

Finkel v Lobo
2017 NY Slip Op 31801(U)
August 24, 2017
Supreme Court, New York County
Docket Number: 805144/14
Judge: Martin Shulman
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NYSCEF DOC. NO. 65

RECEIVED NYSCEF: 08/24/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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AMY FINKEL,

Index No. 805144/14

Plaintiff,

Decision & Order

-against-

ROGERIO LOBO, M.D., COLUMBIA UNIVERSITY
MEDICAL CENTER, NEW YORK-PRESBYTERIAN
HOSPITAL and CENTER FOR WOMEN'S
REPRODUCTIVE CARE,

Defendants.
-----X

Hon. Martin Shulman

In this medical malpractice action, plaintiff, Amy Finkel ("Finkel" or "plaintiff") moves to strike defendants' answers, or alternatively to preclude defendants from testifying regarding her medical records, sonogram images, records from non-parties Drs. Greene and New¹ and billing records. In the event the motion is denied, plaintiff seeks an order compelling defendant Rogerio Lobo, M.D. ("Dr. Lobo") to appear for a further deposition in order to examine him regarding documents purportedly not provided before or at his deposition. Defendants oppose the motion.

Finkel's complaint against defendants is based upon claims of failure to diagnose premature ovarian failure which allegedly resulted in her infertility. This motion is based upon plaintiff's claim that certain alleged discrepancies and omissions in the medical records defendants have produced indicate that their production is incomplete and that they are intentionally withholding documents plaintiff needs to establish her case. In opposition, defense counsel takes great exception to Finkel's

¹ Drs. Greene and New (the "endocrinologists") are plaintiff's endocrinologists who Dr. Lobo consulted while treating her.

counsel's allegations of defendants' purported intentional alteration of plaintiff's medical records, demands that such statements be retracted and requests a hearing to determine whether a good faith basis exists for such accusations. In the event this court finds after hearing that no good faith basis exists for plaintiff's counsel's statements, defense counsel requests appropriate sanctions.

Finkel contends the following discovery is outstanding and/or incomplete: 1) a complete certified copy of plaintiff's medical records;² 2) a complete copy of her medical history³ taken on July 14, 2000 when she first began treating with Dr. Lobo, together with attachments⁴ referenced therein; 3) legible sonogram images needed for expert review; 4) complete copies of the endocrinologists' records relied upon by Dr. Lobo; and 5) complete billing records. See Mem. of Law in Supp. of Motion, p 6. In allegedly not producing the foregoing, plaintiff also claims defendants are in default of several court orders,⁵ to wit:

² Plaintiff claims defendants provided three different versions of her medical records prior to the commencement of and during this action.

³ See form entitled "Interval Gynecology History." Motion at Exh. D.

⁴ The medical history form ultimately provided to plaintiff's counsel on January 12, 2016 was followed only by three blank pages. From this plaintiff's counsel urges that intentional redaction can be inferred since Dr. Lobo would have reason to hide the form and its attachments since it contradicts his deposition testimony and corroborate's Finkel's deposition testimony regarding her use of oral contraceptives as of the date she began treating with Dr. Lobo.

⁵ Attached at Exh. A to Motion.

- 9/21/15 compliance conference order which directed defendant Center for Reproductive Care to produce a certified copy of its records within 30 days;⁶
- 12/22/15 status conference order which directed defendants to provide a complete copy of the EBT records (patient file/chart with ultrasound images) within 30 days;⁷
- 5/17/16 so-ordered stipulation which directed defendants to respond within 30 days to plaintiff's 4/11/16 demand (*id.* at Exh. G) for a complete copy of her records including the medical history form and endocrinologists' records which Dr. Lobo relied upon in treating and diagnosing her;
- 6/28/16 so-ordered stipulation which again directed defendants to respond to plaintiff's 4/11/16 discovery demand within 30 days;
- 8/9/16 status conference order which again directed defendants to respond to plaintiff's discovery demand by 8/16/16 to;⁸ and
- 10/25/16 so-ordered stipulation which again directed defendants to respond to plaintiff's discovery demand by 11/8/16.⁹

On January 30, 2017 Finkel served a notice to produce narrowing the items sought (*id.* at Exh. H). Defense counsel denied any further discovery was due and this motion ensued.

