

**Jackson v Montefiore Med. Ctr. N. Div. Adult Mental  
Clinic**

2017 NY Slip Op 30924(U)

April 7, 2017

Supreme Court, Bronx County

Docket Number: 250808/13

Judge: Donald A. Miles

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
IAS PART 8**

Index No. **250808/13**  
Motion Calendar No.  
Motion Date:10/24/16

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ROBERTO E. JACKSON

Plaintiff,

-against-

**DECISION/ ORDER**  
**Present:**  
**Hon. Donald Miles**  
**Justice Supreme Court**

MONTEFIORE MEDICAL CENTER NORTH DIVISION  
ADULT MENTAL HEALTH CLINIC, MARIA L. DIMEO,  
CRISANTA AZORES ROCKWELL, YENER BALAN, M.D.,

Defendant.

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Recitation, as required by C.P.L.R. 2219(a), of the papers considered in the review of this motion to strike complaint or compel discovery and cross motion to strike answer

<u>Papers</u>	<u>Numbered</u>
<b>Def. Dimeo’s n/m , w/ affirm, exhs.....</b>	<b>1</b>
<b>Def. Rockwell’s x/m, w/affirm, exhs.....</b>	<b>2</b>
<b>Def. Monte &amp; Balan’s x/m w/affirm, exhs.....</b>	<b>3</b>
<b>Pltf’s x/m &amp; opp w/ affid, exhs.....</b>	<b>4</b>
<b>Def. Dimeo’s opp/reply affirm.....</b>	<b>5</b>
<b>Def. Rockwell’s opp/reply affirm.....</b>	<b>6</b>
<b>Def. Monte &amp; Balan’s opp/reply affirm.....</b>	<b>7</b>

*Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:*

In this action, plaintiff, *pro se*, asserts causes of action against defendants, alleging violations of Health Insurance Protection and Portability Act of 1996 (HIPPA), as well as intentional tort and negligence claims, related to his treatment at Montefiore Medical Center- conducted as a condition of his parole. Plaintiff’s complaint indicates that the case stems in part from Montefiore’s social worker, defendant Maria L. Dimeo’s alleged testimony at plaintiff’s parole revocation hearing. Defendants move and cross-move separately to, *inter alia*, strike plaintiff’s complaint or compel plaintiff to respond to certain discovery demands. Plaintiff opposes the defendants’ motions and cross-moves to strike defendants’ answers, as well as for sanctions.

Plaintiff filed the instant complaint on June 11, 2013 and on or about November 13, 2013,

served all the defendants with one Verified Bill of Particulars, along with Discovery Demands. The defendants Montefiore Medical Center and Yener Balan, M.D., joined issue by service of a verified Answer on behalf of both defendants on July 2, 2013. An Answer and Demand for a Verified Bill of Particulars, along with other Initial Combined Demands for Discovery on behalf of defendant Dimeo, was served on plaintiff on or about February 12, 2014. The defendant Crisanta Azores Rockwell served on plaintiff her Verified Answer and Demand for Bill of Particulars dated February 21, 2014, and thereafter served Omnibus Demands on plaintiff for discovery, along with a good faith letter on July 2, 2014

The parties appeared before the court on October 23, 2014 for a Preliminary Conference. At that time, the plaintiff was directed to serve a Bill of Particulars as to each defendant within 30 days, serve authorizations for hospital records and the June 8, 2012 parole revocation proceedings hearing within 30 days. Additionally, plaintiff was directed to serve discovery demands on each defendant within 30 days and each defendant was to respond to plaintiff's discovery demands within 30 days of receipt.

CPLR § 3101 (a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Alien v Crowell-Begin Collier Publ. Co.*, 21 N.Y.2d 403, 406 91968).

There are, however, three categories of matters protected from disclosure. They are privileged matters which are absolutely immune from discovery (CPLR § 3101[b]); attorney's work product, also absolutely immune; and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means (CPLR § 3101[d][2]; *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371 [1991])

### ***Motion and Cross motion to Strike Complaint***

On February 9, 2015, plaintiff provided a supplemental Verified Bill of Particulars as to both defendants Dimeo and Rockwell. On February 12, 2015 counsel for defendant Dimeo sent plaintiff a good faith letter seeking a separate and distinct Verified Bill of Particulars as to each defendant and

requesting compliance with the PC order to provide authorizations permitting the release of plaintiff's Montefiore Medical Center record, as well as the minutes of the Parole Revocation hearing, and also indicating that otherwise defendant would be unable to respond to plaintiff's discovery demands. Plaintiff failed to respond. On June 4, 2015, defense counsel sent plaintiff a third good faith letter and therein provided plaintiff with a blank HIPPA authorization with instructions for completion, to which plaintiff has failed to respond. Counsel on behalf of defendant Rockwell, also claim they sent additional good faith letters dated November 3, 2014 and December 5, 2014 to which plaintiff has failed to respond; and that they rejected the authorization plaintiff attempted to provide at a Federal Court conference as useless because the authorization was made out to obtain the defendant's medical records and defendant did not maintain private medical records as to the plaintiff as all of defendant's treatment notes are within the Montefiore Medical Center medical records.

