Sequence No. 001

PLAINVIEW ORAL and MAXILLOFACIAL
ASSOCIATES, P.C. and BARRY D. BASS,
DDS,

Defendant.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendants move pursuant to CPLR 3126(3) for an order striking the plaintiffs' complaint and dismissing the underlying action with prejudice. The defense asserts the plaintiffs refused to furnish the defendants with responses to their demands and notices for discovery and inspection dated October 23, 2015 and November 20, 2015, and the Court's preliminary conference order dated January 21, 2016.

The defense seeks, in the alternative, pursuant to CPLR 3126(2) an order precluding the plaintiffs from offering evidence or testimony at the time of trial. The

defense asserts the plaintiffs refused to furnish the defendants with responses to their demands and notices for discovery and inspection dated October 23, 2015 and November 20, 2015, and the Court's preliminary conference order dated January 21, 2016.

The defense further seeks, in the alternative, pursuant to CPLR 3124 an order compelling the plaintiffs to further duly executed, notarized and unrestricted authorizations responsive to the defendants' demands and notices for discovery and inspection dated October 23, 2015 and November 20, 2015, and the Court's preliminary conference order dated January 21, 2016.

The plaintiffs oppose the defense motion to provide further authorizations for dental and medical records. The plaintiffs point out the lawsuit involves a claim that the nerves in the plaintiff Marie Rubbo's mouth, and which affected her tongue. The plaintiffs assert the authorizations provided are appropriate and the authorizations not provided are authorizations to which the defendants are not entitled since the records requested have any concern with the injuries alleged in this matter. The plaintiffs aver the defendants were provided with authorizations for all dentists and dental specialists treating the plaintiff with the in last ten years, and all healthcare providers treating Marie Rubbo for the injuries allegedly sustained as a result of the defendants' negligence as alleged in the bill of particulars. The plaintiffs' attorney states, in an affirmation dated June 21, 2016, he confirmed that Marie Rubbo never had any mental health treatment at any time. The plaintiffs' attorney states, contrary to the defense assertion, the defendants

were provided with pharmacy records.

In reply, the defendants contend the authorizations sought by the defense are related to the treatment and injuries at issue in the litigation. The defense asserts the authorizations provided by the plaintiff were restricted in time frame and scope. The defense points out the plaintiffs' bill of particulars set forth that there was dental treatment, allegedly resulting in a nerve injury, treatment by neurologists and the need for medical treatment, and the authorizations sought bear upon such treatment directly related to the plaintiffs' claims.

The Court determines the defendants satisfy the burden of clearly showing the plaintiffs' failure to comply with discovery demands and court-ordered discovery, and that failure was willful and contumacious (*Brandenburg v County of Rockland Sewer Dist. #1, State of N.Y.*, 127 A.D.3d 680 [2d Dept. 2015]). The defendants provide proof of the plaintiffs' failure to comply. "Compliance requires not only a timely response, but a good-faith effort to provide a meaningful response" (*Arpino v F.J.F. & Sons Elec. Co., Inc.*, 102 A.D.3d 201 [2d Dept. 2012]). In opposition, the plaintiffs fail to show what is sought is not material, relevant and necessary in this litigation or provide a reasonable excuse for failing to comply with the defendants' demands and the court order.

ORDERED that the motion is GRANTED pursuant to CPLR 3124 directing the plaintiffs to further duly execute, notarize and provide unrestricted authorizations responsive to the defendants' demands and notices for discovery and inspection dated

October 23, 2015 and November 20, 2015, and the Court's preliminary conference order dated January 21, 2016, within 30 days after service of a copy of this order with notice of entry, and it is also,

ORDERED that unless the plaintiffs fully comply with responses to the defendants' demands and notices for discovery and inspection dated October 23, 2015 and November 20, 2015, and the Court's preliminary conference order dated January 21, 2016 within 30 days after service of a copy of this order with notice of entry, the plaintiffs are precluded pursuant to CPLR 3126(2) from offering evidence or testimony at the time of trial regarding the defendants' demands and notices for discovery and inspection dated October 23, 2015 and November 20, 2015, and the Court's preliminary conference order dated January 21, 2016.

This decision will constitute the order of the Court.

So ordered.

Dated: **September 6, 2016**

ENTER:



ENTERED

J. S. C.

NON FINAL DISPOSITION

SEP 13 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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