| **Williams v Davita Healthcare Partners, Inc.** |
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| 2018 NY Slip Op 33816(U) |
| January 11, 2018 |
| Supreme Court, Nassau County |
| Docket Number: 9847/15 |
| Judge: James P. McCormack |
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[* 1]

SUPREME COURT - STATE OF NEW YORK

**PRESENT:**

*Honorable James P. McCormack*
**Justice**

______________________________X

**VICKIE WILLIAMS,**

**Plaintiff(s),**

**-against-**

**DAVITA HEALTHCARE PARTNERS, INC. and DVA RENAL HEALTHCARE INC., d/b/a FREEPORT KIDNEY CENTER,**

**Defendant(s).**

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**TRIAL/IAS, PART 23**
**NASSAU COUNTY**

**Index No. 9847/15**

**Motion Seq. No.: 002**
**Motion Submitted: 1/10/18**

**XXX**

The following papers read on this motion:

Notice of Motion/Supporting Exhibits................................X[1]

Defendants, Davita Healthcare Partners, Inc. and DVA Renal Healthcare Inc., d/b/a Freeport Kidney Center, move this court for an order, pursuant to CPLR §3126, dismissing the complaint, or precluding Plaintiff from offering evidence at trial, for failure to comply with discovery. There is no opposition.

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[1]Plaintiff submitted opposition, but served it, by regular mail, two days before the return date, which is clearly late. This is second motion in a row that Plaintiff could not manage to serve opposition timely. The court therefore will not consider the opposition papers.

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Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...", or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). This motion was brought once before, and was denied due to Defendants' failure to comply with 22 NYCRR 202.7(c). Herein, Defendants' counsel submits an affirmation of good faith that describes the good faith efforts made, and the multiple attempts made by letter, phone calls an in-person conferences to avoid the need for this motion. As such, the court is satisfied good faith efforts were made.

CPLR § 3124 provides that the court has the discretion to compel discovery or to strike a pleading for failure to abide with discovery and disclosure orders. At the discretion of the court, a party's failure to comply with such requests may result in sanctions, pursuant to CPLR § 3126. "Although actions should be resolved on the merits where possible, a court may strike [a pleading] for failure to comply with court-ordered

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discovery where there is a clear showing that the noncompliance is willful and contumacious" (*Rawlings v. Gillert*, 78 AD3d 806 [2d Dept 2010]; *see also* CPLR 3126[3]; *Moray v. City of Yonkers*, 76 AD3d 618 [2d Dept 2010]; *Palomba v. Schindler El. Corp.*, 74 AD3d 1037 [2d Dept 2010]; *Rini v. Blanck*, 74 AD3d 941 [2d Dept 2010]). The determination of whether to strike a pleading is addressed to the sound discretion of the trial court (*see Raville v. Elnomany*, 76 AD3d 520 [2d Dept 2010]; *Pirro Group, LLC v. One Point St., Inc.*, 71 AD3d 654, 655 [2d Dept 2010]; *Workman v. Town of Southampton*, 69 AD3d 619, 620 [2d Dept 2010]).

This case has been marred by Plaintiffs refusal or inability to comply with discovery demands and the orders of this court. In fact, in this court's October 25, 2017 order, the court specifically warned Plaintiff about the consequences of any further dilatory behavior:

> The court's frustration with the parties, and Plaintiff in particular, is palpable. It appears clear that this case has been delayed by Plaintiff's dilatory conduct. To be sure, Plaintiff could not even manage to serve opposition to this motion in a timely manner. After reviewing the motion papers, had the court reached the merits of the motion, it is likely Plaintiff would have been sanctioned in some form for failure to comply with discovery. For that reason, Plaintiff should interpret Defendants' failure to bring a proper motion as the second or third chance she does not necessarily deserve. The court urges Plaintiff to take this opportunity to provide all outstanding discovery immediately upon reading this order in a manner that convinces Defendants there is no need to re-bring this motion.

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Despite this frank and clear warning, Plaintiff has still failed to comply with discovery. On November 15, 2017, this court signed an order directing Plaintiff to supply the following information: 1) A supplementary bill of particulars as to the "unsafe and inherently dangerous condition" and the specific location of Plaintiff's alleged fall, 2) authorizations for her primary care physician, physicians who treated Plaintiff for prior injuries, Dr. Joseph Gregorace, and Dr. Jerry Perry, 3) a response to Defendants' March 6, 2017 notice for discovery and inspection and 4) the complete non-privileged portion of the legal file for Plaintiff's motor vehicle accident. The court ordered indicated that all of the aforementioned items were to be in Defendants' possession no later than December 15, 2017. Failure to comply would result in the complaint being dismissed, and the order would be "self-executing".

Assuming the court were to consider Plaintiff's opposition herein, it is clear that this order was not complied with. Plaintiff alleges some of the materials from the order were supplied, but clearly acknowledges that others were not. There is no explanation for delay. There is no explanation for why the opposition papers for this motion and the prior motion were late. There is no explanation why Defendants had to bring two motions, and why the court had to issue two threatening orders, for Plaintiff to supply some, but not all discovery.

A complete history of this case further outlines Plaintiff's refusal to comply with discovery and the court's directives. During the first compliance conference of this

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matter, on July 11, 2017, Plaintiff was directed to supply outstanding discovery from existing demands and the preliminary conference order within 30 days. If the deadline was not met, the court directed Defendants to bring a motion. The case was adjourned until September 14, 2017, on which date Defendants indicated some discovery was provided, but it was both incomplete and deficient. As a result, they brought a motion which was returnable on September 19, 2017. As of September 14, 2017, Plaintiff has not served opposition to the motion. The case was adjourned until October 26, 2017. On October 26, 2017, the case had not moved forward as Defendants still had not received their discovery and could not prepare for depositions. The matter was adjourned until November 15, 2017, on which date the parties were informed the motion was denied for Defendants' failure to comply with 22 NYCRR 202.7. Plaintiff's counsel was warned, in clear terms, that Plaintiff was granted an inadvertent reprieve and that the court would sign an order directing Plaintiff to comply with discovery by December 15, 2017. The court signed the order that date, in Plaintiff's counsel's presence.

The case was adjourned until January 10, 2018. On January 10, 2018, Defendant's counsel indicated that the December 15, 2017 deadline was not met and that a second discovery motion was brought, returnable on that date. Defendant's counsel further indicated that Plaintiff had sent out opposition a few days prior to the return date. The affidavit of service on Plaintiff's opposition papers indicates it was served on January 8, 2018, for a motion returnable on January 10, 2018.

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The court finds Plaintiff has repeatedly, and brazenly ignored this court's orders and directives. Plaintiff was given multiple opportunities to comply with discovery, and numerous warnings by the court that failure to comply would result in sanctions. Plaintiff even failed to comply with a court order that indicated failure to comply would result in dismissal. Such willful and contumacious conduct warrants dismissal of the complaint.

Accordingly, it is hereby

**ORDERED**, that Defendants' motion to dismiss the complaint for failure to comply with discovery, and failure to comply with the court's directives including the November 2017 order, is GRANTED. The complaint is dismissed.

This constitutes the decision and order of the court.

Dated: January 11, 2018
Mineola, New York

Hon. James P. McCormack, J. S. C.

ENTERED
JAN 19 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE