

Mehler v Jones
2018 NY Slip Op 30729(U)
April 25, 2018
Supreme Court, New York County
Docket Number: 805469/2013
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
Harriet Mehler

Plaintiff,

Index No.
805469/2013

**DECISION and
ORDER**

- against -

Mot. Seq. #003

Cheryl D. Jones a/k/a Cannon J. Tanner Nader Paksima, D.O.,
NYU Hospital For Joint Diseases, and NYU Langone Medical
Center,

Defendant.
-----X

HON. EILEEN A. RAKOWER, J.S.C.

On December 30, 2013, Plaintiff Harriet Mehler ("Mehler") commenced this action against Defendants Cheryl D. Jones a/k/a Cannon J. Tanner ("Jones"), Nader Paksima, D.O. ("Paksima"), NYU Hospital For Joint Diseases ("NYUJD"), and NYU Langone Medical Center ("NYU Langone"). Mehler alleges that she sustained serious injuries after Jones physically assaulted her. Mehler also claims that as a result of these injuries, she underwent orthopedic surgery. However, as alleged, this surgery was negligently performed by Paksima, an agent of NYUJD and NYU. Paksima filed an Answer on March 6, 2014. NYUJD and NYU Langone filed their Answer on March 7, 2014. E-filing does not reflect an Answer from Jones.

Presently before the Court is Paksima's Order to Show Cause pursuant to CPLR 3126 for an Order dismissing the Complaint. Alternatively, Paksima seeks *inter alia* a self-executing Order of Dismissal in the event that Mehler does not appear for her deposition.

Paksima asserts that Mehler was deposed on October 5, 2015; however the deposition was not completed. Mehler was further deposed on May 2, 2016. On December 6, 2016, the Honorable Joan B. Lobis, J.S.C. ("Judge Lobis"), issued a compliance conference order directing Mehler to be produced for an additional deposition within 60 days. (Paksima's exhibit E) On February 14, 2017, Judge Lobis issued a second compliance conference order directing Mehler to be produced for a deposition within 30 days. Although Mehler scheduled the deposition for March 20, 2017, Mehler moved for a protective order and Paksima opposed with a cross-motion to compel. On May 2, 2017, the parties resolved the pending motions by stipulating to a deposition limited in scope to "three sets of medical records submitted in plaintiff's response to defendant's previous demands" and a letter that Mehler wrote to "codefendant NYU . . . and any further of same letters in her possession." (affirmation of Tomanio at 3) The parties scheduled the deposition for June 15, 2017; however Mehler, did not appear.

On July 10, 2017, Paksima filed an Order to Show Cause to compel Mehler's deposition or have the Answer stricken. On August 8, 2017, the parties agreed to schedule Mehler's deposition by August 31, 2017. However, on the eve of the deposition, Mehler informed the parties of certain health issues and the deposition was cancelled. On November 14, 2017, this Court issued a new deposition schedule and directed Mehler's deposition on or before February 19, 2018. The deposition was not conducted and the parties rescheduled for March 19, 2018. On March 16, 2018, Paksima received word that the deposition was cancelled. On March 23, 2018, Mehler's counsel informed Paksima of the following;

"[W]e could not reach our client. I have an investigator trying to locate her. We have sent repeated letters to her and left messages. I am concerned there may be a health related issue."

(Paksima's exhibit P)

On April 11, 2018, NYUJD and NYU Langone cross-moved for the same relief requested by Paksima.

Mehler opposes. She asserts that she has been “produced twice already for deposition[s]” and that she “stands ready, willing and able to be deposed again.” (affirmation of Bongiorno at 2) Mehler asserts that the delay in schedule occurred because of health related reasons. She also claims that she could not be reached by Counsel because the phone in her “section 8 housing” was “turned off.” Mehler further asserts that she has offered to appear for a deposition on April 16, 2018 but Paksima has refused to agree.

CPLR 3126 Standard

“If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity.” (*Fish & Richardson, P.C. v. Schindler*, 75 AD3d 219, 220 [1st Dept 2010].) “Although actions should be resolved on the merits whenever possible, the efficient disposition of cases is not advanced by hindering the ability of the trial court to supervise the parties who appear before it and to ensure they comply with the court’s directives.” (*id.*) Accordingly, CPLR 3126 provides,

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

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of territory . . . or from using certain witnesses: 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.”

“CPLR 3126 provides various sanctions for violations of discovery orders, the most serious of which are striking a party’s pleadings or outright dismissal of the action.” (*Corner Realty 30/7, Inc. v Bernstein Management Corp.*, 249 AD2d 191, 193 [1st Dept 1998].) “However . . . the extreme sanction of dismissal is warranted

only where a clear showing has been made that the noncompliance with a discovery order was willful, contumacious or due to bad faith.” (*id.*) A “plaintiff’s pattern of noncompliance with discovery demands and a court-ordered stipulation supports an inference of willful and contumacious conduct . . .” (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017].) Although Plaintiff may “tender a reasonable excuse to overcome defendants’ showing of willfulness” (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017]), “failure to offer a reasonable excuse for . . . noncompliance with discovery requests gives rise to an inference of willful and contumacious conduct that warrant[s] the striking of the answer.” (*Turk Eximbank-Export Credit Bank of Turkey v Bicakcioglu*, 81 AD3d 494, 494 [1st Dept 2011].)

Discussion

Mehler’s pattern of noncompliance with the court orders directing her appearance for a further deposition supports an inference of willful and contumacious conduct. (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017].) Despite this, and because Mehler has appeared twice for depositions previously, tendered one reasonable excuse that she has suffered from health issues to account for one missed deposition, and represented that she “stands ready, willing and able to be deposed again”, this Court will afford her one final opportunity to appear for her deposition. (*Menkes v Delikat*, 50 NYS3d 318, 319 [1st Dept 2017].) Otherwise, her conduct shall be deemed willful and contumacious resulting in a dismissal of the Complaint in its entirety.

Wherefore, it is hereby,

ORDERED that Nader Paksima, D.O.’s Order to Show Cause and NYU Hospital For Joint Diseases and NYU Langone Medical Center’s cross-motion are granted to the extent that the Complaint is dismissed in its entirety with prejudice unless Plaintiff Harriet Mehler appears for a deposition on or before May 8, 2018; and it is further

ORDERED that Nader Paksima, D.O. shall be deposed on or before June 9, 2018; and it is further

ORDERED that NYU Hospital For Joint Diseases and NYU Langone Medical Center shall be deposed on or before August 6, 2018; and it is further

ORDERED that Harriet Mehler shall notice depositions for NYU Hospital For Joint Diseases and NYU Langone Medical Center 45 days before August 6, 2018 and NYU Hospital For Joint Diseases and NYU Langone Medical shall provide the deponent's last known address in the event the deponent is no longer in their employ; and it is further

ORDERED that the Note of Issue shall be filed on or before September 6, 2018 with no further extensions.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: April 25, 2018

A handwritten signature in black ink, appearing to read 'Eileen A. Rakower', is written over a horizontal line.

Eileen A. Rakower J.S.C.