

Flores v Ruiz
2018 NY Slip Op 32648(U)
August 14, 2018
Supreme Court, Kings County
Docket Number: 4043/13
Judge: Bernard J. Graham
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

AMANDA FLORES,

Plaintiff(s),

-against-

REGINALD RUIZ M.D., and NEW YORK
HEALTH and HOSPITALS CORPORATION,

Defendant(s).

Index No. 4043/13
Motion Calendar No.
Motion Sequence No.

DECISION / ORDER

Present:

Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: strike the answer of defendant Reginald Ruiz, M.D., pursuant to CPLR§ 3126, due to the failure to submit to a deposition.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1-2 _____
Order to Show cause and Affidavits Annexed.....	_____
Answering Affidavits	_____ 3 _____
Replying Affidavits.....	_____ 4, 5 _____
Exhibits.....	_____
Other:(memo).....	_____

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff, Amanda Flores ("Flores") has moved, pursuant to CPLR § 3126, to strike the answer of defendant Reginald Ruiz, M.D. ("Dr. Ruiz"), due to his failure to appear and submit to a court ordered deposition. Counsel for the defendant opposes the relief sought by the plaintiff and maintains that the failure of Dr. Ruiz to submit to a deposition is not willful nor contumacious and the appropriate relief would be to preclude him from testifying at trial if he fails to comply and submit to a deposition within thirty (30) days of the trial date of this matter.

Background:

In the underlying case, the plaintiff commenced an action, on or about March 5, 2013, by the service of a summons and complaint, in which causes of action were asserted in medical malpractice, lack of informed consent and loss of services against Dr. Ruiz and the New York City Health and Hospitals Corporation ("HHC"). Issue was joined by the service of defendants' answer dated April 25, 2013.

Thereafter, the plaintiff served a Notice of Deposition, dated December 18, 2013, upon the defendants (see Exhibit "B" annexed to plaintiff's Order to Show Cause). In a Preliminary Conference Order, dated December 20, 2013, before the Hon. Justice Ann T. Pfau of this Court, the parties agreed to a discovery schedule which included the submission of Dr. Ruiz to a deposition (see Exhibit "C" annexed to plaintiff's Order to Show Cause). Thereafter, the Hon. Justice Marsha L. Steinhardt issued an Order in the Central Compliance Part, in which Dr. Ruiz was directed to submit to a deposition, on or before October 15, 2014 (see Exhibit "D" annexed to plaintiff's Order to Show Cause). At a subsequent scheduled settlement conference before the Hon. Justice Steinhardt, Dr. Ruiz was again directed to appear for an Examination Before Trial on or before February 17, 2015 (see Exhibit "E" annexed to plaintiff's Order to Show Cause). Thereafter, by order dated May 11, 2015, the Hon. Justice Michelle Weston issued an Order also directing Dr. Ruiz to submit to a deposition on or before October 12, 2015 (see Exhibit "F" annexed to plaintiff's Order to Show Cause). Finally, by order dated June 9, 2016, the Hon. Justice Lawrence Knipel, in restoring the underlying action to the active calendar, directed that the deposition of Dr. Ruiz be completed prior to October 31, 2016 (see Exhibit "G" annexed to plaintiff's Order to Show Cause).

On or about December 16, 2016, the plaintiff filed a Note of Issue even though discovery was not as yet completed. In the accompanying affirmation of plaintiff's counsel, it was noted that the deposition of Dr. Ruiz had not been conducted to date because defendant's counsel was unable to locate their client. Thereafter, the defendants moved for summary judgment and a dismissal of plaintiff's complaint, which request for relief was denied in a Decision and Order by the Hon. Justice Weston dated November 29, 2017.

This matter is currently scheduled for jury selection on September 4, 2018 in Part 36 of this Court.

Plaintiff's contentions:

In support of her motion to strike the answer of Dr. Ruiz, the plaintiff maintains that the failure of Dr. Ruiz to submit to a deposition is willful and contumacious as he is in violation of five Court orders pertaining to discovery. Plaintiff alleges that Dr. Ruiz has not personally provided any explanation for his failure to appear and the information upon which defendants' counsel has relied upon to explain his absence is based upon hearsay and conjecture. Counsel for plaintiff contends that any claim that Dr. Ruiz is unavailable because he committed suicide is unfounded as there is no admissible evidence that he took his own life.

The plaintiff maintains that the striking of Dr. Ruiz's answer is warranted as he is the only witness who has personal knowledge as to whether there was malpractice in this matter, and plaintiff will have to establish the doctor's malpractice without his testimony. Plaintiff asserts that the defendants would benefit if Dr. Ruiz was only precluded from testifying as that would shield him from having to defend this case which plaintiff counsel characterizes as being indefensible.

Defendants' contentions:

Counsel for defendant Dr. Ruiz, in opposing the relief sought by the plaintiff, contends that the failure of the doctor to submit to a deposition has not been willful nor contumacious as the doctor has not been seen or heard from since the inception of this action in 2013, and counsel has never met nor spoken with Dr. Ruiz, and has never had the opportunity to advise him of his need to appear and submit to a deposition.

