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| <b>Soffa v Dennett</b>                                                                                                                                                                                                         |
| 2018 NY Slip Op 30951(U)                                                                                                                                                                                                       |
| May 16, 2018                                                                                                                                                                                                                   |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 805224/2015                                                                                                                                                                                                     |
| Judge: Eileen A. Rakower                                                                                                                                                                                                       |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

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CAROL SOFFA,

Plaintiff,

- v -

JAY DENNETT, M.D.,

Defendant.  
-----X

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

This is a medical malpractice case where it is alleged that defendant, Jay Dennett, M.D. ("Dr. Dennett"), failed to diagnose herpes zoster (shingles) on the plaintiff Carol Soffa's ("Plaintiff") forehead and misdiagnosed it as melanoma. Plaintiff also claims that Dr. Dennett failed to timely refer Plaintiff to another specialist and prescribe timely medications.

Presently before the Court is Plaintiff's Order to Show Cause for an Order extending the time for which she must appear for a deposition. Dr. Dennett cross-moves to vacate the note of issue<sup>1</sup> or dismiss this action pursuant to CPLR 3126 for failure to comply with Court orders.

A. Background

On November 17, 2016, Plaintiff appeared for her deposition and conceded that she makes notes about all of her medical care. Thereafter, Dr. Dennett demanded all notes made by Plaintiff relating to Dr. Dennett's treatment or any treatment that Plaintiff received for Herpes Zoster. On December 12, 2016, at a compliance conference, Plaintiff represented that she was unaware of the demands. The Honorable Joan B. Lobis, J.S.C. ("Judge Lobis") directed that Plaintiff

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<sup>1</sup> It appears from The Supreme Court Records On-Line Library that Plaintiff did not file a Note of Issue.

respond to the demands within 30 days. Plaintiff finally responded to these demands by February 20, 2017. However, the copies of the notes that Plaintiff provided left sections faded, indecipherable and undated. Judge Lobis issued another order on February 28, 2017 directing Plaintiff to provide Dr. Dennett with a clear copy of the prior notes within 20 days and any additional notes regarding her treatment from other providers. On March 9, 2017, Plaintiff provided copies of some additional handwritten notes but the copies were allegedly even darker than those previously produced and the dates were cut off. In response, Dr. Dennett moved for an Order dismissing the complaint on the grounds that Plaintiff failed to comply with discovery pursuant to CPLR 3126. Plaintiff also moved to compel Dr. Dennett to re-appear for a deposition. On August 15, 2017, this Court heard oral argument and ordered the supplemental depositions of Plaintiff and Dr. Dennett within 30 days.

On September 26, 2017, this Court issued a compliance conference order directing Dr. Dennett's deposition on October 6, 2017<sup>2</sup> and Plaintiff's by November 29, 2017. On November 21, 2017, this Court entered a second compliance conference order directing Plaintiff's deposition to be held on November 29, 2017. Allegedly, Plaintiff's counsel informed Dr. Dennett's counsel on November 28, 2017, that Plaintiff sustained an injury due to a fall. On January 9, 2018, this Court issued a third compliance conference order directing Plaintiff to appear for a deposition by March 29, 2018. This Court also extended the note of issue date to April 17, 2018. Plaintiff did not appear for the deposition and on April 10, 2018, this Court informed the parties that the note of issue date remained April 17, 2018. However, the parties were permitted to move by Order to Show Cause for an extension.

Accordingly, Plaintiff brought this instant Order to Show Cause. Plaintiff argues that she would prefer not to be deposed in her apartment because it is crowded. Though she can walk, she prefers not to travel to counsel's office either because she is "unsteady on her feet". (affirmation of Appell at 2) Dr. Dennett cross-moved without opposition, arguing that Plaintiff's failure to complete the supplemental deposition is willful contumacious.

On May 1, 2018, this Court conferenced the Order to Show Cause. A per diem attorney appeared representing Plaintiff along with Counsel of record for Dr. Dennett. The Court issued a compliance conference order directing Plaintiff's

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<sup>2</sup> Dr. Dennett's deposition was completed on October 10, 2017.

deposition to be held within 1 week by May 8, 2018. The Court adjourned the instant Order to Show Cause to May 10, 2018.

