

Mingione v Manoach
2018 NY Slip Op 31761(U)
March 26, 2018
Supreme Court, New York County
Docket Number: 805066/2016
Judge: Martin Shulman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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ANNA MINGIONE, by the Executors of her Estate,
PHYLLIS MINGIONE and ERNEST MINGIONE,
et al,

Index No: 805066/2016

Decision and Order

Plaintiffs,

-against-

SETH MANOACH, M.D., ALBERT MATALON, M.D.,
NEW YORK-PRESBYTERIAN LOWER MANHATTAN
HOSPITAL, and JOHN/JANE DOE #1-10,

Defendants.
-----X

Hon. Martin Shulman, JSC:

Plaintiffs move pursuant to CPLR §3126 to strike defendants Seth Manoach, M.D. and New York-Presbyterian Lower Manhattan Hospital's (NYPH) answers or, alternatively, to preclude or compel discovery. Defendants oppose the motion, which is granted in part as set forth below.

Section 3126 of the CPLR provides in pertinent part as follows with respect to penalties for refusal to comply with orders to disclose:

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 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 contend that they have made every effort to comply with plaintiffs' demands and thus deny that their conduct was willful or contumacious. Apparently, NYPH's acquisition of New York Lower Manhattan Hospital in 2013 has complicated its

ability to provide much of the requested discovery. This court agrees that defendants' conduct is not willful or contumacious and accordingly, denies plaintiffs' requests to strike their answers or for a preclusion order. The portion of plaintiffs' motion seeking an order compelling defendants' compliance is determined as follow:

☐ **Plaintiffs' December 7, 2017 good faith letter:**

☐ **Policies and procedures relating to CVVH machines and their use**

Defendants submit an affidavit from an individual with personal knowledge (Opp. at Exh. B) stating that NYPH is not in possession of tables of contents for its policies and procedures manual, and it is not its practice to maintain same. Contrary to plaintiffs' claims, this affidavit is sufficient and no deposition of the affiant is warranted.

☐ **Search affidavit substantiating that NYPH is not in possession of 2014 policies and procedures for hemodialysis and end stage renal disease**

Defendants provide these policies and procedures in their opposition at Exh. D and thus have satisfied this discovery obligation.

☐ **Tables of contents for policies/procedures for the Emergency, Nursing, ICU/Critical Care and Nephrology Departments**

See affidavit annexed to defendants' opposition at Exh. B indicating that no tables of contents exist.

☐ **CVVH Machine Manufacturer's Instruction Manual**

Defendants submit an affidavit of an individual with personal knowledge (Opp. at Exh. C) stating in detail that a thorough search of the ICU Department, where CVVH machines are located, was conducted and no manufacturer's manual was

found. Plaintiffs respond that defendants should provide whatever instruction manual currently exists. To the extent that a current instruction manual, or any other manuals in existence from 2014 to date may exist, defendants are directed to provide them within 30 days of the electronic filing of this decision and order.

☐ **Current Policies and Procedures**

This court agrees with defendants that current hospital policies and procedures are irrelevant to whether or not defendants adhered to such policies in 2014.

☐ **Demands 4-7**

☐ **Information regarding the identity, current employment status and last known address (if no longer employed) of hospital personnel depicted in videos and photographs plaintiffs produced**

☐ **Instruction manual for CVVH machine (demands 5 and 6)**

☐ **"Hospital policy" referenced in April 8, 2014 letter to plaintiffs addressing their complaints regarding the CVVH machine**

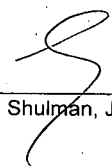
Defendants do not address these demands and are instructed to respond to them within 30 days of the date of this decision/order's electronic filing.

For the foregoing reasons, plaintiffs' motion is granted in part and denied in part as set forth herein above.

Counsel for the parties are directed to appear for a status conference on May 8, 2018 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
March 26, 2018



Hon. Martin Shulman, J.S.C.