SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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TYRINA DAVIS THOMAS

MEMORANDUM DECISION

Plaintiff(s),

Index No. 307047/2013

-against-

OTIS ELEVATOR COMPANY,

Defendant(s).

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HON. LAURA DOUGLAS:

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Tyrina Davis Thomas ("plaintiff") claims that she was injured on January 2, 2013 on the premises of the Empire City Casino in Yonkers, New York because of an elevator which was negligently designed and maintained by defendant Otis Elevator Company ("defendant").

Defendant now moves for certain relief because of its claims that plaintiff has not complied with prior discovery orders of this court. Defendant seeks (1) to preclude plaintiff from introducing evidence of the matters encompassed by the orders of this court on May 4, 2017 and January 31, 2018, or, alternatively, (2) for dismissal of the plaintiff's complaint because of her failure to comply with those orders, or (3) for this court to issue a self-executing order pursuant to CPLR §§3126 and 3124 to provide HIPAA and Arons compliant authorizations.

Defendant argues that there has been a significant history of delay by the plaintiff in this matter in complying with court-ordered discovery. The initial preliminary conference took place on March 10, 2014. Thereafter, defendant argues that plaintiff failed to fully comply with that order, which resulted in the defendant having to move on at least two occasions to compel the balance of discovery. Further, plaintiff's deposition was begun in December 2014 but was not completed until June 15, 2015. A third motion was thereafter made by the defendant to compel discovery because it claimed plaintiff had not responded to certain discovery demands, nor supplied authorizations and medical reports.

On January 4, 2017, a conference was held because the Note of Issue had not yet been filed. At that conference, certain authorizations were directed to be supplied and the plaintiff was directed to serve a supplemental verified bill of particulars regarding employment and wage loss

claims. An additional conference was held on March 24, 2017. At this conference, the court directed that a certain nonparty deposition be held, and that the plaintiff provide HIPAA compliant authorizations "as previously directed by prior orders" allowing the defendant to obtain the records from Dr. Giles Scuderi, Madison Avenue Radiology and Doshi Diagnostic. Plaintiff was also instructed to file her Note of Issue by April 4, 2017.

Thereafter, defendant claims that it received two envelopes from plaintiff's counsel on April 6, 2017, one of which contained a Note of Issue, and the second of which contained an amended bill of particulars.[1]. Plaintiff claims that the alleged injuries contained in the amended bill (specifically claims of traumatic brain injury, depression, and bilateral carpal tunnel syndrome) were never discussed at prior court conferences and no prior notice had been given to it that plaintiff intended to claim such injuries.

Because of the amended bill of particulars, defendant sought further discovery and to vacate the Note of Issue. Ultimately, it made a motion to dismiss the complaint or, alternatively, to vacate the Note of Issue and provide for further discovery. This motion was resolved by a so-ordered stipulation dated May 4, 2017 which vacated the Note of Issue on consent, and directed the plaintiff to provide (1) HIPAA compliant authorizations for all providers, including updated ones for any providers for whom authorizations had previously been given, (2) new and updated medical reports from all providers, and (3) complete response to the defendant's notice for discovery and inspection dated April 10, 2017.

Further conferences were held with the court, and defendant concedes that plaintiff supplied certain discovery, but that she failed to identify anyone who treated her for any psychiatric claims, nor did she supply authorizations for the records of Lenox Hill Hospital or her pain management specialist, Dr. Lerner. Defendant also alleges that it first learned of the name of plaintiff's psychologist (Dr. Spector) at her follow-up deposition on January 22, 2018, but that she had never supplied an authorization for that provider; and they further claim that they have never received authorizations as to certain doctors referenced in the amended bill of particulars; specifically Drs. Xenos, Lehman and Edelman.

Plaintiff claims that she has attempted to provide all required discovery in good faith, has provided voluminous amounts of information and/or authorizations to defendant, and has appeared for five independent medical examinations. Additionally, in response to the instant motion she supplied the defendant with a flash drive containing her entire record from the Worker's Compensation Board, which she alleges she only recently received. The information on the flash drive contains 600 separate documents, consisting of the records of all of the healthcare providers which the defendant seeks. Plaintiff also claims that she has supplied the records from Behavioral Medicine Associates and has fully complied with the defendant's most recent notice for discovery and inspection dated April 27, 2018.

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[1] Defendant claims that the dates reflected on the Note of Issue do not accurately show when it was filed and does not coincide with the date it was supposedly mailed.

Defendant acknowledges receipt of the additional records and authorizations from the plaintiff, but claims it has been prejudiced because of the inordinate delay in providing discovery, her failure to completely comply with numerous orders of this court, and the inability of the doctors it designated to perform independent medical examination to have full information at the time those examinations were conducted. Further, defendant argues that plaintiff had been well aware of the ongoing treatment she had been receiving and failed to live up to her independent obligation to provide discovery in a "timely fashion".

DISCUSSION

Civil Practice Law and Rules §3126 states:

> If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, 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:
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> > 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, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
> > 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

Among the alternative forms of relief requested by the defendant, is the dismissal of the complaint for the failure of the plaintiff to comply with prior discovery orders. The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the court (see Orgel v. Stewart Tit. Ins. Co., 91 AD3d 922 [2d Dept 2012]; Fishbane v. Chelsea Hall, LLC, 65 A.D.3d 1079, 1081[2d Dept 2009]). For such relief to be granted, it must be determined that the failure to comply with those prior orders was willful and contumacious; such conduct can be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply, or a failure to comply with court-ordered discovery over an extended period of time (Mew v Civitano, 151 AD3d 840, 841 [2d Dept 2017]). Similarly, an order of preclusion is proper where it is "... determine[d] that the offending party's lack of cooperation with disclosure

was willful, deliberate, and contumacious" (Pryzant v. City of New York, 300 A.D.2d 383 [2d Dept 2002]; see Palmieri v. Piano Exch., Inc., 124 A.D.3d 611, 612 [2d Dept 2015]).

In this matter, the plaintiff has failed on numerous occasions to fully comply with court-ordered discovery. However, this Court is not persuaded that such failure was "willful and contumacious" because voluminous discovery has been provided by the plaintiff, up to and including in her response to the instant motion.[2]

Under the circumstances of this case the imposition of conditions rather than dismissal or preclusion is appropriate (see, Citizens Sav. & Loan Assn. of N.Y. v. New York Prop. Underwriting Assn., 92 A.D.2d 907 [2d Dept 1983]; Alvarado v. The Fair, 91 A.D.2d 985 [2d Dept 1983]). In reviewing the status of the provided discovery as discussed in both plaintiffs and defendants motion papers, it appears that the only item previously sought which is presently outstanding is a HIPAA and Arons compliant authorization allowing the defendant to obtain the records from Behavioral Medicine Associates, and the doctors associated with that office. Accordingly, plaintiff is to supply such authorization to the defendant within 30 days from the date this order is served upon her with notice entry, or she shall be precluded from introducing evidence at trial with reference to that medical provider. It is therefore

ORDERED that the defendant's motion is denied, except that plaintiff is directed to provide the defendant with a HIPAA and Arons compliant authorization to obtain the records of Behavioral Medicine Associates within 30 days from the time order is served upon her with notice of entry, or be precluded from introducing evidence relative to that medical provider at trial.

This constitutes the order of the court.

Dated: 9-13-18

J S C

[2] The court does note, however, the suspect circumstances under which plaintiff claimed to file a Note of Issue in April 2017, while simultaneously serving an amended bill of particulars which necessitated further discovery, without, apparently, having discussed in court conferences immediately preceding that filing that she intended to serve such an amended bill.