Also, on behalf of defendants Montefiore and Yener Balan, counsel submits a good faith letter to plaintiff dated May 15, 2014 as well as a letter dated June 11, 2014 to the DCM Part, requesting the court's intervention in overseeing and facilitating discovery in light of plaintiff's *pro se* status.

Defendants<sup>1</sup> now move to strike plaintiff's complaint or compel plaintiff to provide defendant with the aforesaid authorizations contending that plaintiff has set forth claims which relate to his alleged treatment at Montefiore Medical Center as well as related to defendant Dimeo's alleged testimony at the parole revocation hearing. Hence, defendant claims that the items demanded are critical to the preparation of the defense and that plaintiff's refusal has frustrated the disclosure process.

### ***Plaintiff's Cross Motion to Strike Answer and Sanctions***

Plaintiff in his opposition to the motions and in support of his cross motion to strike defendants answers, argue that it is the defendants who have "repeatedly express their intention to not comply with Discovery request from plaintiff and have ignored Court Order." Plaintiff further contends that the defendants' demands for authorizations for the medical records is a

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<sup>1</sup>All the co-defendants for the sake of brevity and judicial economy, incorporate the arguments and evidence contained in defendant Dimeo's motion.

“fishing expedition.”

Defendants argue that they cannot be compelled to complete defendants’ deposition because the plaintiff’s deposition has yet to be conducted. Furthermore, the defendants cannot be compelled to conduct the plaintiff’s deposition without first obtaining the records that are central and pertinent to plaintiff’s case. Defendants argue essentially that without access to Montefiore Medical Center medical records, the parole hearing transcripts and responses to their demands, the defendants cannot defend this claim, cannot prepare and take plaintiff’s deposition, and therefore, cannot meet the court’s deadlines regarding discovery.

The nature and degree of the penalty to be imposed pursuant to CPLR §3126 against a party who "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" is a matter within the discretion of the Court (CPLR § 3126; see, *Zletz v. Wetanson*, 67 N.Y.2d 711, 499 N.Y.S.2d 933, 490 N.E.2d 852. A plaintiff’s willful and contumacious conduct may be inferred from his repeated failure to comply with court-ordered discovery. *Nowak v. Veira* 289 A.D.2d 383, 383-384, 737 N.Y.S.2d 372, 373( 2nd Dept.2001).

In the instant case, the defendants have established their good faith attempts to resolve the issues of discovery with the plaintiff. Moreover, plaintiff has not established any wilful default or abuse of the discovery process on the part of defendants in not complying with plaintiff’s discovery requests.

However, since plaintiff did make an attempt to respond to defendants’ discovery demands, the court will not impose the ultimate sanction of striking plaintiff’s complaint. Instead, the court will permit plaintiff one last opportunity to appropriately respond to the defendants’ request for authorizations.

In view of the foregoing, it is hereby

ORDERED that defendants’ motion and cross motions are granted to the extent that plaintiff’s complaint shall be stricken, unless within 30 days of service of a copy of this Order with Notice of Entry, plaintiff shall provide the defendants with signed and completed HIPAA authorizations for the release of his Montefiore Medical Center records and the June 8, 2012 parole revocation hearing, in the form provided by defendants, and it is further

ORDERED that the defendants are to provide plaintiff with the HIPPA forms for signature no later than 10 days of the date of this Decision/Order. Upon receiving the forms, plaintiff is directed to sign, initial, and date the forms in the appropriate locations and then mail the completed forms to defendant's respective attorneys, no later than 20 days of the date of this Decision/Order, and it is further

ORDERED that plaintiff's cross-motion to strike defendants' answers and for sanctions is granted to the extent that each defendant's Answer shall be stricken unless they respond to plaintiff's discovery demands within 60 days of receipt of plaintiff's duly executed HIPPA authorization forms.

This constitutes the Decision and Order of the Court.

APR 07 2017

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DATE



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HON. DONALD MILES

Justice Supreme Court