

Ho-Shing v Joseph
2018 NY Slip Op 33544(U)
November 26, 2018
Supreme Court, Westchester County
Docket Number: 51032/17
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
VIODELDA HO-SHING,

Plaintiff,

-against-

DECISION & ORDER

JAMES JOSEPH, M.D., DAVID LENT, M.D.,
SOUTHERN WESTCHESTER ORTHOPEDICS &
SPORTS MEDICINE ASSOCIATES, P.C., ST. JOHN'S
RIVERSIDE HOSPITAL, STRYKER CORPORATION,
HOWMEDICA OSTEONICS CORPORATION D/B/A
STRYKER ORTHOPAEDICS, STRYKER SALES
CORPORATION, and MAKO SURGICAL CORP.,

Index No.: 51032/17
Motion date: Nov. 19, 2018
Seq. Nos.1, 2, 3 & 4

Defendants.

-----X
LEFKOWITZ, J.

The following papers were read on these unopposed motions by defendants, James Joseph, M.D., David Lent, M.D., Southern Westchester Orthopedics & Sports Medicine Associates, P.C., St. John's Riverside Hospital, Stryker Corporation, Howmedica Osteonics Corporation d/b/a Stryker Orthopaedics, Stryker Sales Corporation, and Mako Surgical Corp., (hereinafter, collectively "defendants") for an order pursuant to CPLR 3126 dismissing plaintiff's complaint, or in the alternative, precluding plaintiff from offering evidence, compelling plaintiff to provide responses to defendants' demand for discovery; an award of costs; and such other and further relief as this Court deems just and proper.

- Order to Show Cause (Seq#1) - Affirmation in Support - Good Faith Affirmation - Exhibits A-E
 - Order to Show Cause (Seq#2) - Affirmation in Support - Good Faith Affirmation - Exhibits A-U
 - Order to Show Cause (Seq#3) - Affirmation in Support - Good Faith Affirmation - Exhibits A-R
 - Order to Show Cause (Seq#4)
- NYSCEF Record

Upon the foregoing papers and the proceedings held on November 19, 2018, these motions are determined as follows:

This action sounding in medical malpractice was commenced by the filing of a Summons and Verified Complaint on January 25, 2017. Following the joinder of issue, a Preliminary Conference

was held on July 17, 2017. Since that time, thirteen (13) compliance conferences have been held and twelve (12) orders issued directing plaintiff to provide outstanding discovery. The record reveals that plaintiff has failed to timely comply with the numerous court orders directing discovery. Defendants complain that for a number of the compliance conferences, plaintiff appeared by per diem attorneys who were not sufficiently familiar with the facts and history of the case and when counsel of record did appear, counsel arrived late.

Presently, defendants complain that the following discovery is outstanding although duly demanded and previously ordered, including pursuant to the last order issued on September 24, 2018: updated authorization for IRS records; a HIPPA authorization for Dr. Kushner; an authorization to obtain Workmen's Compensation records; HIPPA authorizations for treaters from 2017 to present; a HIPPA authorization for Hartsdale Imaging; an Arons authorization for Dr. Luks; an Arons authorization for Dr. Kai Ming Fu; an Arons authorization for Dr. Jane Wachs; a copy of all materials in Plaintiff's possession related to her discrimination lawsuit relative to an incident with her colleague (or the index number of the suit with an authorization permitting the release of such records); an authorization for gym records from LA Fitness; and a HIPPA authorization for CVS for updated pharmacy records.

CPLR 3126 provides that if any party "wilfully fails to disclose information which the court finds ought to have been disclosed," the court may issue an order of preclusion or an order striking the pleadings, dismissing the action, or rendering judgment by default against the disobedient party. "The nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter generally left to the discretion of the Supreme Court" (*Carbajal v Bobo Robo*, 38 AD3d 820 [2d Dept 2007]). To invoke the drastic remedy of striking a pleading, or preclusion, a court must determine that the party's failure to disclose is willful and contumacious (*Greene v Mullen*, 70 AD3d 996 [2d Dept 2010]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept 2007]; *Kingsley v Kantor*, 265 AD2d 529 [2d Dept 1999]). Willful and contumacious conduct can be inferred from repeated noncompliance with court orders or a failure to comply with court ordered discovery over an extended period of time, coupled with the lack of an adequate excuse for the failure (*Mei Yan Zhang v Santana*, 52 AD3d 484 [2d Dept 2008]; *Carbajal v Bobo Robo, Inc.*, 38 AD3d 820 [2d Dept 2007]; *Prappas v Papadatos*, 38 AD3d 871 [2d Dept 2007]).

As noted by the Court of Appeals, "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" (*Kihl v Pfeffer*, 94 NY2d 118 [1999]; see also *Gibbs v St. Barnabas Hospital*, 16 NY3d 74 [2010]). "The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines also breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution" (*Gibbs v St. Barnabas Hospital*, 16 NY3d 74 [2010]).

In this instance, over several months, this Court has issued numerous orders directing plaintiff to serve verified bill of particulars, respond to defendants' discovery demands and provide duly executed authorizations to defendants. Plaintiff did not oppose the four (4) motions in a timely

manner. Instead, plaintiff uploaded to NYSCEF an affirmation in opposition on the eve of oral argument. ¹ Plaintiff's counsel also arrived at oral argument approximately one hour late after the calendar had been called. Although plaintiff has failed to provide a satisfactory explanation for the complete and utter failure to comply with this Court's Orders and defendants' discovery demands, the Court prefers dispositions on the merits and will give plaintiff one last and final opportunity to comply with the Court's orders.

In view of the foregoing, it is

ORDERED that defendants' motions are granted to the extent that plaintiff is directed to provide the following on or before December 3, 2018 to all defendants: an updated authorization for IRS records; a HIPPA authorization for Dr. Kushner; an authorization to obtain Workmen's Compensation records; HIPPA authorizations for treaters from 2017 to present; a HIPPA authorization for Hartsdale Imaging; an Arons authorization for Dr. Luks; an Arons authorization for Dr. Kai Ming Fu; an Arons authorization for Dr. Jane Wachs; a copy of all materials in plaintiff's possession related to her discrimination lawsuit relative to an incident with her colleague (or the index number of the suit with an authorization permitting the release of such records); an authorization for gym records from LA Fitness; and a HIPPA authorization for CVS for updated pharmacy records; and it is further

ORDERED that each of the moving defendants is awarded the sum of \$100.00 in motion costs to be paid by plaintiff on or before December 3, 2018; and it is further

ORDERED that plaintiff shall file proof of payment of the motion costs by NYSCEF on or before December 3, 2018; and it is further

ORDERED that if plaintiff fails to fully comply with this Order as directed hereinabove, defendants shall file on NYSCEF on or before December 7, 2018 an affirmation of noncompliance and a proposed order dismissing plaintiff's complaint, and the Court will issue an order of dismissal; and it is further

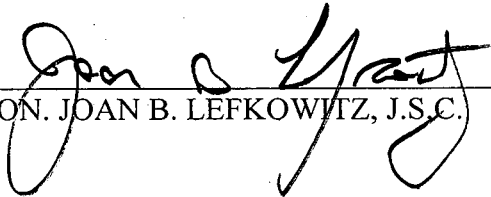
ORDERED that all parties are directed to appear for a conference in the Compliance Part, Courtroom 800, on December 20, 2018 at 9:30 a.m.; and it is

ORDERED that defendants shall serve a copy of this order with notice of entry upon plaintiff within five (5) days of entry.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
November 26, 2018

¹The untimely opposition papers have not been considered.


HON. JOAN B. LEFKOWITZ, J.S.C.

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