

**Barnett v Leipziger**

2017 NY Slip Op 30553(U)

January 24, 2017

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 27  
NASSAU COUNTY**

**Plaintiff(s),**

**-against-**

**Index No.: 601857/13**

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

**Motion Seq. 003**

**Motion Submitted: 11/16/16**

**Defendant(s).**  
\_\_\_\_\_x

The following papers read on this motion:

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

Defendant, Lyle S. Leipziger, M.D.<sup>1</sup>, (Leipziger) moves this court for an order, pursuant to CPLR §3126, to dismiss Plaintiff's complaint for failure to comply with discovery. This is the third discovery-related motion brought by Dr. Leipziger in this action. Plaintiff submitted opposition to the motion, but said opposition was untimely and

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

Dr. Leipziger opposes the court considering it. Specifically, after receiving a two-week adjournment on the motion, Plaintiff e-filed her opposition to the motion on the return date of the motion. There was no explanation for the delay in the opposition papers, nor was there a request, or an offer to allow Dr. Leipziger more time to submit a reply. Unfortunately, this behavior is consistent with Plaintiff's recalcitrance throughout this matter and the court will no longer countenance it. The court will not consider the opposition papers as they were not timely filed.

In the short form order issued from the last discovery motion, this court detailed Plaintiff's pattern of delay, failure to appear and failure to prosecute this matter. The court expressed its profound frustration with Plaintiff and, despite believing it would have been justifiable to preclude or even dismiss the complaint, the court issued Plaintiff a financial sanction and a conditional order. Now Dr. Leipziger is compelled to bring yet another discovery-related motion as Plaintiff has filed to properly respond to more discovery demands. The parties are referred to this court's April 12, 2016 order for a procedural and factual history. However, it is relevant to note that on the last certification conference in this matter, September 14, 2016, Plaintiff failed to appear. On that date, the case was certified ready for trial over Dr. Leipziger's objection.

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). Though Defendant did submit an affirmation of good faith, this court is satisfied that, based upon Plaintiff’s dilatory conduct throughout this case, conferral would have been futile.

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]).

In the moving papers, Dr. Leipziger documents various authorizations and items from a notice to produce that were still outstanding. After service of the motion, Plaintiff provided a response, dated September 28, 2016, that included some of the authorizations. However, regarding the notice to produce, the response stated: “Diaries, logs and insurance bills will follow under separate cover if found, client is currently searching in [sic] event none can be found and [sic] affidavit for the same will be provided.” Once again, the court finds Plaintiff’s behavior willful and contumacious, warranting sanctions. The notice to produce was served in May, 2016. The September 28, 2016 response was therefore untimely. Despite having nearly five months, Plaintiff was just then “searching” for the materials.

Plaintiff will be precluded at trial from offering any pictures depicting her alleged injuries, or from testifying about any pictures depicting her injuries. Further, as Plaintiff failed to provide authorizations to two gyms, Plaintiff will be precluded at trial from testifying, or offering any evidence, about how her alleged injuries impacted her ability to exercise, whether at a gym, at her home or anywhere else.

Despite being precluded, plaintiff is still under an obligation to provide the

pictures and authorizations, to the extent not already provided, within 10 days of being served with notice of entry of this order. Further, Plaintiff shall provide the diaries, logs and insurance bills within 10 days of being served with notice of entry of this order. If it is alleged that the requested material does not exist, Plaintiff will provide an affidavit proving in detail the efforts made to find the requested material. This affidavit will include dates, times and persons spoken to. Failure to comply with any aspect of this order will result in the complaint being dismissed. This order will be self-executing. Further, if Defendant alleges that Plaintiff's efforts to find the requested material were not diligent and the court agrees, the complaint will be dismissed.

Accordingly, it is hereby

**ORDERED**, that Dr. Leipziger's motion for sanctions pursuant to CPLR §3126 is GRANTED; and it is further

**ORDERED**, that Plaintiff is precluded, on her direct or re-direct case, at trial from offering any pictures depicting her injuries, or from testifying at trial regarding any pictures; and it is further

**ORDERED**, that Plaintiff is precluded, on her direct or redirect case, at trial from testifying, or offering any evidence relating to how her alleged injuries impact her ability to exercise; and it is further

**ORDERED**, that despite the preclusion order, Plaintiff must still provide all outstanding authorizations and pictures, to the extent not already provided within 10 days

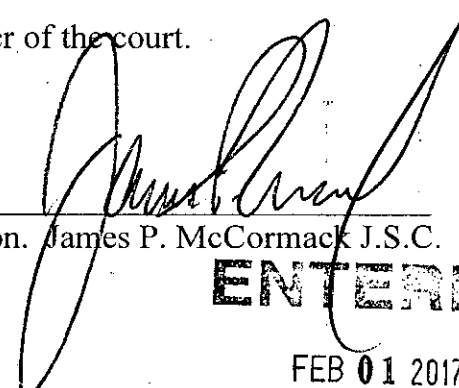
of being served with notice of entry of this order. Failure to comply will result in the complaint being dismissed. This order will be self executing; and it is further

**ORDERED**, that Plaintiff shall provide to Dr. Leipziger's counsel, within 10 days of being served with notice of entry of this order, a detailed affidavit regarding any discovery items she claims to not have in her possession. This affidavit shall include dates, times and persons spoken to in her efforts to find the materials . Failure to provide the affidavit, or to establish through the affidavit that diligent efforts were made to find the requested material will result in the complaint being dismissed. This order will be self-executing.

**ORDERED**, that summary judgment motions shall be served no later than April 13, 2017 and shall be made returnable no later than May 15, 2017.

This constitutes the decision and order of the court.

Dated: January 24, 2017  
Mineola, New York

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

**ENTERED**  
FEB 01 2017  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE