

Sukhram v Khan

2018 NY Slip Op 33360(U)

November 9, 2018

Supreme Court, Bronx County

Docket Number: 302341/2014

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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MANGAL P. SUKHRAM, HEMWATTIE SUKHRAM
and RAVENDRA SUKHRAM,

DECISION AND ORDER

Plaintiffs,

Index No. 302341/2014

- against -

TAHIR M. KHAN and SUNNY's LIMOUSINE,

Defendants.

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John R. Higgitt, J.

Upon defendants' September 12, 2018 notice of motion and the affirmation and exhibits submitted in support thereof; there being no opposition to the application; and due deliberation; defendants' motion to strike plaintiffs' complaint for failure to provide discovery is granted in part.

Defendants assert that plaintiffs have not responded to their November 6, 2014 demands for medical records and collateral source information and their discovery demands dated December 2, 2014. Defendants assert further that plaintiffs have failed to provide a supplemental bill of particulars, and that these failures have prevented defendants from scheduling independent medical examinations of plaintiff.

Defendants' demands for medical and collateral source records required plaintiffs to provide the records of all providers treating plaintiffs and authorizations for hospital, facility, physician, pharmacy, pre- and post-accident records of care for the body parts injured in the subject accident, and collateral source, no-fault, Workers' Compensation, IRS, employment and school records.

Defendants' December 2, 2014 demands required plaintiffs to provide authorizations to permit defendants to obtain the medical, no-fault and non-privileged legal files for plaintiff

Mangal Sukhram's two prior accidents and plaintiff Hemwattie Sukhram's prior accident.

The June 3, 2016 preliminary conference order required plaintiffs to provide a supplemental bill of particulars to as special damages and lost earnings, to the extent necessary, upon completion of plaintiffs' depositions, and to respond to defendants' December 2, 2014 demands. The order warned plaintiffs of the possibility of the imposition of costs or other sanctions in the event of noncompliance.

The February 10, 2017, March 6, 2018 and July 17, 2018 compliance conference orders required plaintiffs to respond to outstanding discovery and warned of the possibility of the imposition of the sanction of waiver or preclusion in the event of noncompliance. The October 4, 2018 compliance conference order required plaintiffs to respond to defendants' December 2, 2014 demands.

The sanction of striking a party's pleading is warranted only where the movant conclusively establishes the recalcitrant party's willfulness and contumacy; willfulness and contumacy may be established by the violation of multiple court orders without reasonable excuse (*see Watson v City of N.Y.*, 157 AD3d 510 [1st Dept 2018]). The sanction of preclusion may be imposed even where the failure to disclose was neither willful nor contumacious (*see Vandashield Ltd v Isaacson*, 146 AD3d 552 [1st Dept 2017]).

On a motion to compel the production of discovery pursuant to CPLR 3124, the movant bears the burden of establishing a basis for the production of the discovery sought (*see Troshin v Stella Orton Home Care Agency, Inc.*, 2018 NY Slip Op 30922(U) [Sup Ct, N.Y. County 2018]). Movant must "demonstrate that the ... discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Brito-Amezquita v 928 Columbus Holdings LLC*, 2017 NY Slip Op 32514(U), at *4

(Sup Ct, N.Y. County 2017)). The opposing party bears the burden of establishing the materials are immune or exempt from discovery (*see Ambac Assurance Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451 [1st Dept 2012]). If the resisting party previously asserted a privilege or immunity from disclosure, movant must establish on its motion to compel such production that the privilege or immunity does not apply (*see id.*). Even if the resisting party failed to timely assert an objection to the material sought, if the court finds that the demands were palpably improper or sought privileged material, a response will not be compelled (*see Lea v N.Y.C. Transit Auth.*, 57 AD3d 269 [1st Dept 2008]). As to demands that are not palpably improper and that do not seek privileged information, if the party resisting disclosure failed to seek a protective order or otherwise timely object to production of the discovery sought, it will not be heard to object to the demand (*see Fiore v Bay Ridge Sanitarium, Inc.*, 48 Misc 2d 318 [Sup Ct, Kings County 1965]).

Plaintiffs have not objected to defendants' demands, complied with the conference orders or responded to this motion.

The court retains broad discretion in supervising discovery (*see Crooke v Bonofacio*, 147 AD3d 510 [1st Dept 2017]), and any CPLR 3126 sanction imposed should be commensurate with and proportionate to the nature and extent of the disobedience (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877 [2013]; *Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000]). Given the nature and extent of plaintiffs' disobedience, the penalty specified below is appropriate.

Accordingly, it is

ORDERED, that defendants' motion to strike plaintiffs' complaint for failure to provide discovery is granted to the extent that plaintiffs are precluded from offering evidence at trial as to the injuries, treatment and/or sequelae addressed by the records for which authorizations have

been demanded unless, within 30 days after the service upon plaintiffs of a copy of this order with written notice of its entry, plaintiffs provide the authorizations and records demanded by defendants' November 6, 2014 Demand for Medical Reports, Records, Bills and Authorizations, defendants' November 6, 2014 Demand for Collateral Sources and defendants' December 2, 2014 Supplemental Demand for Authorizations; and it is further

ORDERED, that if plaintiffs fail to comply with this conditional order, counsel for defendants shall e-file an affirmation attesting to plaintiffs' noncompliance with this order and shall file such affirmation within ten (10) days after the expiration of the time for plaintiffs to comply; and it is further

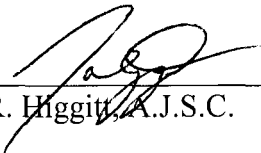
ORDERED, that defendants' time in which to conduct independent medical examinations of plaintiffs is extended to 90 days after service of a copy of this order with written notice of its entry; and it is further

ORDERED, that defendants' motion is otherwise denied; and it is further

ORDERED, that this conditional preclusion order is self-executing.

This constitutes the decision and order of the court.

Dated: November 9, 2018



John R. Higgitt, A.J.S.C.