

Laspalakis v Weinfeld
2018 NY Slip Op 32099(U)
August 27, 2018
Supreme Court, New York County
Docket Number: 805347/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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Christine Laspalakis,

Plaintiff,

Index No.
805347/2016

**DECISION and
ORDER**

- against -

Mot. Seq. 2

Steven Weinfeld, MD, and Mt. Sinai
Medical Center,

Defendants.

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

Defendants Steven Weinfeld, MD, and The Mount Sinai Hospital s/h/a “Mt. Sinai Medical Center” (collectively, “Defendants”) move for an Order pursuant to CPLR §3126 (3) dismissing this action due to Plaintiff’s violation of this Court’s Orders directing Plaintiff to produce outstanding discovery. In the alternative, Defendants seek an Order pursuant to CPLR §3124 compelling Plaintiff to provide the outstanding discovery by a date certain, and should Plaintiff fail to comply, automatically dismissing this action with a self-executing Order. Plaintiff does not oppose.

Background

Plaintiff commenced this action by filing a Summons and Complaint on August 31, 2016. Defendants joined issue by service of Verified Answers on November 4, 2016.

On November 4, 2016, Defendants served Initial Discovery Demands on Plaintiff, including the following: a Demand for a Bill of Particulars; Notice to Produce Authorizations; CPLR §4545 Demand; Request for Identity of Witnesses and Notice to Produce; Demand for Expert Witness Disclosure; Demand for Party Statements; Demand for Social Networking Information; Demand for Photographs, Video and Audiotapes; Demand for a Trial By Jury; and a Notice to Produce

Medicare/Medicaid Lien Information. Defendants corresponded with Plaintiff's counsel in good faith on January 23, 2017, February 22, 2017, and March 23, 2017 to follow up with these demands. Following receipt of Plaintiff's Bills of Particulars, Defendants served a letter following up regarding deficiencies in the Bills of Particulars and remaining outstanding discovery on August 17, 2017.

A Preliminary Conference was held on August 22, 2017, at which the Court entered an Order directing Plaintiff to provide authorizations and responses to outstanding discovery within thirty days. On January 24, 2018, Defendants appeared for a Court-ordered Compliance Conference in this matter, but Plaintiff's counsel failed to appear. The Order issued on that date directs Plaintiff to appear on the adjourned date of February 6, 2018. Defendants served a copy of the Court's Order on Plaintiff's counsel along with further good faith correspondence regarding outstanding discovery on January 29, 2018, and again on February 5, 2018.

Plaintiff's counsel again failed to appear at the Court-ordered Compliance Conference adjourned to February 6, 2018. In an Order issued that day, the Court directed Plaintiff to appear for an adjourned date of March 20, 2018. The Court further directed Plaintiff to provide responses to outstanding discovery demands by February 26, 2018, prior to the adjourned conference date. Defendants served this Order on Plaintiff's counsel along with further good faith correspondence on February 7, 2018.

The parties appeared at the adjourned conference date of March 20, 2018. The Order entered at that conference directs Plaintiff to provide responses to all of Defendants prior demands as outlined in the Court's prior Orders within thirty days. Plaintiff failed to comply with the Order. Defendants served a good faith letter on May 7, 2018, requesting that the outstanding discovery be served by May 17, 2018.

Legal 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 willfully 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).

Section 22 NYCRR § 202.27 states:

"At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their

readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as follows:

- (a) If the plaintiff appears but the defendant does not, the judge may grant judgment by default or order an inquest.
- (b) If the defendant appears but the plaintiff does not, the judge may dismiss the action and may order a severance of counterclaims or cross-claims.
- (c) If no party appears, the judge may make such order as appears just.”

Discussion

To date, Plaintiff’s counsel has failed to appear at multiple court conferences. Additionally, Plaintiff has failed to furnish responses to demands for the following: Initial Combined Demands (served on November 4, 2016); Supplemental Bills of Particulars (as to deficiencies outlined in Defendants’ letter dated August 17, 2017); multiple HIPAA-compliant authorizations (to obtain records of treatment from Dr. Arthur Kennish, Dr. C. Ronald Mackenzie, Linda K. Franks, and all prior and subsequent primary care providers, infectious disease doctors, therapists, dermatologists and pharmacies); Arons authorizations allowing Defense Counsel to interview Dr. John Deland, Dr. Lloyd Gayle and Dr. Barry Brause; and photographs depicting Plaintiff’s foot both prior and subsequent to the subject surgery. In failing to oppose Defendants’ motion, Plaintiff provides no explanation for Plaintiff’s repeated noncompliance with discovery demands and Court Orders.

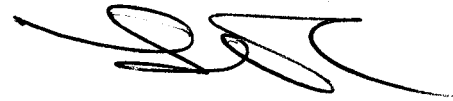
Wherefore, it is hereby

ORDERED that Defendants’ motion to strike Plaintiff’s pleadings is granted unless Plaintiff produces responses to all demanded discovery within 10 days from the date of this Order; and it is further

ORDERED that the parties are reminded to appear at the compliance conference scheduled for September 11, 2018 at 9:30 AM in Part 6.

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

Dated: AUGUST ²⁷ , 2018



Eileen A. Rakower, J.S.C.