⁶ Defendants produced the subject records for the first time at Dr. Lobo's December 15, 2015 deposition, where they were marked as exhibit 1 (the "EBT records").

⁷ On January 12, 2016 defendants provided a copy of the EBT records to Finkel's counsel (the "1/12/16 EBT records"). Plaintiff alleges the 1/12/16 EBT records: 1) were not identical to the EBT records in that the medical history form included in the 1/12/16 EBT records was omitted from the EBT records; 2) contained no certification or indication they were the complete records in Dr. Lobo's possession; and 3) the sonogram images were unreadable.

⁸ Defense counsel failed to appear at the 8/9/16 status conference.

⁹ Defendants responded on 11/14/16 but plaintiff contends the response did not include a complete certified copy of plaintiff's records and medical history, legible sonograms or billing records.

In opposition, defendants deny any wilful or contumacious conduct warranting the imposition of penalties under CPLR §3126 and insist that the aforementioned items Finkel demanded were already provided to her counsel, with the exception of billing records, which defense counsel now attaches as exhibit A to his opposing affirmation. Defendants address the motion's specific claims as follows:

Dr. Lobo's Records: Dr. Lobo's original records were presented at his deposition and marked as an exhibit. The medical history form plaintiff's counsel claims was not provided until after the deposition was in fact included and the only explanation for Finkel's counsel's statements otherwise is that counsel failed to review it when examining Dr. Finkel. In light of the foregoing, defendants assert that plaintiff's alternative request for a further deposition of Dr. Lobo based on this form should be denied.

With respect to the content and authenticity of the EBT records, Dr. Lobo testified under oath that he produced plaintiff's original medical chart at that time and was unaware of any other records. Notwithstanding defendants' claim that Dr. Lobo's testimony sufficiently authenticated the EBT records, defense counsel now provides a certification from Dr. Lobo with respect to the EBT records. See Pewarski Aff. in Opp. at Exh. D.

Endocrinologists' Records: A review of the transcript of Dr. Lobo's deposition testimony adequately explains that he does not have complete records from the endocrinologists, who are not affiliated with him or his practice. He clearly explained

that he only received portions of those records and they are included in the EBT records.

Dr. Lobo's Billing Records: As previously stated, all billing records have now been produced (Pewarski Aff. in Opp. at Exh. A).

Dr. Lobo's Sonogram Studies: Photostatic copies of Finkel's sonograms as contained in Dr. Lobo's chart were provided to plaintiff's counsel on January 12, 2016 and counsel had a full opportunity to inspect and review the originals. Further, defendants are willing to provide photographic copies of the sonogram images and will provide same upon plaintiff's payment of the attendant costs set forth in their June 2, 2017 invoice (*id.* at Exh. E).

Discussion

With respect to penalties for failure to comply with discovery procedures, CPLR §3126 provides in relevant part as follows:

If any party...refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

- (1) an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
- (2) an order prohibiting the disobedient party from supporting or opposing designated claims or defenses...; or
- (3) an order striking out pleadings or parts thereof,...or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Where a party disobeys a court order and by his conduct frustrates the disclosure scheme provided by the CPLR, dismissal of the party's pleadings is within the broad discretion of the trial court. *Zletz v Wetanson*, 67 NY2d 711 (1986); *Berman v Szpilzinger*, 180 AD2d 612 (1st Dept 1992). In *Stanfill Plumbing & Heating Corp. v Dravo Constructors, Inc.*, 216 AD2d 101 (1st Dept 1995), the First Department held that the lower court "did not improvidently exercise its discretion in dismissing the underlying action for the failure of plaintiff to comply with prior court-ordered discovery." The court specifically found that it was proper to dismiss the plaintiff's complaint since the record revealed that the lower court had given the plaintiff ample opportunity to comply with discovery and the plaintiff repeatedly failed to comply. *Id.*

While the penalty of striking a pleading for failure to comply with disclosure is extreme, the courts nonetheless have held that dismissing the pleading is the appropriate remedy where the failure to comply has been "clearly deliberate or contumacious." *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374 (1st Dept 1990); *Kutner v Feiden, Dweck & Sladkus*, 223 AD2d 488, 489 (1st Dept 1996), *lv denied*, 88 NY2d 802 (1996) (disobedience of a series of court orders directing discovery warranted striking of pleading); *Berman v Szpilzinger, supra*.

Defendants have now fully complied with Finkel's discovery demands. First, the billing records and legible sonogram images have been provided, albeit not until after plaintiff was compelled to bring this motion and in disregard of four court orders. As to the endocrinologists' records, Dr. Lobo satisfactorily testified that he did not receive

their complete records and that those in his possession were included in his deposition production. See Pewarski Aff. in Opp. at Exh. C, pp 45-46.

Furthermore, Dr. Lobo's records were properly authenticated at his deposition. To the extent that any discrepancies may exist between the contents of Dr. Lobo's records provided on various occasions, there is no indication of intentional alteration of same. Plaintiff's counsel's assertions to the contrary are mere speculation.

Second, with respect to Finkel's medical history form allegedly omitted from the EBT records and not provided until after Dr. Lobo's deposition, as Finkel's counsel acknowledges in reply, "it is simply [defense counsel's] recollection versus ours."¹⁰ Vandamme Reply Aff. at ¶27. With respect to the missing attachments, in reviewing the Interval Gynecology History form plaintiff completed at her first visit to Dr. Lobo, she responded "see attached" to supplement her answers to questions 3, 18, 23 and 24 concerning the "vitamins/minerals" she was then taking; changes related to her menstrual periods; recent operations, serious illnesses or injuries; and any other gynecologic or non-gynecologic problems. See Motion at Exh. D. These topics do not appear to be relevant to determining whether Dr. Lobo knew Finkel was taking oral contraceptives at that time.¹¹ As such, there is no basis for plaintiff's counsel's theory that Dr. Lobo would have reason to intentionally withhold these attachments.

¹⁰ Defense counsel avers that he personally reviewed the form at issue on the day of Dr. Lobo's deposition and thus can positively confirm that it was included in the EBT records. Pewarski Aff. in Opp. at ¶ 19.

¹¹ Dr. Lobo performed blood work at plaintiff's first visit on July 14, 2000, which revealed, *inter alia*, low testosterone levels. Dr. Lobo testified that this could be attributed to use of oral contraceptives, however, the patient history form Finkel completed indicates she was not taking oral contraceptives at that time.

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Turning to the issue of whether defendants should be penalized for their delayed compliance, the disregard of four court orders, without excuse, is not to be taken lightly. Nevertheless, in its discretion, no penalties will be imposed on defendants at this time. As more fully set forth in the analysis above, it was unnecessary for plaintiff to bring this motion as to certain of the items sought (*i.e.*, certification of Dr. Lobo's records, the medical history form and endocrinologists' records) since the records were authenticated via Dr. Lobo's deposition testimony, the missing attachments to the medical history form do not appear to be vital to proving plaintiff's case and the absence of the endocrinologists' complete records was explained.

As to defense counsel's request for a hearing and potential imposition of sanctions against plaintiff's counsel, this court agrees that counsel's inflammatory accusations are unsupported and speculative. However, such drastic relief should have been sought by cross-motion on notice to plaintiff's counsel.

For all of the foregoing reasons, it is

ORDERED that defendants' motion is denied in its entirety.

Counsel for the parties are directed to appear for a further status conference on September 5, 2017 at 9:30 a.m., at 60 Centre St., Room 325, New York, New York.

The foregoing constitutes this court's decision and order.

Dated: New York, New York
August 24, 2017



Hon. Martin Shulman, J.S.C.