Counsel for Dr. Ruiz maintains that they have been diligent in their attempt to locate the doctor, and in doing so, have retained the services of an investigative service. In opposing plaintiff's motion, counsel has offered the affidavit of Vincent Dolan, who has worked as a private investigator for over thirty years and is the owner of Dolan Investigations. His work as a private investigator includes searching for missing persons. Mr. Dolan states that in performing his duties and attempting to locate the doctor he had pertinent information as to the doctor's date of birth, his social security number, various addresses and phone numbers that he may have lived at or used, and the possibility that he may have relocated to California. Mr. Dolan states that after accessing certain databases, performing investigative research and speaking with various individuals, he was unable to locate Dr. Ruiz or confirm that he is deceased. Mr. Dolan was further advised that the doctor is no longer licensed to practice medicine in the United States nor in the Philippines where his family originates from. Additionally, he learned from the San Francisco Police Department that Mr. Ruiz was reported to that department in 2013 as being missing and has not been seen or heard from. Mr. Dolan states that he has spoken to Sergeant Long of the Special Victims/Missing Persons squad of the San Francisco Police Department who oversees the department's ongoing investigation in attempting to locate Dr. Ruiz. Sergeant Long allegedly provided Mr. Dolan with certain relevant information. He advised him that Dr. Ruiz

has four siblings, all of which are doctors. It is alleged that Sergeant Long had spoken to Donna Ruiz, the sister of the doctor, who advised him that she has not heard from her brother since 2013, and in the months prior to leaving New York in 2013 he had split up with his partner, sold his apartment and gave away his dog. Sergeant Long also advised Mr. Dolan that there is a video that shows that Dr. Ruiz left the hotel he has been staying at on April 16, 2013, and there is no indication that he ever returned. The possessions of Dr. Ruiz were later found in his hotel room.

Counsel for Dr. Ruiz states that there is no basis to suggest that Dr. Ruiz chose to avoid testifying in this action by taking his own life.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties and considered the arguments presented herein, as well as the applicable law, in making this determination with respect to this Order to Show Cause by the plaintiff which seeks to strike the answer of Dr. Ruiz, one of the defendants.

At issue before this Court, is the appropriate sanction that may be imposed against Dr. Ruiz for his failure to submit to a Court ordered deposition. The plaintiff maintains that the appropriate relief is the striking of Dr. Ruiz's answer and defendant asserts that such relief would be drastic, and the circumstances of this case would not warrant the granting of that request.

CPLR § 3126 (2) provides that a Court may sanction a party for willfully failing to comply with discovery, including precluding the party from "producing in evidence designated things or items of testimony". Generally, the nature and degree of the penalty to be imposed against a party who refuses to comply with court-ordered discovery, pursuant to CPLR § 3126, is

a matter within the discretion of the court (see Duncan v. Hebb, 47 AD3d 871, 850 NYS2d 610 [2nd Dept. 2008]; Kihl v. Pfeffer, 94 NY2d 118, 122-23, 700 NYS2d 87 [1999]); Jaffe v. Hubbard, 299 AD2d 395, 751 NYS2d 491 [2nd Dept. 2002]). Martin v. City of New York, 46 AD3d 635, 847 NYS2d 621 [2007]).

Striking a defendant's answer is a drastic remedy which is inappropriate absent a clear showing that the failure to comply with discovery demands was willful and contumacious (see Duncan v. Hebb, 47 AD3d at 871. Willful and contumacious conduct may be inferred from a party's conduct, from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply (see DeVito v. J & J Towing, Inc., 17 AD3d 624, 625, 794 NYS2d 74 [2005]; Duncan v. Hebb, 47 AD3d at 871; Stone v. Zinoukhova, 119 AD3d 928, 990 NYS2d 567 [2nd Dept. 2014]).

The Supreme Court has discretion with respect to denying the striking of the defendant's answer where there was no clear showing that the defendant's failure to comply with discovery demands was willful or contumacious (Main Omni Realty Corp., v. Matus, 124 AD3d 604, 1 NYS3d 319 [2nd Dept. 2015]; Perla v. Daytree Custom Builders, Inc., 119 AD3d 758, 989 NYS2d 322 [2014]).

The Court in Heyward v. Benyarko, 440 NYS2d 21, 82 AD2d 751 [1st Dept. 1981]), determined that while it is the obligation of the client to remain in contact with their attorney so that the attorney can communicate with him, the client's neglect of that obligation is not equivalent to a willful failure to appear for examination before trial as the client has not been informed of the examination.

The Supreme Court is vested with broad discretion in supervising disclosure, and its determination that the drastic remedy of striking the answer was not warranted will not be

disturbed absent an improvident exercise of that discretion (see Brandes v. North Shore Univ. Hosp., 22 AD3d 778, 803 NYS2d 204 [2nd Dept. 2005] Jenkins v. City of New York, 13 AD3d 342, 788 NYS2d 117 [2004]).

Here, the Court has carefully considered that counsel for Dr. Ruiz has performed their due diligence in attempting to locate their client. Counsel has retained the services of a private investigative agency (Dolan Investigations) who has submitted an affidavit as to the steps they have taken in their attempt to locate Dr. Ruiz. While to date they have not been able to definitively determine the current whereabouts of Dr. Ruiz, it appears that he has not been seen or heard from since the inception of this matter. While this Court understands the importance of his testimony to the plaintiff, the striking of an answer would be a significant burden to the remaining defendant, New York Health & Hospitals Corporation. This Court cannot find at this time that Dr. Ruiz's failure to appear and submit to a deposition was either willful or contumacious and in the interests of justice, this Court will not strike the answer of the defendant Dr. Ruiz, but will order that he be precluded from testifying at trial.

Conclusion:

The Order to Show Cause by the plaintiff which seeks to strike the answer of defendant Dr. Ruiz is granted to the extent of precluding him from testifying at trial.

This shall constitute the decision and order of this Court.

Dated: August 14, 2018
Brooklyn, New York

ENTER

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County

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FILED
KINGS COUNTY CLERK

HON. BERNARD J. GRAHAM

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