On May 10, 2018, a different per diem attorney appeared on behalf of Plaintiff along with Counsel of record for Dr. Dennett. On the record, Dr. Dennett's counsel informed the Court that although Plaintiff appeared for her deposition on May 8, 2018, she did not bring clear copies of her notes. During the deposition, the per diem attorney present on behalf of Plaintiff stated on the record that Plaintiff was incompetent and ended the deposition. Dr. Dennett's counsel stated on the record that the per diem attorney present during the deposition had never met Plaintiff before. Indeed, Plaintiff was allegedly unprepared for the deposition and without the appropriate discovery that she was directed to produce. The Court inquired on the record as to whether Plaintiff was incompetent, and the per diem attorney before this Court stated that although he was "concerned", he had not met Plaintiff and could not speak about her state.

#### B. Standards

#### *CPLR 3126*

"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].)

#### *Incompetency*

CPLR 1201, entitled “Representation of infant, incompetent person, or conservatee,” provides that “A person shall appear by his guardian ad litem if he is an infant . . . or person judicially declared to be incompetent . . . or if he is an adult incapable of adequately prosecuting or defending his rights.”

With respect to the Rules of Professional Conduct, Rule 1.14 (b) provides,

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or

guardian.

(Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.14 [b])

*Rules of the Justices*

The rules of this Court provide, “Counsel and parties who are appearing should be prepared and authorized to discuss all aspects of the matter . . .” (New York County, Supreme Court, Civil Branch, [http://www.nycourts.gov/courts/1jd/supctmanh/uniform\\_rules.pdf](http://www.nycourts.gov/courts/1jd/supctmanh/uniform_rules.pdf) [accessed May 10 2018].)

C. Discussion

As a preliminary matter, Plaintiff has filed no opposition to Dr. Dennett’s cross-motion to dismiss. This Court notes that approximately 9-months have passed since this Court directed the supplemental deposition of Plaintiff. In those 9 months, this Court has issued 4 compliance conference orders directing Plaintiff to appear for a deposition. As of May 8, 2018, the deposition was still not completed and Plaintiff had not produced clear copies of her notes despite Dr. Dennett’s right to examine Plaintiff about her notes. Accordingly, Plaintiff’s pattern of non-compliance, not only with respect to this deposition but also the production of notes, gives rise to an inference of willful and contumacious conduct. (*Jackson v OpenCommunications Omnimedia, LLC*, 147 AD3d 709, 709 [1st Dept 2017].) That a per diem attorney represented, on the record, to this Court that Plaintiff may be incapacitated is unpersuasive because the per diem attorney stated that he had never met Plaintiff, nor had any more information on this matter. Despite appearing counsel’s “concern” about Plaintiff’s competence to proceed, Plaintiff has not been judicially declared incompetent nor has Plaintiff’s counsel sought the appointment of a guardian ad litem. (CPLR 1201; Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.14 [b]) Furthermore, Plaintiff’s attorneys of record as well as the numerous per diem attorneys who have appeared on Plaintiff’s behalf had numerous opportunities to raise issues of incompetency especially at the conference held one week before the deposition. Raising them now as an excuse without more is unavailing. Lastly, appearing without personal knowledge of the matter contravenes the Rules of this Court, and this Court cannot rely on such representations. (New York County, Supreme Court, Civil Branch, [http://www.nycourts.gov/courts/1jd/supctmanh/uniform\\_rules.pdf](http://www.nycourts.gov/courts/1jd/supctmanh/uniform_rules.pdf) [accessed May 10 2018].)

Wherefore, it is hereby,

ORDERED that Plaintiff Carol Soffa's Order to Show Cause for an extension of time to appear for her deposition is denied; and it is further

ORDERED that Defendant Jay Dennett, M.D.'s cross-motion to dismiss the complaint in its entirety pursuant to CPLR 3126 is granted without opposition; and the clerk is directed to enter judgment accordingly.

DATED: MAY 16, 2018



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EILEEN A. RAKOWER, J.S.C.